E-Briefing Detailed Version
(Covering the period from 15 October – 17 December 2010)

1. Current consultations

1.1 "The Architecture of Change Part 2 - the new SRA Handbook - feedback and further consultation"

As mentioned in the previous e-briefing, earlier this year the SRA released the second handbook consultation "The Architecture of Change Part 2 - the new SRA Handbook - feedback and further consultation" (see http://www.sra.org.uk/sra/consultations/OFR-handbook-October.page for details. The CLLS's Professional Rules and Regulation Committee (PR&RC) is taking the lead in responding to this consultation. The consultation period ends on 13 January 2011. A summary of the paper is set out in the previous e-briefing. See http://www.citysolicitors.org.uk/FileServer.aspx?oID=875&lID=0 for details.

1.2 Green paper on options for European Contract Law for consumers and businesses

Also as mentioned in the previous e-briefing:

- In July this year, the European Commission launched a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses. (See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF for details.). Comments on the paper are due: on **31st January 2011**. A summary of the paper is set out in the previous e-briefing. See http://www.citysolicitors.org.uk/FileServer.aspx?oID=875&lID=0 for details.

- The Ministry of Justice subsequently launched a "Call for Evidence on the European Commission's Green Paper about European Contract Law". The Call for Evidence exercise closed on 26 November 2010. Representatives from a number of CLLS Committees met to consider issues arising from the Call for Evidence and work on preparing the CLLS response was led by the CLLS Construction Law Committee. (See http://www.justice.gov.uk/consultations/call-for-evidence-180810.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=886&lID=0 for the response. See http://www.citysolicitors.org.uk/FileServer.aspx?oID=875&lID=0 for a summary of the Call for Evidence paper.) As the Executive Summary for the paper stated:

> **EXECUTIVE SUMMARY**
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> Whilst the CLLS are happy for the Results of the Expert Group to be published they do not believe that any of the other options put forward by the Green Paper are useful, appropriate or justified, given the paucity of statistical evidence and analysis identifying any problems or any need for action.
>
> There is evidence that small and medium enterprises (**"SMEs"**) who choose not to engage in cross-border trade within the European Union (the "**EU**") are more influenced

by factors other than the legal system prevalent in different Member States, such as cultural and linguistic differences and transport costs.[1]

The very competence of the EU to act on this matter is doubtful. Even if divergent national laws could be shown to deter trade, it would be difficult to show that any of the options in the Green Paper would actually reduce such effect. This means that Article 114 of the Treaty on the Functioning of the European Union ("**TFEU**") (formerly Article 95 of the EC Treaty ("**TEC**")) cannot be relied upon to provide a legal basis for enacting any of the options put forward by the Green Paper. It is also difficult to justify competence for action in this area under other legal bases in the treaties.[2]

Evidence also indicates that many companies prefer their international dealings to be governed by English law rather than the law of any other legal system.[3] A new instrument would dilute the effect of English law as a gateway for attracting trade into the EU and the UK and may be more likely to benefit the economies of New York or Switzerland whose law might increase in popularity.

The loss of trade and revenue for the Government and businesses providing legal and related services may in fact exceed any supposed benefits from the creation of a competing legal system, while limited resources would be exhausted by the unnecessary costs and uncertainties of developing and applying new laws.

There could be particular difficulties for Europe's financial centres and for legal certainty. In particular, the proposals are wholly unsuited for major financial transactions where legal certainty is an imperative. Concerns that this might become a mandatory law, would lead to a flight to non-EU jurisdictions for choice of law and dispute resolution. It is notable that while an EU jurisdiction's legal system, English law, is probably the most popular in international transactions, New York and Switzerland provide strong competition. Even an optional law would be seen as a "slippery slope" towards enforced abandonment of Member States' own systems of contract law, and ultimately other laws and would damage not only England, but also other Member States attractiveness for choice of law and jurisdiction. We believe that it would damage the EU if EU institutions were to seek themselves to contract on the terms of the proposed optional law. It is simply not suitable for major commercial transactions, matching neither the legal certainty of common law systems nor even that provided by civil law systems with specific commercial codes.

At a social level, we would note that a system of law is part of the cultural fabric of a nation or state. The optional proposal would require all Member States to have an alternative legal culture. More extreme proposals require that all Member States abandon completely their own systems of contract law (radically in the case of common law countries). This cuts across principles of preservation of cultural identity and of subsidiarity enshrined in the Treaty.

Finally there is no economic impact assessment. This is not the time to embark on the education of all the EU's lawyers and establishing a European Commercial Court, yet these steps would be essential with the proposed optional instrument, as well as more extreme alternatives. Even with those steps it would be many decades before any modest degree of legal certainty and consistency would emerge for the new system. The costs, financial in terms of training and dispute cost and in time to resolve disputes, appear, even without detailed analysis, to far outweigh any supposed benefits. It could also, coupled with other moves in the legal field (European arrest warrants, proposed EU attachment orders etc.) unnecessarily add to the anti-EU feeling engendered by the current financial crisis.

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1 See reference to Eurobarometer 278 (2009) discussed in response to Question 1

2 These are fully discussed by Hesselink, Martijn W., Rutgers, Jacobien W. and De Booys, Timothy Q., The Legal Basis for an Optional Instrument on European Contract Law (October 31, 2007). Centre for the Study of European Contract Law Working Paper No. 2007/04, available at SSRN: http://ssrn.com/abstract=1091119.

3 2010 International Arbitration Survey, Chart 9.

So far as the consumer acquis is concerned, harmonisation measures (eg the Directive on Unfair Terms in Consumer Contracts) already in place and the proposals presently being debated are the right way to enhance consumer confidence and have a firm basis in the Treaties. It is a policy matter whether there are any circumstances where small businesses would benefit from being afforded some of the protections afforded to consumers.

2. Current and Recent submissions and publications

2.1. Professional Representation Committees

2.1.1 Professional Rules and Regulation Committee

See paragraph 1.1, above.

2.2. Specialist Committees

2.2.1 Commercial Law Committee

The Commercial Law and Company Law Committees jointly responded to the Ministry of Justice consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010) (See http://www.justice.gov.uk/consultations/briberyactconsultation.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=872&lID=0 for the response.)

The guidance which was the subject of the consultation centres on procedures which commercial organisations can put in place to prevent persons associated with them from bribing. As the consultation paper stated:

> **About this consultation paper**
>
> 1. Section 9 of the Bribery Act requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing.
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> 2. Further to the Secretary of State's Written Ministerial Statement on 20 July 20101 this consultation paper seeks views on guidance the Government proposes to publish under section 9 of the Bribery Act 2010 before the Act comes into force in April 2011. The consultation period will last 8 weeks. It is shorter than the standard 12 week period in order to allow enough time for views to be considered and for guidance to be published early in the New Year in advance of the Act coming into force in April 2011.
>
> 3. The objective of the Government in providing guidance under section 9 of the Act is to support businesses in determining the sorts of bribery prevention measures they can put in place. The timetable for the publication reflects the need to give as much notice as possible of the guidance before the Act comes into force.
>
> 4. The Government proposes guidance formulated around six general principles, included at Annex A, designed to be of general applicability across all sectors and for all types and size of business. It is not intended to be prescriptive or standard setting, or impose any direct obligation on business.
>
> 5. This consultation is confined to the guidance about bribery prevention procedures to be published under section 9. Your comments are invited on the questions set out below.

6. This consultation document also includes, at Annex B, a number of illustrative scenarios. These illustrative scenarios are intended to focus on those areas of business which can present real risks of bribery for many commercial organisations. Each scenario is accompanied by a series of questions that are indicative of questions that organisations may wish to ask themselves when applying the guiding principles to their individual circumstances. The scenarios cover the use of intermediaries and agents, hospitality and promotional expenditure, political and charitable donations, facilitation payments and dealing with business partners.

Other guidance on the Act

7.

7. The guidance to be published under section 9 and included here in draft at Annex A is designed to complement, not replace or supersede other forms of bribery prevention guidance published by industry or sector representative bodies or by non-governmental organisations. In addition, it does not seek to undermine the rules set by the Financial Services Authority for the financial services industry. Organisations must continue to comply with sector-specific regulations and standards at all times.

8. Joint guidance for prosecutors is currently being drawn up by the Director of Public Prosecutions and Director of the Serious Fraud Office to encourage a broad consistency of approach to the Act between the police, CPS and SFO. The Lord Advocate will govern the issuing of prosecutor guidance in Scotland. In Northern Ireland guidance will be issued by the Director of Public Prosecutions for Northern Ireland in consultation with the Attorney General for Northern Ireland and the Advocate General for Northern Ireland

9. Finally, the Ministry of Justice will be publishing a circular on the Act as whole, which may also be of assistance to anyone seeking more understanding of the provisions.

The Committee's submission responded to the specific questions contained in the consultation document, and also offered general observations in relation to the issues of scope, prosecutorial discretion, hospitality and promotional expenditure, facilitation payments and intelligence gathering.

The Committee also responded to the OFT draft proposals on advertising of prices (See http://www.oft.gov.uk/shared_oft/market-studies/AoP/OFT1291.pdf for the background document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=865&lID=0 for the response.)

As the OFT stated:

The study

1.5 In October 2009, the OFT launched this market study to look at the use of price framing. We have collected evidence to support decisions about the kind of enforcement cases that should be a priority for us under the Consumer Protection from Unfair Trading Regulations (CPRs). The study draws on a large body of evidence including academic psychology studies, experimental research, and consumer surveys.

1.6 We collected evidence about, and examined in detail, the following pricing practices:

- partitioned 'drip' pricing, where price increments 'drip' through during the buying process
- 'baiting sales', where only a very limited, or no, products are available at the discount price and consumers may ultimately purchase a full priced product
- 'reference prices', where there is a relatively high reference price compared to sale price, for example 'was £50, now £20', or '50% off'
- time-limited offers, such as sales which finish at the end of the month or special prices which are available for one day only
- volume offers, where it may be difficult for consumers to assess an individual price, for example 'three-for-two'
- complex offers, such as package prices with many separate elements to the price, and

- price comparison sites which may use some of the practices described above.

…1.14 Taken together, our core concerns, our ranking of the likelihood of particular price frames to mislead and our identification of those features of a market that make harm more likely build a clear framework that we will use to prioritise enforcement cases.

1.15 We have extensively road tested our conclusions by holding large roundtable meetings with businesses covering: travel; supermarkets and department stores; household fittings and furnishings; price comparison sites; and many others.

1.16 Following publication of this report we will look to see whether there appears to be significant movement in the areas where we have identified the highest potential for consumer harm and, working with our enforcement partners, take targeted follow up enforcement action if necessary.

As the Committee's response stated:

Naturally we welcome clarification of the law and trading practices generally to avoid consumers being misled and there are many aspects of the Proposals which are to be welcomed and, in our view, should not be contentious.

That said, we have the following general concerns around the Proposals:

- The draft proposals envisage traders providing more detailed sales information to consumers with the aim that consumers are not misled over sales prices. While a laudable goal, in practice we see increased administrative burdens on traders, with significant time and cost consequences. Inevitably some of these additional costs may be passed on to consumers. With the increased levels of administration, we also see a likelihood of more pricing errors being made, and thereby consumers being more (not less) confused.

- The existing guidance (including the CAP Code (recently revised on 1 September 2010)) and the BERR Guidance for Traders on Good Practice (updated in May 2008 to take into account the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)) already provide clear and easily understandable guidance to traders in making price indications. This allows them to run simple, yet effective, price campaigns. Our concern is that the Proposals are, in many cases, unnecessary to the extent that they change/conflict with existing settled areas of regulation/guidance which already provide effective compliance solutions (at least with larger organisations).

- The average UK consumer is generally endowed with qualities of being "*reasonably well informed, reasonably observant and circumspect*". The Proposals should not disregard the consumer's ability to assess products and prices independently. This may be particularly so for common every day products or where customers have a familiarity with brands.

2.2.2 Company Law Committee

The Company Law Committee recently responded to the Law Commission Consultation on Criminal Liability in Regulatory Contexts. (See http://www.lawcom.gov.uk/docs/cp195_overview_web.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=885&lID=0 for the response.)

As the consultation paper stated:

1.13 …the most important task undertaken [in] our Consultation Paper ("CP"), Criminal Liability in Regulatory Contexts,11 is the introduction of rationality and principle into the creation of criminal offences, when these are meant to support a regulatory strategy. We have understood this to mean the development of a set of proposals to reduce routine reliance on relatively trivial criminal offences, as a means of trying to secure adequate standards of behaviour. In particular, we will consider whether much more use should be made of other, more cost-effective, efficient and ultimately fairer ways of seeking to achieve that goal than the creation of ever more low-level

criminal offences. Consequently, we will explore whether all relevant Government departments should make a concerted effort to use these alternatives far more than they have in the past.

1.14 We will also set out the circumstances in which there is a legitimate case for creating criminal offences to support a regulatory strategy. We consider the longstanding argument that criminal offences should be created to deter and punish only serious forms of wrongdoing, as we will explain in Parts 3 and 4 of the CP. By serious wrongdoing is meant wrongdoing that involves principally deliberate, knowing, reckless or dishonest wrongdoing.

…1.16 Our terms of reference do encompass special consideration of the position of businesses. Businesses are the most common target of regulatory initiatives. In addition to the issues just described, we will be addressing some questions about the criminal liability of businesses. We will consider a series of criminal law doctrines, described briefly above,13 that have an impact on businesses. We will consider the extent to which these doctrines may be arbitrary, or unfair, perhaps especially where small businesses are concerned.

As the response stated:

1. INTRODUCTION AND SUMMARY

The Company Law Committee supports most of the Law Commission's proposals in principle. However, this support depends upon the proposed approach for civil penalties being satisfactory and providing appropriate safeguards. We think more information on what would be proposed is needed before a final view can be reached. Although we agree that, in theory, it would be better to reduce the number of matters dealt with by way of criminal offences, we do not think there will be better regulation if matters currently dealt with by criminal law are instead subject to a number of different regulatory regimes which are inconsistent and dealt with by different regulatory bodies.

It is important that any regime for imposing civil penalties (i) requires the same burden of proof before liability is established where the civil penalty replaces an existing criminal offence (i.e. the burden of proof before a civil penalty is imposed should be the same as that applicable for the criminal offence) (ii) offers appropriate protections in relation to evidence (iii) ensures that the decision to seek a civil penalty is kept separate from other regulatory decisions (iv) requires a clear approach to determining any penalty to be imposed and (v) provides for full rights of appeal to the courts. We are also concerned about the speed with which action is taken and decisions are made and the inter relationship between any civil penalty proceedings and any criminal prosecution. We are also concerned that sufficient resources are available for such an approach to work in practice.

As above, the Commercial Law and Company Law Committees jointly responded to the Ministry of Justice consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010) (see paragraph 2.2.1 above.)

The Company Law Committee also responded to the BIS Consultation on the Future of Narrative Reporting (see http://www.bis.gov.uk/Consultations/the-future-of-narrative-reporting-a-consultation?cat=open for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=867&lID=0 for the response). As the BIS website stated regarding the consultation:

This consultation is part of implementing the Coalition Agreement commitment to "reinstate an Operating and Financial Review to ensure that directors' social and environmental duties have to be covered in company reporting and investigate further ways of improving corporate accountability and transparency".
The objective of the consultation is to look at ways to drive quality of company reporting to the level of the best and thereby enable stronger and more effective shareholder engagement. The consultation paper is open in exploring all options - regulatory and non-regulatory - to achieve the objectives. The consultation focuses in particular on the business review provisions, but as part of its exploration of wider narrative reporting, it also looks at issues relating to the Directors' Remuneration Report.

> The consultation closes on 19 October and is seeking views from all those concerned in company reporting including companies, their members and others who regularly use company reports. **The Government will publish its conclusions at the end of the year.** (emphasis added).

As the overview to the Committee's response stated:

> We believe that the quality of narrative reporting has improved significantly in recent years. While this has resulted partly from changes to the requirements to which companies are subject it has also, possibly to a greater extent, been driven by the demands of investors and other stakeholders. We strongly believe that further improvements can be facilitated by appropriate regulation such as the liability regime in section 463 of the Companies Act 2006 (a good example of regulation that has facilitated better reporting) and through softer measures, namely pressure from investors and others and clearer guidance.

2.2.3 Construction Law Committee

The Construction Law Committee led the CLLS response to the Ministry of Justice "Call for Evidence on the European Commission's Green Paper about European Contract Law" (see paragraph 1.2 above for details).

2.2.4 Financial Law Committee

The Financial Law Committee recently responded to the HMT Consultation on the Special Administration Regime for Investment Firms. (See http://www.hm-treasury.gov.uk/consult_special_invest.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=879&lID=0 for the response.)

As the HMT website stated regarding the consultation:

> The Government is conducting a detailed review of resolution arrangements for failing investment banks. As part of this review the Government published a consultation paper on a new special administration regime for investment firms. The consultation is aimed at the financial services, legal advisors, insolvency practitioners, investment firms.
>
> The special administration regime is based on the proposals previously set out in the December 2009 consultation paper Establishing resolution arrangements for investment banks and the responses to that paper. The other regulatory proposals that were consulted on in the December paper, to enhance the protection of client assets and money, and to ensure that investment firms prepare for their own failure, are being considered and will be taken forward by the FSA, subject to its own consultation and cost benefit processes under the Financial Services & Markets Act 2000.

As the response stated:

> Overall the Committee welcomes the introduction of this regime. There are, however, areas that require attention, particularly to ensure a smooth meshing with the expectations raised by the FSA's regime for client money in CASS and to address issues of legal uncertainty which would be likely to inhibit the regime achieving its intended benefits.
>
> Our response addresses the questions raised in the Consultation…

The Committee also responded to the HMT Consultation on Implementation of EU Directive 2009/44/EC on Settlement Finality and Financial Collateral Arrangements (See http://www.hm-treasury.gov.uk/consult_amending_directive_implementation.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=882&lID=0 for the response.)

As the HMT website stated regarding the consultation:

> This consultation document seeks views on proposals for implementation in the UK of the Amending Directive.
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> On 6 May 2009 the European Parliament and Council adopted Directive 2009/44/EC (the "Amending Directive"), which amends Directive 98/26/EC on settlement finality in payment and securities settlement systems (the "SFD") and Directive 2002/47/EC on financial collateral arrangements (the "FCD"). Member states have until 30 December 2010 to adopt and publish their implementing measures, which are to apply from 30 June 2011.
>
> This consultation is aimed at participants in the payment and settlement industry and other interested parties such as legal in solvency specialists.

As the Committee said in its response:

> **Financial Collateral**
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> 1. This is the response of the Financial Law Committee of the City of London Law Society to the Consultation Paper issued in August 2010 by H.M. Treasury on the implementation of EU Directive 2009/44/EC (the **"Amending Directive").**
>
> 2. We recommend that the protections afforded by the 2003 Regulations should be extended, not only to cover "system charges" and " collateral security charges", but also to cover all "market charges" within Part VII of the Companies Act 1989.
>
> 3. We propose that H.M. Treasury should extend the protections afforded by the 2003 Regulations to financial collateral arrangements which form part of a "wholesale transaction", whether or nor the financial collateral in question is in the possession or under the control of the collateral-taker.
>
> 4. Alternatively, or in addition, the 2003 Regulations should be amended to introduce a new definition of "control", which includes "negative control", thus reversing the *Gray* decision. Thought should be given as to whether it is possible to define "possession", even if the definition is restricted to specifying the sort of cases which the concept of "possession" should include.
>
> 5. These considerations have become more important now that the 2003 Regulations are to be extended to cover credit claims.
>
> 6. The 2003 Regulations should be amended to deal with the other problems identified in Appendix B and to make a small but important amendment to the definition of "credit claims".
>
> 7. If H.M. Treasury has any concerns about its *vires* to make these amendments under section 2(2) of the European Communities Act 1972, we would ask it to effect the proposed changes under its powers to make regulations about financial collateral arrangements contained in section 255 of the Banking Act 2009 (the **"2009 Act").**
>
> **Settlement Finality**
>
> 1. Similarly, we consider that it is essential to ensure that the 1999 Regulations remain fit for purpose with reference, in particular, to recent legislative, regulatory and market developments affecting the UK's systemically-important infrastructure.
>
> 2. There must be complete market confidence that any extension in the legislative protections given to "collateral security charges" is well-founded in law. We support the proposal that "collateral security charges" should benefit from the same disapplications of UK legislative and common law rules as "security financial collateral arrangements". However, we would not wish there to remain any doubt as to the effectiveness of the legislative route by which this has been achieved. For this reason, we have suggested that the relevant changes are effected either by using the powers under section 255 of the 2009 Act, or by making appropriate amendments to the 1999 Regulations themselves using the powers under section 2(2) of the European Communities Act 1972.

3. Changes to the regulatory landscape now mean that "payment institutions" are able to provide payment services which are broadly equivalent to those provided by banks and electronic money institutions. In order to ensure the efficient and effective provision of such services by these new payment service providers, these institutions will need to participate in designated payment systems. This will not be possible unless the 1999 Regulations recognise that such new providers are eligible to be "participants" of such systems. We therefore recommend that appropriate changes be made to the 1999 Regulations to allow for this.

4. Systemic issues created by "interoperable systems" mean that, if the 1999 Regulations are to continue to protect the integrity of the UK's designated systems in the manner contemplated by the Amending Directive, certain key provisions must apply not only in relation to participants of the designated system, but also the participants of interoperable systems in relation to those designated systems. We have suggested a number of drafting changes to achieve that objective.

5. In view of the absolute need to protect the stability of systems that are already designated, it is essential that the Amending Directive does not interrupt the seamless and continuous SFD protections for those systems. Accordingly, we would strongly recommend the inclusion in the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements)(Amendment) Regulations 2010 (the **"Amending Regulations")** of an appropriate "continuity" provision in similar terms to that set out in Article 10.2 of the SFD (as amended by the Amending Directive).

6. We believe that H.M. Treasury has the power to make all of these suggested changes to the 1999 Regulations under section 2(2) of the European Communities Act. This is because they would help to fulfil the key objectives of the SFD, as a minimum harmonization directive, with reference to the current and prospective payment and securities settlement models operating in the UK and elsewhere in the EEA. They would do this by: (a) reducing systemic, legal and other risks associated with participation in payment systems and securities settlement systems (see Recitals (1), (2) and (9) of the SFD); (b) contributing to the efficient and cost effective operation of cross-border payment and securities settlement arrangements (see Recital (3)); and (c) minimizing the disruption caused to the UK designated systems by the insolvency of a participant in that system or an interoperable system in relation to that system (see
Recitals (4), (14a) and (22a)).

Timing

1. It is recognised that it is unlikely to be possible to make all of these changes before the Amending Directive is required to be implemented, that is, on or before 31 December 2010.

2. The Amending Regulations will, of course, introduce the provisions intended to implement the Amending Directive. We propose that they could without too much difficulty also deal with:
(a) the three problems identified in Part I of Appendix B (Equivalent Financial Collateral, Appropriation and Banking Act 2009), all of which relate to the 2003 Regulations;
(b) the recognition of "payment institutions" as eligible to be participants of designated payment systems by amending the 1999 Regulations and certain other amendments; and
(c) the inclusion in the Amending Regulations of an appropriate "continuity" provision in similar terms to that set out in Article 10.2 of the SFD (as amended by the Amending Directive), which relates to settlement finality.

3. We have suggested amendments to the 1999 Regulations and the 2003 Regulations in Appendices E and F respectively in order to illustrate the sort of changes that might be required to deal with points (a) and (b) (but not point (c) because that would be dealt with in the Amending Regulations themselves). All of these changes would be implemented on or before 31 December 2010. Appendices E and F also contain some suggested additional drafting amendments.

4. The remaining changes recommended in this response would be implemented at a later date or dates. However, the fact that we have suggested that implementation should be delayed does not mean that the changes are any less significant or pressing; it simply means that they may require

further discussion or that they can only be implemented using the powers contained in section 255 of the 2009 Act[4].

The Financial Law and Insolvency Law Committees also responded separately to the Insolvency Service Consultation document on proposals for a restructuring moratorium (See http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/RestructuringMoratoriumConsultationDocument.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=884&lID=0 or the Financial Law Committee response. See paragraph 2.2.5 below regarding the Insolvency Law Committee's response.)

As the Executive Summary to the consultation paper stated:

> **Executive Summary**
>
> (i) Companies seeking a negotiated restructuring of their debts with their creditors face increasing costs and complexity. There is an increased risk that businesses that are otherwise viable could be forced into a formal insolvency process as a result of a failed restructuring. That outcome would be very damaging for the companies affected, putting jobs at risk, and adversely affecting all of their creditors.
>
> (ii) The risks involved in restructuring are greatest for larger companies, whose financial arrangements are more complex, and who may be more highly leveraged. However failure of such a company could affect businesses of all sizes, including suppliers and customers. It could also impact on the prospects for economic growth and recovery.
>
> (iii) To help address these risks the Government is proposing a new restructuring moratorium. The moratorium is intended to help companies where the core business is viable but, in order to avoid the prospect of future financial distress or even insolvency, there is nevertheless the need to reach some form of compromise or restructuring. It would provide those companies with the option of a protected breathing space, during which a restructuring could be negotiated and agreed.
>
> (iv) The option of a restructuring moratorium would be available to companies that are seeking a contractual compromise, or are preparing a statutory compromise proposal – either a Company Voluntary Arrangement or a Scheme of Arrangement.
>
> (v) The moratorium would last initially for up to three months, allowing the company to negotiate and agree the terms of the restructuring or compromise. An extension of this period would be available for more complex negotiations, or where further time was required for the approval of a statutory compromise proposal.
>
> (vi) To benefit from the protection of a moratorium, companies would need to satisfy a set of eligibility tests and qualifying conditions. For companies that were failing or were already insolvent, existing insolvency procedures (including administration or liquidation) would continue to apply.
>
> (vii) In order to help safeguard creditors' interests, the directors' application for a moratorium must be sanctioned at a court hearing during which creditors would be able to be represented. An authorised insolvency practitioner would also be involved at certain key stages of the application process, and in helping to safeguard the interests of creditors whilst the moratorium was in force.
>
> (viii) Although the directors would remain in control of the company's affairs during the moratorium, they would be subject to a range of obligations and possible penalties to deter misconduct or abuse.

Regulations made under section 255 require an affirmative resolution of both Houses of Parliament: see sub-section 256(1) of the 2009 Act.

(ix) The proposals are expected to result in an estimated quantified annual saving to business of around £16M per year, as well as other non-quantified benefits.

As the Financial Law Committee stated:

> The Committee strongly supports the aim of encouraging the rescue culture and welcomes the proposals as an attempt to improve the choice of tools available for achieving a company rescue. It is pleased that the consultation document addresses a number of concerns expressed by the Committee in its previous paper of September 2009 and adopts some of its suggestions. However, the proposals need to be developed in greater detail and give rise to a number of potential issues. The comments of the Committee's working party on these issues are set out in the attached response.
>
> If the proposals are taken forward, further consultation with stakeholders will be essential.

2.2.5 Insolvency Law Committee

As mentioned (see paragraph 2.2.4 above), the Insolvency Law Committee also responded to the Insolvency Service Consultation Paper entitled "Proposals for a Restructuring Moratorium". (See for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=871&lID=0 for the response.)

As the Committee's response stated:

> 4. In this response, we have made some general comments in relation to the relevant sections of the Consultation rather than confining our comments to the particular questions raised. This is because we consider that there are some key points not covered by the consultation questions. We have set out in the Appendix a summary of our responses in relation to the consultation questions although these should be read in the light of this response as a whole.
>
> 5. Initiatives aimed at assisting the restructuring of viable businesses facing financial difficulty, particularly where such initiatives may reduce the costs inherent in that process, are to be welcomed. We are grateful that this latest proposal takes on board many of the comments made in response to the earlier proposals in the June 2009 consultation paper on "Encouraging Company Rescue". In particular, we welcome the fact that the proposed restructuring moratorium is not limited to scenarios where a CVA is being considered but is much wider in scope.
>
> 6. That said, we consider that a strong case needs to be made out for introducing any legislative changes (and the period of uncertainty that such changes inevitably brings about). Legal certainty in a restructuring scenario is even more important in a period of economic downturn. The detail is essential and, for the reasons set out in this paper, we are concerned that some of the detail in relation to the proposed moratorium (particularly in relation to the priority of moratorium debts, international scope or recognition and who should be consulted in relation to, or asked to approve, the moratorium) has not yet been worked through and could prove problematic when it comes to pinning down the detail.
>
> 7. Members of our committee are divided in relation to whether a strong case can be made out for the proposed restructuring moratorium. As discussed further below, some members have given examples of restructurings where it was necessary to use the stay inherent in a formal insolvency process in order to bind dissenting creditors. Others have cited restructurings which almost failed as a result of last-minute creditor action. There are also concerns that, without a statutory moratorium, creditors may commence insolvency proceedings in order to trigger credit default swap (CDS) protection and in circumstances where such proceedings are not in the interests of the stakeholders as a whole.5

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5 Ironically, for the reasons given in paragraph 10(a) below, the moratorium might itself be used to trigger CDS protection without the need for the company to be placed into any insolvency process. While this would not necessarily be a bad thing (if it prevented the company from going into formal insolvency proceedings), we doubt that this is the intention behind introducing the moratorium.

8. On the other hand, some members question whether the moratorium is the right focus for any legislative change. They suggest that the greater risk is not so much that individual creditors may threaten to destabilise a restructuring at the negotiating stage by refusing to sign up to a standstill but that such creditors can derail a restructuring altogether by refusing to consent to it. In other words, the key challenge in a restructuring (and the area more worthy of legislative reform) is imposing on dissenting creditors (with differing or unrealistic economic objectives) a restructuring plan that is generally acceptable to the company's stakeholders in cases where a fully consensual solution is not achievable.

9. There is greater consensus that, in practice, the moratorium is only likely to be used in relation to a holding company rather than an operating company. Most restructurings of financial indebtedness are done at the holding company level in order to minimise the impact on the operating companies (for example by triggering contractual termination rights). This may make some of the proposals regarding the notice that is to be given to creditors regarding the moratorium more workable (as discussed below). It could also have an impact on whether it is necessary to introduce the concept of super-priority debts incurred during the moratorium…

2.2.6 Litigation Committee

The Litigation Committee recently responded to the Joint Advocacy Group consultation document on Proposals for a Quality Assurance Scheme for Criminal Advocates (See http://www.sra.org.uk/sra/consultations/joint-advocacy-group-quality-assurance-scheme.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=877&lID=0 for the response.)

As the consultation paper stated:

Executive summary

1. The Joint Advocacy Group (JAG) was established by the Bar Standards Board, the Solicitors Regulation Authority and ILEX Professional Standards to develop a scheme to quality assure criminal advocacy across the three professions.

2. This paper sets out the proposed scheme and invites comments.

3. Effective advocacy is fundamental to the justice system. Members of the public rely upon it for the proper presentation of their case and the courts are dependent upon it for the proper administration of justice. There is therefore a need for systematic and consistent quality assurance of advocates.

4. Central to JAG's consideration is the desire to develop a scheme which is cost effective, proportionate and straightforward. An unduly burdensome or bureaucratic scheme would not be in the interests of anyone.

5. The proposed scheme therefore builds on the existing education framework for entry into advocacy to develop a rigorous assessment process to ensure that adequate standards are attained at the start of an advocate's career. Periodic re-accreditation will ensure that those standards are maintained as the advocate's career progresses. This is complemented by an informal reporting arrangement for judges and others to refer poorly performing advocates for remediation or re-training. It is proposed that the scheme will be managed by an independent body, accountable to, and with oversight from, the three regulators of advocates.

6. JAG accepts that there is considerable work still to be done to bring the scheme in to operation, particularly in relation to financial planning, and this will continue during the consultation process. This paper seeks views on the proposed framework of the scheme and its component parts and

responses will be taken into account as JAG develops the final scheme for introduction in July 2011.

As the response stated:

We write to express our views about the above Consultation.

While our members practise predominantly in the civil courts, we are committed to supporting and maintaining the highest standards of advocacy in all courts. We have significant reservations about the proposals in the Consultation paper, which we believe to be unnecessary to address the rare cases of poor advocacy. For the same reasons, we would resist any suggestion in the future that a scheme such as that proposed in the Consultation paper for criminal advocates be required for civil advocates.
Our members believe that market forces can be relied upon to ensure quality of advocates. Even if it is accepted, as the JAG suggests, that market forces alone are insufficient to ensure the quality of advocacy in criminal matters, we believe that the proposals in the Consultation paper are unnecessarily complex and likely to lead to unnecessary and unjustified expense. Our members consider that there are more proportionate ways of improving the quality of advocacy, while avoiding the significant costs and heavy administrative burden of the proposal.

If, contrary to these submissions, the JAG goes ahead with the scheme, we believe the commencement date of July 2011 is extremely ambitious, especially given, as the paper itself acknowledges, that there are significant preparatory steps that need to be taken before then.
The JAG estimates in the Consultation paper, that the number of advocates with criminal higher rights of audience is approximately 8,500. We have previously expressed our concern at the significant cost of training and examination for the new higher courts (civil advocacy) qualification. If the per head cost was equivalent for the current proposal, the total initial training and examination budget for the 8,500 advocates would need to be in the order of £20 million (at *circa* £2,000 per head). This does not take account of the loss of earnings during any training period. Costs of such magnitude may prove to be a significant deterrent for smaller firms.

There would also be a very substantial cost to the judiciary in the time taken, and training necessary, to complete the proposed judicial evaluation forms (the common standards on which these forms are to be based extend to three-and-a-half pages). The consultation paper indicates that a full financial assessment has yet to be made.

The proposed scheme has a complex system of accreditation. In addition, it is proposed that there be reaccreditation every five years and that Queen's Counsel will not be exempted from the accreditation process. This poses a significant financial and administrative burden upon criminal advocates and, for those advocates who are employed, also their employers.

In our view, for those advocates who are employed there will typically be other systems in place to maintain standards in the form of regular performance reviews; and, for self employed advocates, market forces do present a very powerful mechanism for removing the weaker advocates. The present system of Layers 1 and 2 (which we do not oppose) should address the more extreme cases of poor advocacy and we are unconvinced by the proposed additional Levels 3 and 4. Whilst the highest standards should be the aim, those to whom it is addressed are likely to be less amenable to this kind of system; market forces on the other hand do reward excellence.

It is also proposed that the scheme will be managed by an independent body (the Performance of Advocacy Council), accountable to, and with oversight from, the three regulators of advocates (the Solicitors Regulation Authority, ILEX Professional Standards and the Bar Standards Board). We question whether there really is a need for an additional layer of regulation and bureaucracy.

As a result of the costs identified above (especially the hidden costs of lost income) we are concerned that the scheme would only be adopted by those in a more privileged position, and that it will be a barrier to entry to those who do not have the support of a substantial firm or chambers which can provide the infrastructure and financial support to facilitate compliance with the proposed scheme.

We are also concerned at the proposed institutionalisation of judicial appraisal of the performance of advocates. If advocates consider that their advancement is very heavily dependent upon regular

judicial approval it may create an atmosphere of increased (and unnecessary) deference to the Bench and, possibly, may even act as a deterrent against raising controversial or unpopular points for fear of provoking an unfavourable judicial reaction in that appraisal process. There is a public perception that such behaviour can occasionally occur in the period up to a senior barrister's appointment as a QC and the proposals might lead to a risk that such behaviour would become more common.

For the reasons set out above we do not agree with the proposal in the paper. We recommend that the JAG consider more proportionate plans. It may be that the current system, or a much more "light touch" form of intervention, is appropriate. As the JAG notes, the judiciary has already felt able to respond on competence and performance.

2.2.7 Revenue Law Committee

The Revenue Law Committee recently responded to the HMT document "Bank Levy: A Consultation" (See http://www.hm-treasury.gov.uk/consult_bank_levy.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=864&lID=0 for the response.)

As the HMT website stated regarding the consultation:

> The Government has launched a consultation on the design and implementation of a bank levy. This consultation sets out proposals to address a number of operational issues around design and implementation, including definitions of who will pay the tax.
>
> The consultation follows the Chancellor's announcement to introduce a bank levy in the June Budget. The Government believes that banks should make a fair contribution to the system, which reflects the risks they pose, and should be discouraged from risky funding practices.
>
> The levy complements the wider agenda to improve regulatory standards and financial stability.

As the response stated:

> It is disappointing in the light of the principles outlined in "Tax Policy Making- a new approach" that consultation has only taken place at the latter part of stage 2 of the policy making process once the policy option had been identified. It would have been preferable for there to have been consultation at an earlier stage to consider the wide range of options in this area. We have a concern that unilateral imposition by the UK of a levy of this kind will have a harmful effect on the competitiveness of the UK as a financial centre and it is therefore particularly important to mitigate any resulting damage that the levy is seen to be correlated with its policy aims, fair as between different institutions and certain and predictable in its application.
>
> You have included in that document at Section 5 a summary of the questions for consultation, and our comments address those questions in turn to the extent that we have comments