

E-Briefing – Detailed Version
(Covering the period from 19 June to 17 July 2009)

1. Professional Representation

1.1 Professional Rules and Regulation Committee

The Professional Rules and Regulation Committee (“PR&RC”) recently commented on Lord Hunt’s Initial Response to Evidence. (See <http://www.legalregulationreview.com/files/Initial%20Response%20to%20Evidence%20FINAL.pdf> for Lord Hunt’s Initial Response to Evidence, and <http://www.citysolicitors.org.uk/FileServer.aspx?old=606&IID=0> for the PR&RC’s comments.) [

The submission stated that:

1. The Committee did not believe *“that any benefit would be gained by creating a duality of rules and principles, some of which would fall under a professional standards banner and the others of which would fall within a regulatory code of conduct. “ and that it would be far better “to have a single set of regulations which covered all aspects of solicitors’ conduct whether ethical or administrative in nature ; “*
2. The Committee was *“concerned that the conclusions in the Smedley Report might not be given the priority in [Lord Hunt’s] final report which they deserve”* and that *“the case for a separate regulation unit is overwhelming”*; and
3. It *“would be reluctant to support the establishment of a solicitors’ defence union”*.

2. CLLS Specialist Committees

2.1 Company Law

The (CLLS) Company Law Committee recently commented (in a joint report with the Law Society’s Standing Committee on Company Law) in response to the European Commission’s Call for Evidence on Market Abuse Directive 2003/6/EC on Insider Dealing. (See http://ec.europa.eu/internal_market/consultations/docs/2009/market_abuse/call_for_evidence.pdf for the Commission’s document and <http://www.citysolicitors.org.uk/FileServer.aspx?old=597&IID=0> for the response.)

As the submission stated:

We believe reform and revision of the MAD regime is required in a number of respects:

- the policy objectives of MAD will be met more effectively if different definitions of "inside information" are adopted for the insider dealing prohibition and the issuer disclosure obligations of "inside information";
- the definition for the purposes of the prohibition of insider dealing should involve a simple test of price sensitivity, i.e., it would not include a "reasonable investor" test or a requirement that future events or circumstances be "reasonably expected";
- the definition of "inside information" for the purposes of the issuer disclosure obligation should be retained as it is;
- the circumstances in which an issuer may delay disclosure of inside information should be clarified; specifically:
 - (a) the condition that delay should not mislead the public should be dropped; and
 - (b) the ability to delay disclosure if necessary to preserve continued viability of the issuer should be clarified[;

- (c) issuers should be permitted to delay disclosure while verifying the facts in order to avoid a premature misleading disclosure].
- it should be made clear that transaction reporting by managers and their closely associated persons should not require the reporting of pledges over shares.

The submission also made a number of detailed comments regarding the Directive.

2.2 Financial Law

The Financial Law Committee responded to the European Commission's Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"). (See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF> for the Commission's Green Paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=604&IID=0> for the response.) The submission referred to a number of matters, including:

- The requirement to obtain a declaration of enforceability from a designated national court in the Member State of enforcement, and the possible abolition of "exequatur";
- The development of rules concerning jurisdiction and the recognition and enforcement of judgments affecting third countries, or their nationals;
- The need for effective steps to be taken to support and protect the exercise of party autonomy with respect to dispute resolution processes. (The submission stated "*the Committee would urge the Community to accede at the earliest possible opportunity to the Hague Choice of Court Convention and to extend its application to non-exclusive choice of court agreements*".)
- The *lis pendens* provisions in the Regulation. (The submission stated that "*the lis pendens provisions in the Regulation work reasonably well in practice and are not in need of a radical overhaul.*";)
- The proposal that the court having jurisdiction over the substance of the dispute may set aside a provisional measure granted in another Member State; and
- The place of arbitration within the framework of the Regulation. (The submission stated "*Absent agreement on the exclusive competence of the courts of the Member State of the seat of the arbitration, the Committee would favour the continued exclusion of arbitration together with any ancillary proceedings relating to arbitration, including any question as to the validity or effect of an arbitration agreement, from the scope of the Regulation.*".)

2.3 Litigation

The Litigation Committee is continuing to work on the response to the Civil Litigation Costs Review, being conducted by Lord Justice Jackson. On 13 July the Committee held an open meeting regarding the review, which attracted almost 100 attendees. The panel members for the discussion were Lord Justice Jackson, Lindsay Marr (Chair, CLLS Litigation Committee), Hilton Mervis and Hardeep Nahal. Topics covered during the discussions included

- 1) Contingency fees, the indemnity principle and costs shifting;
- 2) The litigation process:
 - a) Pre-action protocols and disclosure process; and
 - b) Docket system, witness statements, experts reports;
- 3) Costs:
 - a) capping / budgets; and
 - b) assessment/recovery; and
- 4) The process going forward.

2.4 Planning & Environmental Law

The Planning & Environmental Law Committee recently commented on the application of the Carbon Reduction Commitment (“CRC”) to Private Equity Funds. (See <http://www.decc.gov.uk/en/content/cms/consultations/crc/crc.aspx> for information on the DECC consultation on the draft order to implement the CRC, and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=607&IID=0> for the response.) The submission stated:

- Private equity house – *“For the purposes of compliance with the CRC, it will be necessary to determine whether a general partner can be said to exercise dominant influence or control over a limited partnership, which will demand a careful analysis and interpretation of the limited partnership’s constitutional documents, including the limited partnership agreement together with any side letters”*;
- Fund: *“Within each individual limited partnership it will be necessary to identify any parent–subsidiary relationships that might exist between the limited partnership and its investee companies”*;
- Limited partnership – a single limited partner in an English limited partnership is unlikely to be held to be a parent; however, a single investor who is able to exert dominant influence may be; and
- *“It will be necessary for all private equity houses to carry out a careful analysis of the voting and other control provisions that exist between all the relevant entities: manager, general partner, limited partnership, limited partners and investee companies, in order to determine correctly the composition of the CRC participant group.”*

2.5 Regulatory Law

The Regulatory Law Committee also recently commented on the FSA’s discussion paper DP09/2 *“A regulatory response to the global banking crisis”*. See http://www.fsa.gov.uk/pages/Library/Policy/DP/2009/09_02.shtml for the discussion paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=596&IID=0> for the response. The response focussed on the issues arising from the paper that had legal as well as market implications. Some of the submission’s key points included:

- Unregulated activities within regulated groups – the submission queried the extent to which the *“FSA’s “limited direct powers over the holding company” are a real impediment to effective group supervision “*, although it agreed that *“FSA cannot regulate an unregulated parent company through influencing its subsidiaries “*;

- Unregulated entities within regulated groups – the submission favoured “*the FSA’s current approach of “indirect regulation” of unregulated entities or sectors*” but not “*the extension of this policy to “restrict the type, amount or concentration of business that the regulated firms undertake with unregulated entities or the specific unregulated activities”*”;
- Global and consistent implementation – The submission argued that the FSA should sell its solution to the banking crisis to the EU and beyond, and should “*resist the temptation of being “first to market” with its own implementation*”;
- Section 7: systemically important firms – The submission asserted that “*the FSA [should] ensure that its regulatory response to systemically important banks is formulated only once the debate in the international arena is concluded, and [should] ensure that its regulatory response is on a competitive footing with its international counterparts*”;
- Section 8: groups and intra-group exposures:
 - Maintaining the current “free access” model. Regarding the supervision of financial groups, the submission stated that “*We agree that further work remains to be done to assess the correct supervisory approach, and consider that an adjustment to the current supervisory model would be an appropriate response that worked with the grain of the market*; and
 - Structure of operation – Re the competing obligations that may arise for a regulated entity within a financial group, the submission argued that the FSA should make it clear that the duty of the entity’s senior management to comply with solo regulatory requirements “*is already addressed through the obligations placed on the senior managers of regulated firms through the operation of [FSA Handbook chapters] SYSC and APER*”;
- Section 9: international architecture: the submission argued that:
 - Early warning and challenge: macro-prudential supervision – if “*macro-prudential supervision*” is allowed, such a supervisor must have sufficient authority and political independence, and “*should operate within the framework of a clear set of explicit objectives*”;
 - Supervisory colleges: - the “*formation of colleges for the major international banking and financial services groups*” is supported. Colleges should be relatively informal arrangements involving a small number of key supervisors; should have due regard for the respective host state regulators and should keep them informed; and could have a tiered membership approach;
 - Passporting and branching:- “*emphasis should be placed on ensuring a more common set of standards that is consistently and effectively supervised and enforced by the relevant regulators, rather than on limiting the operation of the principle of passporting*”; and

- EU level rulemaking and oversight body – financial supervision should remain a national responsibility (c.f. *“the centralisation of rulemaking in a single EU body”*); and
- Section 10: Market issues:
 - Transparency – *“it may be that this is an area where closer supervision under the current legal and regulatory regime is appropriate rather than greater regulation and we would therefore not propose the FSA promoting measures in this field in the international fora”*; and
 - Strengthening market infrastructure: The submission stated *“We support the FSA’s work on the range of initiatives designed to strengthen the infrastructure for OTC derivatives. We think, however, that there are a number of legal and operational issues that need to be carefully worked through..”*

The Regulatory Law Committee also recently commented on the European Commission’s proposal for a Directive on Alternative Investment Fund Managers (the Directive). (See http://ec.europa.eu/internal_market/investment/alternative_investments_en.htm for the consultation document and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=608&lID=0> for the response.)

The submission stated that:

- It is essential, if the Directive is to be successful, that there be no doubt as to its scope (as otherwise there will be uneven implementation and the possibility of regulatory arbitrage across Member States);
- There were fundamental uncertainties about the definition of *“alternative investment fund”* (in terms of the activities that fall within the scope of the Directive and the position of third country managers and funds);
- The Directive needs to contain a proper definition of what is meant by *“collective investment undertaking”* and to make it clear what activities bring a person or an entity within the scope of the definition of *“manager of alternative investment funds”*;
- The Directive needs to take into account the fact that *“Given that the Directive applies to funds of every kind and strategy, account needs to be taken of the fact that there are many possibilities at present for the structuring of the fund arrangements... It is critical that there is clarity as to which entity is the AIFM”*. Likewise the definition of *“management services”* within the Directive needs to be clarified;
- There is no settled meaning for the concepts of funds *“domiciled”* or *“settled”* in a third country and a Member State (the Directive creates regimes which distinguish between the two); and
- *“It is not clear whether credit institutions, insurance companies and pension funds are intended to be excluded from the whole of the Directive (including the provisions relating to managing and marketing AIF in which third parties invest) or only to be excluded in respect of management of their own account monies... It is also not clear what the position is in relation to MiFID firms and what investment services may be provided by them to AIF or AIFM which are not subject to the Directive or to their other clients in relation to such AIF”*.

The Committee also made a further submission with regards to the AIFM Directive (see <http://www.citysolicitors.org.uk/FileServer.aspx?old=611&IID=0>), stating that *“In addition to the points already made, we believe that the following elements are capable of giving rise to great uncertainty unless clarified and are particularly acute for arrangements which are, perhaps unintentionally, caught within the current wide definition of “Alternative Investment Fund”*”:

- The definition within the AIFM Directive of the concept of “leverage” (in the context of references within the AIFM Directive to AIFs being “leveraged”);
- How the value of “assets under management” are to be calculated for the purposes of the AIFM Directive’s threshold tests;
- *“[t]he position of a manager where the value of the assets under management fluctuates above and below the threshold level”*;
- What is meant in article 2(a) of the AIFM Directive by *“directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding”*;
- The position in relation to national private placement regimes;
- What is meant by “marketing” in the AIFM Directive;
- The AIFM Directive’s delegation provisions (which are unclear in a number of respects) (and what constitutes “management services” under the Directive);
- The interaction between the AIFM Directive and the Prospectus Directive (regarding promotions);
- Whether the AIFM Directive regulates AIFs as well as AIFMs;
- The scope/effect of the exemption for credit institutions and insurance companies;
- The position of MiFID investment firms, and the services which they can provide to AIFs;
- Article 35 of the AIFM Directive (which *“is inconsistent with a common passport regime and has the potential to make the [AIFM] Directive passport (including that under Article 39) illusory for non-EU funds”*), and the relationship between Articles 35 and 39; and
- The AIFM Directive’s transitional provisions (including *“the position of non-EU managers, funds and services provide[r]s during the three year transitional period.”*)

2.6 Revenue Law

The Revenue Law Committee recently commented on the Finance Bill 2009: Taxation of the Foreign Profits of Companies: Debt Cap and International Movement of Capital Provisions, further to its comments to the Government on the original draft proposals relating to the taxation of foreign profits, made on 3 March 2009. (See <http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?>

[nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&id=HMCE_PROD1_029074&propertyType=document](http://www.citysolicitors.org.uk/FileServer.aspx?oID=598&lID=0) for the consultation document and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=598&lID=0> for the response.)

The submission stated that while it was appreciated *“that the Government has taken steps to positively address some of the concerns raised by the CLLS and others in the responses to the consultation.. ..significant concerns do remain.”* The submission *“comment[ed] on the provisions relating to the debt cap and international movement of capital aspects of the measures contained in the Finance Bill 2009 (including the draft legislation on financial services companies and anti avoidance rules released on 5 June 2009)”,* as well as *“the financial services provisions (paragraphs 6A to 6G), the anti avoidance rules in Part 5A and the new international movement of capital rules.”* The submission further stated that:

- Regarding the debt cap rules:
 - *“It remains our view that the policy behind the imposition of the debt cap is flawed and therefore we remain against the introduction of the rules.”*
 - *“the rules [are] very complex and not always clear”.*
 - HMRC Guidance on the rules should be published.
 - The proposed start date for the rules of 1 January 2010 is unworkable

- Regarding the Financial Services Exemption (Paragraphs 6A-6G), further clarity would be useful regarding which businesses would qualify for the exemption

- Guidance should be published regarding the Anti Avoidance rules (Part 5A)

- Regarding the new international movement of capital rules, the submission stated that *“As stated previously, we welcome the abolition of the current Treasury Consent regime from 1st. July 2009. We still cannot see any imperative for imposing reporting requirements for cross-border transactions going forward and it remains our view that these reporting rules should be dropped. “*