E-Briefing Detailed Version
(Covering 1 March 2011 – 14 April 2011)

Current matters

Appointment of CLLS Chief Executive

David Hobart, formerly Chief Executive Officer at the Bar Council of England & Wales, joined the CLLS on 9 May as its new Chief Executive.

Corporate Crime & Corruption Committee

The CLLS recently formed a new specialist committee, the Corporate Crime and Corruption Committee. As the relevant press release stated:

> **CITY OF LONDON LAW SOCIETY**
> **CONTINUES ITS EXPANSION WITH A LAUNCH OF A NEW COMMITTEE**
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> The City of London Law Society (CLLS) is pleased to announce that it has recently formed a new specialist working group, the Corporate Crime and Corruption Committee which will look at issues relating to corporate criminal responsibility.
>
> The Committee will be ***Chaired by Michael Caplan QC***, Partner at Kingsley Napley LLP. Michael has been a solicitor working in the White Collar Crime area for over 30 years and was one of the first Solicitor QC's to be appointed from this practice area**.** He sits as a Recorder in the Crown Court, is authorised to sit as a Deputy High Court Judge and is a member of the Criminal Procedure Rule Committee chaired by the Lord Chief Justice
>
> Michael commented, "I am delighted to become the first chair of the new committee. There is a great deal to consider in this area affecting the City including the much published Bribery Act and its guidance, the shape and future of the prosecuting and regulatory authorities, recent changes to the Criminal Procedure Rules, enforcement and civil settlements. There has also been the first prosecution under the Corporate Manslaughter legislation which cannot be ignored by all companies."
>
> David McIntosh, Chair of CLLS said, "This new corporate Committee is the first City of London Law Society specialist Committee formed for some time and reflects the call for this sort of committee at a time when important regulatory enforcement changes are taking place. The Committee will incorporate into one entity the considerable number of solicitors who are regularly involved in major corporate and international corruption cases."…

SRA Handbook

The SRA's new Handbook can be accessed at http://www.sra.org.uk/handbook/. As the SRA webpage states:

> This Handbook sets out the standards and requirements we expect our regulated community to achieve and observe, for the benefit of the clients they serve and in the public interest.

The draft SRA Handbook is subject to approval by the Legal Services Board. It is being introduced on a phased basis, beginning in August 2011. The key implementation date is 6 October 2011.

Our approach to regulation is outcomes-focused and risk-based so that clients receive services in a way that best suits their own needs…

EU Contract Law Proposals

On 12 April 2011 the Legal Affairs Committee of the European Parliament voted to support an optional instrument of European contract law. An EU press release on this issue stated:

> The models would be backed by an EU contract law system, offered as an alternative to coping with disparate national laws. MEPs say that this system could boost single market trade by improving consumer protection and certainty as to the law. Its use would be entirely voluntary.
>
> "At the moment, businesses, in particular small and medium-sized ones, are discouraged from engaging in cross-border trade because of the divergences in national contract law. Today's vote was an important step towards introducing a simplified and flexible optional instrument which will enlarge the choice of parties when drawing up contracts, provide legal certainty across borders and can be put in place relatively quickly. Retailers and consumers alike will be able to benefit from a flexible European contract law option. It is important now to ensure that any new rules created are simple, comprehensible and ready for use", said Diana Wallis (ALDE, UK), who is leading Parliament's work on the plan.
>
> MEPs say standard contract terms and conditions based on the EU contract law instrument should be available off-the shelf for firms, so as to provide greater legal certainty about cross-border business transactions. The model contracts would be available in all EU languages. They would be especially useful for e-commerce and distance-selling contracts, but should not be limited to them, say MEPs. They should first be made available for cross-border transactions, but Member States could later decide to make them available for domestic use, too.
>
> The Wallis report says that a regulation establishing "an optional instrument of European Contract Law" would ensure that the single market works better, by benefiting businesses (reduced costs as conflict-of-law rules would not be needed), consumers (legal certainty, confidence, high level of consumer protection) and Member States' judicial systems (no longer necessary to examine foreign laws).
>
> The European Commission proposal is expected in autumn this year.

Furthermore, results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback were recently published by the European Commission (see http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf for the document and http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/523&format=HTML&aged=0&language=EN&guiLanguage=en for a related press release.)

Past consultations etc.

Representational Committees

Company Law Committee

The Committee recently responded to the FRC Consultation on Effective Company Stewardship - Enhancing Corporate Reporting and Audit (see http://www.frc.org.uk/publications/pub2486.html for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=967&lID=0 for the response).

As the consultation paper stated:

> This paper considers how the effectiveness of the stewardship role of Boards and Audit Committees can be enhanced through corporate reporting and audit. We welcome responses from all our stakeholders and particularly seek the views of institutional investors and directors with stewardship obligations. This paper does not focus on the crisis in financial services. Instead, it looks forward and covers companies in all sectors.
>
> What happens next?
>
> The FRC will evaluate the responses to this discussion paper and hold a stakeholder conference on the key issues emerging from the consultation. We will also pilot a number of the initiatives proposed in the discussion paper.Where relevant, we will consult further (including a regulatory impact assessment) on specific proposals that we decide should be taken forward.

As the response stated:

> 1. **Introduction**
> 1.1 **Purpose**
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> We understand the Introduction to say that the ability of shareholders to exercise effective stewardship of companies depends on "the provision of robust and reliable information by companies and on audit assurance of that information". We agree with that.
>
> We also agree with the aim set out in the Introduction of achieving:
>
> > "Higher quality narrative reporting, particularly on business strategy and risk management."
>
> We take this to be the overriding objective. The proposals in the paper should be assessed by reference to their contribution to delivery of this objective.
>
> However, we question the assumption that appears in two of the other aims set out in the paper that greater transparency regarding processes is helpful in delivering this overriding objective. Specifically, we note the following aims:
>
> - "greater transparency of the way that Audit Committees discharge their responsibilities
> - "more information about the audit process ..."

As a general proposition, we think requirements for disclosure about process tend to lead to formulaic, boilerplate disclosures that add little or nothing to the substantive disclosure. At the same time, disclosures of this kind tend to dilute the responsibility of the party concerned (the directors or the auditors) for the substantive disclosures they are required to make. This approach shifts responsibility for judgments on adequacy of the process described to the user of the report. We question whether investors and other users would think that desirable.

1.2 **Evidence**

While we welcome a number of the proposals in the paper, we are concerned at the lack of evidence showing that investors and other users of Annual Reports share the concerns expressed in the paper and will find its proposals of real practical use. We think it is essential that there should be a good empirical basis to support the introduction of additional obligations on companies and their directors and auditors.

The introduction to the paper suggests that it is timely to ask whether the recent financial crisis exposed shortcomings which are relevant to all large companies, not just those in financial services. There is no further discussion of this question and no evidence is adduced on the point. We agree that this is a relevant question but we also see a danger in assuming that the problems faced by banks and other financial institutions in 2008-9 and the lessons learned from that experience necessarily "read across" to other kinds of companies. We suggest therefore that this question requires a more thorough analysis and consultation before new requirements of general application are adopted.

1.3 **Cost**

We would also wish to see more information on the added cost for companies implied by these proposals, beyond the simple statement in chapter 6 of the paper that the FRC believes the benefits will outweigh the costs.

The Committee also produced an updated note regarding admission condition on takeovers (http://www.citysolicitors.org.uk/FileServer.aspx?oID=969&lID=0)

Furthermore, in conjunction with the Company Law Committee of the Law Society, the Committee also responded to the ESMA Call for evidence “Request for technical advice on possible delegated acts concerning the Prospectus Directive” (see http://www.cmvm.pt/CMVM/Cooperacao%20Internacional/Docs_ESMA_Cesr/Documents/ComESMA26012011.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=968&lID=0 for the response)

As the Call for Evidence stated:

On Tuesday 25 January 2011, the European Commission published its request to ESMA for advice on possible delegated acts concerning the Prospectus Directive (2003/71/EC) as amended by Directive 2010/73/EU. ESMA has been asked to deliver certain parts of the requested advice by 30 September 2011.

ESMA invites all interested parties to submit views on aspects or areas ESMA should consider in its advice to the European Commission. All contributions can

> be submitted online via ESMA's website under the heading Consultations at www.esma.europa.eu and should be received by 25 February 2011.

The response questioned whether the Commission's proposals for the format of the summary of prospectuses and the specific form of the key information to be included in the summary would add value to the information provided to investors. The response also commented on some of the other issues which the Commission had asked ESMA to advise on, namely the Proportionate Disclosure Regime (Article 7), the consent to use a prospectus in a retail cascade, as well as the review of the provisions of the Prospectus Regulation (Articles 5 and 7).

Competition Law Committee

Some of the members of the CLLS Competition Law Committee were referred to in the following articles in March in relation to the recent regulatory changes in the competition area:

- "Government's Plan for New Antitrust Agency Will Raise Costs, Lawyers Say" (Bloomber.com [15 March 2011])
- "Antitrust rules could up costs" (City-AM [17 March 2011])
- "Plan to merge watchdogs sparks concern" (Financial Times [14 March 2011])
- "Competition regime given shake-up" (Financial Times [17 March 2011])
- "Watchdog merger plan sparks concern" (ft.com [13 March 2011])
- "OFT and Competition Commission to merge" (ftadviser.com [17 March 2011])
- "Consultation starts on OFT merger" (ftadviser.com [21 March 2011])
- "Balance of trade: lawyers shocked by breadth of government competition consultation" (Lawgazette.co.uk [24 March 2011])

Employment Law Committee

The Employment Law Committee recently responded to the BIS consultation "Resolving workplace disputes - public consultation" (See http://www.bis.gov.uk/Consultations/resolving-workplace-disputes for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=984&lID=0 for the response).

As the consultation paper stated:

> **Executive Summary**
>
> The Government is seeking views on measures to:

- achieve more early resolution of workplace disputes so that parties can resolve their own problems, in a way that is fair and equitable for both sides, without having to go to an employment tribunal;
- ensure that, where parties do need to come to an employment tribunal, the process is as swift, user friendly and effective as possible;
- help business feel more confident about hiring people.

The consultation aims to identify measures to encourage parties to use early dispute resolution, including increased awareness of mediation and realistic expectations of what employment tribunals can award; it puts forward legislative proposals to simplify the employment tribunal process, encouraging earlier settlement of claims where possible and more efficient handling of claims; and it considers the qualifying period for employees before they can bring a case to an employment tribunal (ET) for unfair dismissal.

The proposals set out in this consultation cover:

Mediation – Government is considering how we might enable greater use of alternative dispute resolution tools such as mediation. The consultation seeks to obtain more information about current use, costs and benefits, and barriers.

Early conciliation – to require all claims to be submitted to Acas (the Advisory, Conciliation and Arbitration Service) in the first instance, rather than the Tribunals Service. This would allow Acas a specified period (up to 1 month) to offer pre-claim conciliation in all cases.

Tackling weaker cases – by making the power to strike out more flexible; allowing a judge to be able to issue a deposit order at any stage of the proceedings, to make the deposit order test more flexible and for the Employment Appeal Tribunal (EAT) to be able to make deposit orders; and increasing the deposit and cost limits for weak & vexatious claims from £500 and £10,000 to £1,000 and £20,000 respectively.

Encouraging settlements

- **Provision of information** – to provide for additional information about the nature of the claim being made and to include a statement of loss as required information for claims involving monetary compensation.

- **Formalising offers to settle** - to develop a process for allowing offers of settlement to be “paid in” to the ET if they are rejected. In the event that the ET subsequently makes a less favourable award, then there is a mechanism for recognising the additional costs incurred by the other party in proceeding to hearing.

Shortening tribunal hearings

- **Witness statements to be taken as read** in all hearings, resulting in shorter hearings and therefore saved costs for the system and business.
- **Withdraw the payment of expenses** in tribunal hearings, encouraging parties to settle earlier; and to think more carefully about the number of witnesses they call, so potentially reducing length of hearings.

- **Extend the jurisdictions where judges can sit alone** in ETs to include unfair dismissal, and to remove the general requirement for tripartite panels in the EAT, allowing more efficient use of lay member resource.
- **Introduce the use of Legal officers** to deal with certain case management functions freeing up (more costly) judicial time to concentrate on matters requiring judicial expertise

Introduce fee charging mechanisms in employment tribunals, for example where claimants lodge claims (and respondents choose to counter-claim), and/or for parties in claims that proceed to full hearing.

Increase qualification periods for unfair dismissal from one to two years**,** which would result in some 3,700-4,700 fewer claims being made to tribunal.

Introduce financial penalties for employers found to have breached rights, to encourage greater compliance.

Review of the formula for calculating employment tribunal awards and statutory redundancy payment limits. This is to correct for anomalous effects on the level of increase each year and to provide discretion to prevent possible decreases should Ministers deem it appropriate.

An Impact Assessment has been prepared, and is published alongside this consultation document. We would welcome comments on the Impact Assessment, in particular on our analysis of costs and benefits and whether you consider there are any unintended consequences or other implications of the proposals which have not been properly identified.

The Committee's submission responded to the specific questions in the consultation paper, and stated generally that:

Last minute adjournment of Employment Tribunal Hearings

The problem with the Employment Tribunal Service which has been the subject of most discussion and which in our recent experience has caused most profound concern among our clients, is not the subject of this Consultation at all. This is the last minute adjournment of hearings by Tribunals with no or with virtually no notice. We can offer a formidable body of anecdotal evidence about multi-day hearings, arranged for several months in advance and for which parties and witnesses have cleared their diaries and made travel and accommodation arrangements, only to be informed at 4pm on the afternoon before the hearing is due to start that the case will be adjourned due to lack of judges, courtrooms or both. Usually this will result in the hearing having to be relisted many weeks or months ahead.

We recognise that this phenomenon is not unique to the Employment Tribunal Service and that these are also occasions when other types of dispute are subject to last minute adjournment in the Civil Courts. However, it is our strong impression, based on our recent experience of Employment Tribunal offices throughout England that:

- there is an over aggressive overlisting policy which is the main cause of the problem;
- the recent recruitment of more Employment Judges has not (yet, at any rate) had a significant impact on this problem;

- our clients, whether they be Claimants or Respondents (many of which are international businesses) find the late adjournment of cases to be costly, stressful and incomprehensible. It brings the Employment Tribunal Service into disrepute.

In our view, there is no more urgent problem which the Government and the Employment Tribunal Service should be seeking to address.

As one of the first steps, we suggest that the Employment Tribunal Service should gather and publish details of the number of hearings which are adjourned 48 hours or less before the date on which they have been listed to begin, and that it should be made clear by the Government to the Employment Tribunal Service that the reduction of such occurrences should be an urgent priority.

Financial Law Committee

The Financial Law Committee recently responded to the European Commission's "Consultation on technical details of a possible European crisis management framework". (See http://ec.europa.eu/internal_market/consultations/2011/crisis_management_en.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=956&lID=0 for the response.)

As the consultation paper stated:

> The Commission's Communication of October 2010 sets out a general framework for a comprehensive EU framework for troubled and failing banks. The Commission intends to proceed gradually towards such a regime. As a first step it will adopt before the summer 2011 a legislative proposal for a harmonised EU regime for crisis prevention and bank recovery and resolution. This will include a common set of resolution tools and reinforcement of cooperation between national authorities in order to improve the effectiveness of the arrangements for dealing with the failure of cross border banks. As a second step, the Commission will examine the need for further harmonisation of bank insolvency regimes, with the aim of resolving and liquidating them under the same substantive and procedural rules, and will publish a report, accompanied if appropriate by a legislative proposal, by the end of 2012. To this end the services of DG Internal Market and Services are working together with a group of Insolvency Law Experts (ILEG). Finally, the Commission considers that a third step should include the creation of an integrated resolution regime, possibly based on a single European Resolution Authority, by 2014. This would only be possible if we have previously put in place a single set of substantive rules with respect to resolution and insolvency. This consultation paper presents the technical details for the first step.
>
> These technical details are intended to give effect to the seven principles mentioned in the Commission's Communication of October 2010:
> - Put prevention and preparation first:...
> - Provide credible resolution tools…
> - Enable fast and decisive action...
> - Reduce moral hazard...
> - Contribute to a smooth resolution of cross border groups...
> - Ensure legal certainty…
> - Limiting distortions of competition...

In line with these principles, the services of DG Internal Market and Services propose to reinforce the powers of supervisory authorities to act before the situation is irreversible. The authorities should have broad powers of early intervention to allow them to guide a credit institution towards recovery when the situation of the institution is deteriorating.

One has, however to assume that there will be cases when recovery through an early intervention strategy would not always be possible. It is therefore important that the EU is better prepared to handle the possibility of a bank (or multiple banks) failing without the need of financial support by the state. In such cases, it is important that market exit remains a credible option, not only a theoretical possibility. To that effect, on the basis of the Commission's Communication of October 2010 the services of DG Internal Market and Services aim to develop a resolution framework that intends to reinforce market discipline by ensuring that all institutions can effectively fail in a way which minimises financial and economic disruption. However, a common set of resolution tools is not sufficient to achieve this objective. Without adequate crisis preparation on the part of the authorities to ensure that a credit institution can be effectively resolved in a way that losses fall to the shareholders and creditors (as with any other failed commercial enterprise), it is highly probable that public sector support would still be necessary, with taxpayers continuing to bear the costs of bank failures. The services of DG Internal Market and Services therefore propose to entrust the authorities with new preventative and preparatory powers that would allow them to ensure in good times that there are no significant impediments resulting from banks' legal, operational or business structures that it would make it difficult to apply the resolution tools and resolve them in an orderly manner.

This prevention, recovery and resolution framework should not, however, be considered in isolation. The existence of macro-prudential supervision as well as better focused and more appropriate prudential requirements or a strengthened market infrastructure that include e.g. central clearing for derivatives, are also key to financial stability since they will reduce the likelihood of another crisis of the magnitude of that which broke in 2008 and mitigate the systemic impact of future financial sector failures. The framework is designed to ensure that, if the problems of an institution are irreversible, rescue of the ailing entity is not the only, or even the preferable option, for the authorities (see diagram). Accordingly, the general rule should be that failing credit institutions should be liquidated under ordinary insolvency proceedings. However, this will not always be feasible, and in some cases an orderly winding down through resolution will be necessary for reasons of financial stability: that is to minimise contagion, ensure continuity of vital economic functions, maximise the value of remaining assets and facilitate their return to productive use in the private sector.

Measures that maintain the entity as a going concern - such as the power to write down debt or convert it to equity - should be a last resort, and only used in justified cases. This would help to underpin market discipline.

Following the principles established in the Commission's Communication of October 2010 the authorities will also therefore be given the necessary legal tools to ensure that they will be able to impose, to the maximum extent possible, the losses on the shareholders and all or part of the creditors of the failing entity.

In case resources from shareholders and creditors are not sufficient it would be necessary to call upon the rest of the financial sector. To this end, and as announced in the Commission's Communications of May and October 2010, this

document presents further details about how the funding of bank resolution by the financial sector could be organised.

As the response stated:

5. We welcome the broad objectives of the proposed legislation and in particular support the aim of ensuring that authorities in Member States have the necessary resolution tools to take fast and effective action to ensure the minimum of disruption to financial markets, the continuity of essential financial services and the avoidance of legal uncertainty. We also welcome the adoption of resolution tools and safeguards similar to those introduced in the UK by the Banking Act 2009. There are, however, a number of points on which the proposals are unclear or require further consideration. In particular we consider that:

   (a) The potential adverse consequences and complications of a temporary suspension of delivery or payment obligations, and of the exercise of close-out netting, proposed in Sections G12 and G13 are likely to outweigh any potential benefit of providing a short "breathing space".

   (b) We welcome the safeguards in Section H for counterparties and market arrangements that may otherwise be affected by a partial property transfer but consider that further safeguards are required (in addition to that based on the Settlement Finality Directive) to protect trading, settlement and payment systems and to preserve certainty, efficiency and stability on financial markets. We also consider that the safeguard for structured finance arrangements requires more detailed consideration and fuller consultation.

   (c) If the proposals in Annex 1 to the Working Document for write down of the debt of a failing institution or conversion of debt into equity (referred to in the Working Document as "bail-in") are to be taken forward, they will need to be developed in much greater detail and address the issues summarised by us. Given the complexity of these issues, we have serious concerns whether they can be addressed in the timeframe contemplated by the Working Document.

Intellectual Property Law Committee

The Intellectual Property Law Committee recently responded to the IPO Call for Evidence "Review of Intellectual Property and Growth". (See http://www.ipo.gov.uk/ipreview.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=955&lID=0 for the response.)

The review sought fresh evidence on the extent to which the current IP system successfully promotes innovation and growth and how it could do so more effectively. The Government asked Professor Ian Hargreaves to lead a short review of the Intellectual Property (IP) framework (law and practice) to consider how it might be changed in the interest of promoting innovation and economic growth. As the Professor stated, "[intellectual property and growth] is a subject of considerable economic importance where we have not yet succeeded in grounding policy securely in evidence. ...I also urge respondents to focus upon the question at the heart of this review rather than the catch-all remit of some previous reviews, namely: what, if anything, should we do to change the UK's IP

system in the interests of promoting more rapid innovation and economic growth?”

The paper cited Government concern that the current IP framework may, in certain respects, be obstructing growth by failing to strike the right balance between delivering protection and enabling competitive innovation.

The call for evidence went on to state that the contribution the Review hoped to make would be threefold:

- To outline the key elements of an IP system, nationally and internationally, that would best promote UK economic growth, as a touchstone for future policy decisions.

- To set out some specific actions that should be taken as “first steps” towards this goal.

- To identify any additional areas where there appears to be real potential for improvement, but where further evidence is needed to make firm judgements.

The Review was described as considering all IP rights, particularly in cross-cutting issues such as enforcement and the relationship with competition law, but that it would focus on patents and copyright. It was mentioned that the review would "attempt to concentrate the Review on areas where it can provide the most insight and best policy advice, in the time available."

The review's terms of reference were described as follows:

> The Review will develop evidence-based proposals on how the UK’s IP framework can further promote entrepreneurialism, economic growth and social and commercial innovation. We would like to hear about your experience of the current IP framework and your assessment of how well it promotes these objectives. The Review will draw upon on US and European as well as UK experience, focusing in particular on:
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> - Identification of barriers to growth in the IP system, and how to overcome them;
> - How the IP framework could better enable new business models appropriate to the digital age.
>
> Among the subjects to which the Review is expected to bring this perspective are:
>
> - IP and barriers to new internet-based business models, including information access, costs of obtaining permissions from existing rights-holders, and investigating what are the benefi ts of “fair use” exceptions to copyright and how these might be achieved in the UK;
> - The cost and complexity of enforcing IP rights within the UK and internationally;
> - The interaction of the IP and Competition frameworks;
> - The cost and complexity to SMEs of accessing IP services to help them to protect and exploit IP.
>
> The Review will make recommendations on:

- How the IP system nationally and internationally can best work to promote innovation and growth with a view to setting the direction of the IP policy agenda for the next five to ten years;
- What short and medium term measures can be taken now within the international framework to give the UK a competitive advantage.

The response to the paper was made jointly on behalf of The City of London Law Society – IP Committee, The Law Society and the Intellectual Property Lawyers Association. The response stated that, while a number of detailed issues were addressed, there was one recurrent theme, namely “education, better information and training”. It went on to state that "although growth is not only expected to come from SMEs, these companies are more likely then larger enterprises not to make the most of the system. Of course financial constraints limit the ability of smaller enterprises to obtain the protection they would wish for their businesses. However in addition smaller companies often lack skilled in-house professionals and do not always know where to go for advice and what type of advice they need. They may become wiser as their businesses develop (if they do) but then it may well be too late; either it is too late to apply for the right sort of patent protection or too late to lock the stable door to protect industrial secrets. Also because of the need to obtain finance quickly, unfavourable licence or other agreements may have been executed from which it may be difficult or impossible to extricate the company."

The submission further stated that

> The UKIPO has useful information on its website and runs road shows. It also publishes links to various bodies that can be contacted for information. However it is doubtful whether these bodies are in a position to offer the specialised advice that is required. There would be a clear benefit in expanding the educational programme for SMEs in particular. This would go beyond teaching people what patents, trade marks and copyright are but address IP protection, exploitation and enforcement in a more general commercial context. This would include not only registerable rights but also trade secrets. There are cases where an enterprise would be better advised to set in place proper protection for its know-how than to publish the information by filing patents. Some knowledge of the relevant aspects of contract law would also be beneficial.
>
> Other issues of more general importance are the cost of enforcing rights, uncertainty and delay. The cost of enforcement of patents has been an age old subject for discussion and it is to be hoped that the new procedures in the Patents County Court will make a real difference. It would be sensible to give the new reforms in relation to costs etc time to settle before tinkering with the system further. One area which will take time and trouble to deal with is the slowness and unpredictability of opposition procedures in the EPO. If industry has to wait for years to know whether a patent will finally emerge and if so in what form it can make decision making, whether for the patentee or third parties, very difficult indeed. There will be cases where the failure to deal with third

rate patents quickly and decisively may simply kill a project. This would not matter so much if courts in all Member States were prepared to take a fresh hard look at validity, if infringement proceedings were commenced. Unfortunately for procedural or other reasons this is not always the case and there is a serious risk in some jurisdictions of injunctions being granted notwithstanding the clear invalidity of the relevant patent.:

The main barriers that most, if not all, businesses face in relation to copyright are:

a. a hugely differing approach to the protection and enforcement of copyright, designs and databases between the UK and the civil law systems in the rest of the EU; and

b. the over complexity of overlapping sets of rights to protect copyright works, designs or databases.

This leads to anomalous legal results and expense. In our view, the Government could do more to push for the harmonisation of the categories of rights, the circumstances in which such rights arise or may be registered and the manner of their enforcement across Member States.

The paper went on to respond to the specific questions in the Call for Evidence relating to patents, copyright, enforcement of rights, intellectual property and competition, and SME access to intellectual property services.

The Committee also recently responded to the IPO's "Formal consultation on amendments to Design legislation". (See http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2010-desleg.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=959&lID=0 for the response.)

As the consultation paper stated:

This consultation concerns the laws governing designs registered in the UK ("UK registered designs") under the Registered Designs Act 1949 ("RDA") and registered and unregistered designs (together "Community Design Rights") protected throughout the European Union under Council Regulation 6/2002/EC on Community Designs ("the Community Design Regulation").

Executive Summary

2. The IPO wants to equalise the availability of remedies in the UK for innocent infringement of UK registered designs and Community designs. The purpose of this consultation is to ask you which of the two options available should be adopted. These are either to limit the liability of those who infringe Community designs unintentionally in line with the law currently governing infringement of UK registered designs, or alternatively to remove the limitation of liability in respect of unintentional infringement of UK registered designs.

3. A summary of the two proposals together with the question we would like you to answer, are outlined below:

Proposal 1

To amend the Community Designs Regulation 2005 so that unintentional infringement of a registered or unregistered Community design in the UK cannot give rise to an order to pay damages or an account of profits.

Proposal 2

To amend section 24 of the RDA so as to allow for the possibility of proprietors of UK registered designs obtaining an order for damages and/or an account of profits from the unintentional infringement of a UK registered design.

The Committee responded to the specific questions in the consultation paper. As the response stated:

Q. 1. Do you think there is any reason to maintain the status quo i.e. that financial remedies are available for unintentional infringement of a Community design right but not for unintentional infringement of a UK registered design?

We can see no logical reason to have different financial remedies for what are essentially the same rights. We are not convinced that the decision in J. Choo (Jersey) Ltd v. Towerstone Ltd is correct and we also do not consider that the statement in the last sentence of paragraph 19 of the Consultation Document is correct (for the reasons given in Russell-Clarke and Howe).

Q. 2. What do you think the economic consequences would be for the owner of a Community design right if it cannot get damages for unintentional infringement of its right?

In most design right cases, it should be more important to secure an injunction to stop the infringement than to secure damages at a later date. The fact that damages may not be available should encourage the proprietor to complain at an earlier stage than they might otherwise do rather than "sit on their hands" whilst an innocent infringer incurred a liability in damages.

Q. 3. Given that the UK register of designs is publicly available and searchable online, is it still necessary to prevent the courts from making an order for financial compensation for unintentional infringement of UK registered designs on the basis that the infringer was aware and had no reasonable grounds for supposing that the design was registered?

This is very much a political decision and one which affects a range of IP rights. We can see the arguments that registration should give constructive notice of the design right, but question how realistic that is in practice given the complexity of registered designs law, the fact that it is an unexamined right and the practical difficulties of searching {whilst designs are, in theory, searchable online, it is not at all easy to do so). Section 62(1) Patents Act 1977 is in very similar terms to Section 24B of the RDA and it would be somewhat odd to have different provisions between these two rights. Copyright law is also not dissimilar (Section 97 CDPA 1988).

Q. 4. What are the economic consequences on users if Section 24B of the Registered Designs Act 1949 is repealed? How serious would this be for users?

The risk is that an innocent infringer could incur a substantial liability to damages if the proprietor of the Registered Designs did not complain at an early stage. For importers and retailers in particular this could be quite a major issue.

Q. 5. Does the non-availability of an order for financial compensation in the case of unintentional infringement of UK registered designs alter the behaviour of those who use designs? If so, how does it do so?

We consider that the answer is yes. If retailers and importers, for example, knew that they faced potentially very material liability for innocent infringement of a registered design, then those with the resource to do so will feel forced to spend potentially lots of time and money on searches and advice. However, such searches have severe limitations. It is very difficult and expensive to search for (and take advice in relation to) registered designs (just as it is for patents) and, given the wide variety of articles to which they can relate, it is not really practical to do so other than in certain industries or for certain products when a substantial investment is being made. In fast moving industries, such as clothing, toys, footwear etc. searches are very uncommon and it would be a significant burden on UK business to have to conduct searches for all products.

This means, even after spending that money, infringement can remain a very real risk. As a result, those with more limited resources are likely to conclude there is not enough benefit in undertaking the searches. This will leave those with less resource as the ones facing the biggest risks. The bigger retailers are also likely to force any third party suppliers to give stronger warranties and indemnities about such infringement. However, those suppliers may be smaller independent design boutiques. So, again it is the SMEs of this world that lose out. The fear factor could strangle design innovation. This adversely impacts on consumers since it is likely to lead to a reduction in design choice in the market.

Land Law Committee

The Land Law Committee and The Royal Institution of Chartered Surveyors (RICS) recently produced the following service charge provisions:

- CLLS Land Law Committee Suggested Service Charge Provisions for a Shopping Centre: http://www.citysolicitors.org.uk/FileServer.aspx?oID=975&lID=0.
- CLLS Land Law Committee Suggested Service Charge Provisions for an Office Building: http://www.citysolicitors.org.uk/FileServer.aspx?oID=976&lID=0

Warren Gordon (Secretary of the CLLS Land Law Committee) and Nick Brown (Committee Chairman) set out the following by way of background:

Service charge provisions are one of the more contentious aspects of leases of commercial property. Landlords and tenants often have a very different perspective. Landlords seek the institutionally acceptable lease, while tenants may be concerned about excessive service charges, particularly when they have only a short term lease. The RICS Service Charge Code sets down best practice in the operation of service charge regimes for commercial property with an aim being the improvement of the landlord/tenant relationship.

> Firms represented on the Land Law committee of the CLLS act for many landlords and tenants impacted by service charge issues. It was considered that member firms and their clients and the property industry in general would benefit from some suggested service charge provisions, one set for a shopping centre and one for an office building. The provisions reflect many aspects of the best practice highlighted in the RICS's Code while at the same time being acceptable to institutions.

Nick Brown, Land Law Committee Chairman of CLLS said, “the new provisions will be particularly topical in that they refer to the shortly to be unveiled new edition of the RICS’s Code. This project also demonstrates excellent co-operation between the RICS and CLLS.

Planning & Environmental Law Committee

The Planning and Environmental Law Committee recently responded to the Defra consultation on changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990. (See http://archive.defra.gov.uk/corporate/consult/contaminated-land/ for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=961&lID=0 for the response.)

As the consultation document stated:

> This consultation is seeking views on proposals for updating and revising the Statutory Guidance which forms a key part of the contaminated land regime in England and Wales under Part 2A of the Environmental Protection Act 1990. Views are also sought on minor proposed amendments to the Contaminated Land (England) Regulations 2006 and the Contaminated Land (Wales) Regulations 2006.
>
> The consultation is aimed at specialists in the land contamination sector and anyone else with an interest, including members of the public.
>
> It has been prepared by the Department for Environment, Food and Rural Affairs (Defra) and the Welsh Assembly Government.

The Committee agreed that the statutory guidance to Part 2A of the Environmental Protection Act 1990 (“Part 2A”) is in need of revision and welcome Defra’s Consultation and the invitation to comment on it. It also agreed with the goal of simplification and clarity. It questioned, however, Defra’s conclusion that Part 2A “remains fit for purpose” (Consultation, para 56),1 especially in view of the following"• The Consultation states that there “may have been insufficient targeting of higher-risk sites” (para 51(c)) and that Defra “want[s] the regime to focus on finding the highest risk sites and dealing with them first” (para 58). The current system of requiring each local authority to prioritise land to be remediated in its area (see para 51(c)), however, necessarily results in lower risk sites in some areas having a higher priority than higher risk sites in other areas. We consider that a nationwide prioritisation system should be introduced with enforcement action focused on the most contaminated sites in that system.

The response further stated that:

- The Consultation further states that Defra "also want[s] to increase the chance that polluters will pay where possible; and that landowners pay (all or part of the costs) particularly where they stand to benefit financially from remediation" (para 58). This objective cannot be achieved, however, unless the overly complex liability system is revised and enforcement of the regime is adequately funded. In this respect, we note that Part 2A is "enforcement unfriendly" and also that a substantial number of Part 2A sites (including Helpston, Cambridgeshire, houses at Leigh, Sevenoaks, and Manywells, West Yorkshire), are being, or have been, remediated at taxpayers' expense.

- We also consider that the Environment Agency should be the sole enforcing authority for Part 2A for various reasons including the following.

    - The current liability system requires a large number of local authorities, many of which do not have adequate manpower and/or funding, to understand a multitude of issues in a legally, scientifically and technically complex regime; many authorities do not have this expertise and are unable to develop it because they encounter only a few contaminated sites in their areas.

    - More crucially, it would save money and manpower to concentrate enforcement powers in a single enforcement authority.

    - Having the Environment Agency as the sole enforcing authority would resolve the conflicts that have emerged due to local authorities often having the role of both enforcer and enforcee. Experience has shown that this is a major issue due to the historical role of local authorities as waste authorities, landowners and developers, especially in legacy town centre industrial sites, World War II bomb sites and for affordable housing sites.

    - Having the Environment Agency as the sole enforcing authority would also eliminate the drag placed on enforcement of the regime due to local authorities frequently having to be seen to remediate sites for which they are liable before they pursue appropriate persons for other sites, many of which may be much more seriously contaminated than the local authority sites.

    - Further, it would eliminate the political factor of the local influence of large local employers and industrial sectors when such employers / sectors are potential or actual appropriate persons.

    - The argument that has been made that local authorities have better knowledge of their areas than the Environment Agency does not take into account the Agency's area offices having detailed knowledge of local areas.

    - Still further, we consider that the liaison that Defra is proposing between local authorities and the Environment Agency in respect of the new identification of significant water pollution and the significant possibility of significant water pollution (see, eg, paras 135(a), 145(a)) would not be required if the Environment Agency was the sole enforcing authority. To require an increase in duplicative tasks in these days of budget cuts is wasteful.

    - The Environment Agency would, of course, need additional funding if it was to be the sole enforcing authority for Part 2A. This amount of funding should, however, be substantially less than each local authority being, in theory at least,

adequately staffed to enforce Part 2A. The additional funding to the Agency would also have the additional benefit of less taxpayers' money having to be spent on remediating contaminated sites due to the more experienced and, thus more cost-effective and time-efficient, role of the Environment Agency.

- We question the meaning of Defra's key assumption in the Impact Assessment (p. 2) that enforcing authorities will "put similar effort into contaminated land work as currently". The Environment Agency's report, Dealing with Contaminated Land in England and Wales (January 2009) states that, as of the end of March 2007, most local authorities in England and Wales had inspected less than 10% of their areas for contaminated land. If, as appears to be the case, the inspections have not increased substantially since 2007, it would appear that the Consultation is based on an exceedingly low level of activity by local authorities. It would also seem that it will take far more than the changes proposed in the Consultation to result in any real progress being made in the implementation of Part 2A.

- The Consultation states that Part 2A "has played a very important role in underpinning the wider (market-based) system for dealing with land contamination. … [I]t supports the planning system and acts as a driver to encourage polluters and landowners to clean-up their own land" (para 15).

  First, the Framework for Contaminated Land (24 November 1994) stated, among other things, that the contaminated land regime would deal with hazards posed by contamination at sites that were not being developed by the private sector (Framework, para 2.6). That is, Part 2A was introduced to remove hazards from contaminated land that was not being developed. The planning system was already effective at cleaning up contaminated sites that are being developed and has become even more effective since that time. Part 2A does not, and was not intended to, underpin that system; there is simply no need for it to do so.

  Second, we agree that Part 2A acts as a driver to encourage polluters and landowners to clean up their own land – but so does any liability system for cleaning up contamination whatever its details. The effect of the driver has been gradually reduced as companies and others have seen that relatively few contaminated sites have been determined and that service of a remediation notice will rarely occur. The effect of this driver will continue to deteriorate unless the liability system in Part 2A is substantially revised and its enforcement is adequately funded. A few more high profile Part 2A cases would help to reverse the current trend of enforcement action being an insignificant influence or risk factor due to the very few instances of enforcing action.

The response also made comments in relation to specific paragraphs in the consultation paper, which focussed on legal issues.

Revenue Law Committee

The Revenue Law Committee recently commented on the proposals for the reform of the UK's controlled foreign company rules as set out in Part IIA of the HMRC consultation document "Corporate Tax Reform: delivering a more competitive system". (See http://www.hm-treasury.gov.uk/d/corporate_tax_reform_complete_document.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=948&lID=0 for the response.)

As the introduction to the consultation paper stated:

> This document shows how the Government will work with business to enhance UK tax competitiveness. It is designed to provide business with certainty over the Government's plans and support the recovery by giving business the confidence needed to invest in the UK. By collecting a series of reforms into a single programme, it will allow Government and business to examine the interactions between different elements in a coherent and systematic manner.
>
> > Part I: The Corporate Tax Road Map considers the reform plan as a whole and sets out how the Government will approach each element.
> >
> > Part II: Consultation on Controlled Foreign Company (CFC) reform and the taxation of innovation and intellectual property considers medium-term reform in two key areas, Part II A covers reform of the CFC rules and Part II B covers the taxation of intellectual property (IP) and Research and Development (R&D) tax credits. Here the Government intends to legislate resulting changes in Finance Bill 2012.
> >
> > Part III: Consultation on CFC interim improvements and reform of foreign branch taxation provides an update on reforms announced at the Budget for inclusion in Finance Bill 2011 ahead of publication of draft legislation. Part III A covers CFC interim improvements and Part III B covers foreign branch taxation.

As the response stated:

> Introduction
>
> 1. In our view, it is important that the Government should announce as soon as possible as much detail as possible of the final form of the controlled foreign company rules. While we recognise that the issues involved in this reform are difficult, and that a balance needs to be drawn between protecting the Exchequer from avoidance and enhancing the UK's tax competitiveness, uncertainty has now pervaded this area for a number of years. It is important that this uncertainty should now be laid to rest so that multi-nationals can plan their affairs with reasonable certainty.
>
> 2. We consider that it is important that the proposals are as simple as possible and do not entail undue compliance cost. It is particularly important that exemptions should not be hedged around with complex anti-avoidance provisions.
>
> 3. We agree with the statement in paragraph 1.4 that to be more competitive the UK's corporate tax system should focus more on taxing the profits from UK activity rather than attributing the worldwide income of a group to the UK. We consider, however, that it is important to recognise that in some respects the proposals for the new finance company exemption and IP holding companies represent a pragmatic solution which is not entirely consistent with this principle. The UK is taxing a proportion of the underlying profits from non-UK activity: it is doing this in order to limit the cost of the decisions to retain an unrestricted deduction for interest even where it is paid on a loan

financing an equity investment in a foreign subsidiary and to exempt from tax dividends from foreign subsidiaries. We understand the reasons for maintaining an unrestricted deduction for interest: but we regard it as important to stress that financing a foreign subsidiary with equity is not artificial nor is there any firm basis for determining an arm's length amount of equity in a foreign subsidiary: what is being taxed is part of the underlying profits in order to keep within acceptable bounds the cost of the unrestricted deduction for interest when coupled with a dividend exemption. We come back to this point in our comments on the partial finance company exemption and IP holding company rules.

4. We agree with the points made in paragraph 1.5, subject to the points in the previous paragraph.

5. We agree with the objectives set out in the first three bullet points in box 1A.

The consultation also commented on the New CFC Rules for Monetary Assets and the New CFC Rules for Intellectual Property.

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CLLS