The City of London Law Society

Monthly E-Briefing (Issue 35 – July/August 2012)

The CREST Working Party of the Company Law Committee of the Law Society of England and Wales and the CLLS **Company Law Committee** recently commented on the Proposed Regulation on Central Securities Depositories (CSDs) (Click here for the comments.)

The Committee's response was only concerned with the company law aspects of key parts of the proposed Regulation. It expressed concern in particular that more thought needs to be given to the effect the proposed Regulation will have on the relationship between companies and shareholders and the rights of shareholders. It also stressed that the Regulation should not prejudice the rights of shareholders and that one of its aims is to protect those rights, and referred to Recital 37 of the Regulation which states:

> In order to protect the rights of shareholders, the rights of issuers to choose a CSD should not prevent the application of the national corporate laws under which the securities are constituted and which govern the relation between issuers and their shareholders."

The Company Law Committee of the Law Society of England and Wales and the CLLS Company Law Committee also recently responded to the Draft ECON Report and New Presidency Compromise texts on the proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (See Click here for the 20 March Draft ECON Report, Click here for the Presidency compromise text for the proposal dated 22 May 2012 as amended by the revised Presidency compromise text dated 11 June 2012, and Click here for the response.)

The joint submission commented in detail on some of the recitals and articles contained in the proposed regulation text.

The Company Law Committee also recently responded to the ICAEW's "Guidance on financial position and prospects procedures" Exposure Draft March 2012. (Click here for the consultation paper and Click here for the response.)

The consultation related to draft guidance which the ICAEW had published which addressed a regulatory requirement of companies seeking to list on a UK market. (The exposure draft of the new guidance drew on the results of a 2010 consultation). The Committee responded in detail to some of the questions in the paper.

The Company Law Committee also responded to the BIS January 2012 discussion paper "Providing a flexible framework which allows companies to compete and grow". (Click here for the consultation document and Click here for the response.)

The paper set out the work that the Government is already doing to improve the company law framework to support its objective of providing a framework that gives companies the flexibility to compete and grow effectively. It also considered where more work may be done

on this issue.

The response re-emphasised the points made in some of the Committee's earlier consultation responses. It also identified some points which could assist with reducing the burden affecting companies, such as by reducing the volume of regulation affecting them, reducing their costs, providing clarity where there is currently doubt or confusion, and providing flexibility so that the regulations affecting them can respond to business needs.

The Committee also responded to the FSA's Primary Markets Bulletin Issue No. 2 (Click here for the bulletin and Click here for the response). The consultation concerned proposed changes to the UKLA Technical Notes and Procedural Notes concerning the Listing Rules, the Prospectus Rules and the Disclosure and Transparency Rules within the FSA Handbook. The response made a number of specific comments on the reformatted notes, and raised concerns at the quantity of existing guidance (formal or informal) that had not been replicated in the new notes. The Committee did not think it desirable for useful information on FSA practice and FSA views that was formerly in List! or in the Technical Notes to be withdrawn without an explanation.

The **Competition Law Committee** recently responded to the BIS Consultation Paper, "Private Actions in Competition Law: A Consultation on Options for Reform". (Click here for the consultation paper and Click here for the response.)

The consultation considered four core reforms: to allow the Competition Appeal Tribunal (CAT) to hear more kinds of competition cases and to grant it "additional powers to allow SMEs to quickly and cheaply challenge behaviour that is restricting their ability to grow"; to introduce an opt-out collective actions regime for competition law; to promote ADR; and to ensure that private actions complement the public enforcement regime.

The response was generally supportive of BIS's proposals to strengthen and expand the system for bringing private actions in the UK.

The response went on to make comments in relation to:

- The role of the Competition Appeals Tribunal
- SME Fast Track Procedure
- SME Access to Justice
- Rebuttable Presumption of Cartel Losses and Passing On
- Approach to Collective Actions
- Opt-out System for Businesses
- Costs and Information Exchange
- Bringing Collective Actions
- Strong Encouragement for Voluntary ADR
- Cost Orders
- Redress Schemes and Role of Competition Authorities
- Status of Leniency Applicants

and to respond to the specific questions in the consultation document.

The Committee also recently responded to OFT's consultation paper "Review of OFT's investigation procedures in competition cases". (Click here for the consultation paper and Click here for the response.)

The primary purpose of the OFT document was to consult on the OFT's proposal to introduce a new structure for the way the OFT makes decisions in investigations under the Competition Act 1998. The OFT's aim in setting out the enhancements in the document was

to increase the speed of CA98 investigations, enhance the level of engagement with parties to investigations, and to improve the robustness of the OFT's decision-making process.

The Committee welcomed the OFT's review of its investigation procedures and its focus on key areas such as the robustness of its decision-making procedures as well as its desire to increase the transparency of the investigation process for parties. The Committee supported some of the substance of the Consultation Paper, but raised certain concerns about some of the proposals, and believed that the level of clarity in some areas should be improved.

The Committee also recently submitted a memorandum to the House of Commons Public Bill Committee on the Enterprise and Regulatory Reform Bill 2012-13. (Click here for the document.)

The document stated that the Committee were supportive of:

- The new unified competition authority, the CMA, having separate personnel for the different phases of merger and market investigations
- The decision, following consultation, not to introduce mandatory pre-notification in UK merger control
- The provisions enabling a separation of powers between the investigative and decision-making function of the CMA in "anti-trust" cases, in clause 34(4

However, the Committee raised concerns about the proposals to amend the cartel offence, taking away the *mens rea* of "dishonesty", which it thought were "premature, unfair and potentially chaotic". The Committee also expressed concerns about the new powers of the Secretary of State as regards public interest (rather than competition) issues in market investigations, and with regards to the proposed new time limits in merger control.

The **Corporate Crime & Corruption Committee** recently responded to the MoJ's "Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements [DPAs]". (Click here for the consultation paper and Click here for the response.

The consultation paper proposed that:

> Under a DPA, the prosecutor would lay, but would not immediately proceed with, criminal charges pending successful compliance with agreed terms and conditions stated in the DPA. The terms and conditions might include:
>
> - payment of a financial penalty;
> - restitution for victims;
> - disgorgement of the profits of wrongdoing; and
> - measures to prevent future offending (a monitoring or reporting requirement).
>
> These would be discussed and agreed between the parties and then placed before a judge for consideration and approval. Time limits would be attached to the terms and conditions so that compliance can be managed and it will be clear when the agreement should cease.

The Committee responded in detail to the individual questions in the consultation document.

The **Professional Rules & Regulation Committee** (PR&RC) recently responded to the SRA consultation "On the future of authorised professional firms". (Click here for the consultation paper and Click here for the response.)

The consultation paper sought views on two issues that relate to the SRA's treatment of Authorised Professional Firms (APFs). The issues related to inconsistencies in the regulation of APFs arising from the introduction of alternative business structures (ABSs). The Committee's response addressed the consultation questions in detail. While it mentioned that the vast majority of the CLLS's member firms do not provide mainstream financial services to their clients and so the issues flagged in the consultation paper do not affect them directly, it noted that:

- all CLLS firms clearly have an interest in SRA resources being used appropriately and in access to the SRA Compensation Fund being appropriate, and
- the consultation paper concerned some issues of general public interest. .

The **Regulatory Law Committee** recently commented on the Council of the European Union's draft regulation on insider dealing and market manipulation (Click here for the Interinstitutional File: 2011/0295 (COD) "Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) - Presidency compromise" (4 July 2012), and Click here for the comments.)

The Committee commented on the reference to "arranging" transactions as referred to in the 4 July MAR Presidency Compromise proposal, and with regard to the reporting obligation to lawyers and other professionals as contained in the 25 May MAR Presidency Compromise proposal.

The **Revenue Law Committee** recently responded to the HMRC consultation on Taxation of Controlling Persons. (Click here for the consultation paper and Click here for the response.)

The consultation concerned the engagement practices of controlling persons. It proposed that a provision be introduced to ensure that controlling persons have income tax (PAYE) and National Insurance deducted at source by the engaging organisation. The Committee responded in detail to the consultation questions.

The **Training Committee** recently responded to the LETR Discussion Paper 02/2011: "Equality, diversity and social mobility issues affecting education and training in the legal services sector ".
(Click here for the consultation paper and Click here for the response.)

The paper provided a general map of the legal sector's demographic composition. It also explored the ways in which existing education and training practices "might constitute initial and continuing barriers to access, and are hence a potential constraint on diversity and social mobility".

Our response noted that the paper was "an impressive and ambitious piece of work", considering that it appeared to place a greater emphasis on diversity than equality, and a still greater emphasis on social mobility than on either diversity or equality. The submission emphasised the support of the CLLS and its member firms for the objective of social mobility, and also their commitment to the existing equality and diversity agenda. However it questioned the need for regulatory intervention as a means of achieving social mobility goals.

Robert Leeder
Policy & Committees Co-ordinator

Useful links:	Contacts:	Website:
The Law Society	Liz Thomas	The City of London Law Society
The Solicitors Regulation Authority	Robert Leeder	