The City of London Law Society

Monthly E-Briefing (Issue 42 – September/October 2013)

The CLLS recently responded to the Ministry of Justice's Call for Evidence on the Legal Services Regulatory Framework (Read paper). The response identified the costs, complexities and inefficiencies of the current legal services regulatory system, and outlined the challenges that would face an appropriate new regulatory framework.

The **Competition Law Committee** recently responded to the European Commission consultation "Towards more effective EU merger control" (**Read paper**). The Commission sought views on possible improvements of the EU Merger Regulation, in particular:

- extending the scope of the EU Merger Regulation to the acquisition of non-controlling minority shareholdings; and
- reforming the referral system between the Commission and national competition authorities, making it more business-friendly by streamlining and shortening procedures but without fundamentally changing the system's basic features.

The submission responded in detail to the consultation questions.

The Committee also recently responded to the BIS Consultation Paper "Streamlining Regulatory and Competition Appeals". (Read paper). The consultation concerned the appeals frameworks for regulatory and competition decisions. The Committee responded in detail to the Consultation Paper. In summary it agreed with some of the proposals made in the Consultation Paper (including the eligibility of judges to hear appeals and certain improvements to the administrative decision-making of the OFT and sectoral regulators). However, the Committee noted that it had very serious reservations about many of the other proposals, in particular the proposal to move away from a "full merits" standard of review for certain appeals to either a "flexible judicial review standard" or defined statutory grounds of appeal.

The Committee also recently responded to the BIS/Competition and Markets Authority (CMA) consultation **"**Competition regime: CMA priorities and draft secondary legislation" (Read paper). The consultation invited views on the secondary regulation relating to the formation of the CMA. In its response, the Committee commented in relation to the proposed maximum penalty levels, and on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated.

The Committee also responded to the CMA consultation "Competition and Markets Authority guidance: part 1" (Read paper). The paper made a number of detailed comments in relation to the proposed CMA merger guidance, supplemental guidance on market studies and market investigations, approach to administrative penalties, and transparency.

The **Corporate Crime & Corruption Committee** recently responded to the Sentencing Council consultation on the draft guideline on fraud, bribery and money laundering offences (Read paper). The Committee responded to the specific consultation questions, and noted that it welcomed the guidelines and that it generally supported the proposed methodology for

calculating sentences – i.e. determining the category (and thus the starting point and range of sentence) according to the culpability of the offender and the harm caused, to be followed by considering after-the-event factors such as cooperation and plea.

The Committee also responded to the Serious Fraud Office consultation "Deferred Prosecution Agreements: Consultation on Draft Code of Practice" (Read paper). As part of its submission, the Committee expressed the general view that the DPA Code of Practice provides less certainty than existing guidance published by regulatory authorities in relation to settlement mechanisms analogous to DPAs. It argued that, if left as currently drafted, the Code of Practice is likely to quickly become moribund when prosecutors acquire powers to enter into DPAs as it is likely to be overtaken by fact sensitive decisions taken in individual cases.

The **Insolvency Law Committee** recently responded to The Insolvency Service consultation "Red Tape Challenge - changes to insolvency law to reduce unnecessary regulation and simplify procedures" (Read paper). The consultation contained proposals which form part of the response to the Government's 'Red Tape Challenge' agenda, and related to regulations affecting insolvency practitioners (IPs), the practice of insolvency and the reporting duties of IPs on the conduct of directors. The response focused mainly on Part 2 of the Consultation, which related to changes to the law governing insolvency processes. The main body of the response highlighted the key points which the Committee considered may require further consideration, while the Appendix (which should be read in conjunction with the main body of the response) contained specific replies to the Consultation questions. The response also stated more generally that "Initiatives aimed at eradicating unnecessary costs from the administration of insolvency proceedings, thereby potentially increasing returns to stakeholders, are clearly to be welcomed. Potential cost savings must, however, be considered in the context of what a particular provision is intended to achieve. While, in most cases, we consider that the correct balance has been struck between cost-saving and policy considerations, a number of proposals may require further consideration. These are discussed below."

The Committee also responded to the European Commission's "Consultation on a new European approach to business failure and insolvency" (Read paper). The consultation aimed to acquire views on the need for and feasibility of harmonising certain aspects of insolvency law, as a follow up to the Commission's December 2012 Communication "A new European approach to business failure and insolvency". The Committee's submission responded in detail to the consultation questions and, more generally, stated "We are surprised at the piecemeal approach to the harmonisation of EC Insolvency legislation which appears to underpin the Consultation. It is, as indicated by some of the responses above, generally not possible simply to amend parts of insolvency legislation in isolation, as any significant proposed amendment needs to be considered in the context of both the wider insolvency legislation of each Member State and other areas of law, whether company law, contract law, tax or otherwise, which would potentially be affected by the proposed amendments. Any other approach is likely to result in unintended consequences, uncertainty resulting from conflicting legislation and unnecessary litigation which will reduce returns for creditors."

The **Insurance Law Committee** recently responded to the PRA Consultation Paper "Schemes of arrangement by general insurance firms" (CP6/13) (Read paper). The consultation sought views on the PRA's draft supervisory statement which explains the stance the PRA will take where insurance firms are proposing schemes of arrangement for solvent insurers. The response raised a number of concerns, and stated "The Consultation Paper ("CP") states that the approach to schemes of arrangement is reflective of the PRA's policy on insurance supervision as set out in the PRA Approach Document. It appears that in a number of respects, however, the CP is not consistent with the stated policy."

The Committee also responded to the PRA Consultation Paper "Capital extractions by run-off firms within the general insurance sector" (CP7/13). Read paper). The consultation sought views on the PRA's draft supervisory statement which, the PRA stated, "clarifies the

PRA's expectation of compliance with existing prudential provisions within the PRA Handbook for run-off firms in the general insurance sector". The response stated that the Consultation Paper was a helpful expansion of the PRA's thinking and the internal procedures it applies when considering a proposal for capital extraction. The response also raised several points on which it was felt clarification was needed.

The **Litigation Committee** and **Planning & Environmental Law Committee** recently responded (separately) to the Ministry of Justice's consultation paper entitled "Judicial Review: Proposals for further reform". (Click here for the Litigation Committee's response and click here for the Planning & Environmental Law Committee's response.) The consultation invited views on potential measures for the further reform of judicial review, and followed on from the Government's earlier judicial review consultation, which closed in January 2013. The Litigation Committee's response was concerned solely with judicial review in a commercial context. In overview, the Committee stated that it was not convinced by the arguments in the Consultation Paper that the system of judicial review is in need of reform in the manner proposed in the Consultation Paper. The Planning & Environmental Law Committee's response was concerned solely with those questions in the Consultation Paper that immediately concern the planning & environmental law practitioners who make up the membership of the Committee. In general, the submission described the Ministry of Justice's further set of proposals for the reform of Judicial Review as premature, considering that the results of the earlier reforms introduced in July 2013 through the Civil Procedure (Amendment No 4) Rules 2013 (SI 2012/1412), and similarly the planning fast-track procedure introduced by the Administrative Court, have yet to be properly assessed.

The Litigation Committee also responded to the JAC paper "Crime and Courts Act 2013: Consultation on the application of the equal merit provision" (Read paper). The consultation sought views on potential approaches to the application of the provisions in Part 2 of Schedule 13 to the Crime and Courts Act 2013 (CCA) relating to diversity considerations where candidates for judicial office are of equal merit. As the response stated, "The Committee's response to the Consultation Paper (the "Paper") overall is simple: as the introductory section of the Paper makes clear: the provisions of the Crime and Courts Act 2013 ("CCA") clarify that the Judicial Appointments Commission's duty "to make selections 'solely on merit' does not prevent it from selecting one candidate over another for the purposes of increasing judicial diversity where there are two candidates of equal merit" [emphasis added]. In summary, the Committee's view is that while a broader selection process may usefully be employed to increase the population from whom the final selection may be made, that final selection must be made "solely on merit", and an appointment in favour of a particular candidate on the basis of improving diversity can only be made either if that candidate is the best on merit, or is of "equal [top] merit" with another candidate."

The Committee also responded to the **CHANCERY MODERNISATION REVIEW'S PROVISIONAL REPORT** (Read paper). The Provisional Report, which made over 100 detailed recommendations, formed part of an in-depth review of the practice and procedure of the Chancery Division, and followed an intensive process of consultation and analysis between the review team and the whole of the chancery community. The Committee commented on several of the issues raised in the Provisional Report.

The Committee also responded to the Ministry of Justice's Consultation Paper "Costs protection in defamation and privacy claims: the Government's proposals" (Read paper). The Consultation Paper proposed a scheme that would allow a court to exclude or limit the normal costs liability of an unsuccessful party to publication proceedings because that party would suffer severe financial hardship if it were ordered to pay the successful party's costs. The response was critical of the fact that the Consultation Paper did not set out any criteria as to how the court should assess severe financial hardship. The response concluded that "the Committee considers that the Consultation Paper should be withdrawn and a new paper issued that sets out the options for determining severe financial hardship and assesses how

they might operate in practice. Without that, any consideration of the questions in the Consultation Paper will be incomplete at best, and probably flawed."

The **Planning & Environmental Law Committee** recently responded to Defra's "Consultation on the Waste Prevention Programme for England" (Read paper). The consultation sought views on the proposed roles and responsibilities that the Government and others will have in helping to reduce waste, in order to help the Government finalise the first waste prevention programme for England. The Committee responded to the consultation questions on whether it broadly agreed with the proposed role for Government, business, local authorities, and others and individuals.

The **Regulatory Law Committee** recently responded to the Joint Money Laundering Steering Group (JMLSG) consultation on proposed amendments to its Money Laundering Guidance for the Financial Sector (Read paper). The Committee noted that "Whilst we do not have many comments, those that we have arise out of an issue which we consider to be an important matter of principle. The JMLSG Guidance is an invaluable guide to firms as to the ways in which they may meet their legal obligations. It has a particular significance because the FCA refers to it when judging firms' compliance with FCA rules. It is therefore very important that the Guidance does not make broad ranging propositions which overstate the obligations which a firm has as a matter of law or which do not, in their drafting, reflect the very wide range of business carried out by the different firms who are subject to the Money Laundering Regulations."

The Committee also recently responded to FCA CP 13/5: "Review of the client assets regime for investment business" (Read paper). The Consultation Paper consulted on material changes to the rules in relation to client money, custody assets and mandates. The submission responded in detail to some of the consultation questions.

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