Editorial

Plus Ça Change: Même Chose or Même Pose

It is annual report time for City regulatory bodies and those performing similar functions. Just published is that of the Investment Ombudsman and also that of the outgoing Chairman of the Securities and Investments Board. Others are due, and they are well worth reading. Even if such reports do not reveal all the details that followers of City regulatory performance might want to garner, they do provide an overall picture of how well the system of regulation and those who police it are doing, also to some general insights into what changes and improvements are sought by regulators. Quite apart from these annual reports, two fundamentally more important reports or papers have relatively recently been published. The first is the Bank of England's Legal Risk Committee's Consultation Paper, published in late February, and the second is the Law Commission's Consultation Paper on Fiduciary Duties and Regulatory Rules.

Whilst the two bodies' consultation papers are looking at different issues, they are not really a million miles away from each other, and in a phrase, both are concerned with the dangers of legal uncertainty in the UK's financial and securities markets. The BoE's Risk Committee was set up about eighteen months ago largely as a result of the uncertainties created by the Law Lords' judgment in the Hammersmith and Fulham swaptions case, although they allowed themselves to have a wider remit. The Law Commission Study is a separate exercise undertaken at the behest of the DTI and whose focus has been predominantly on the possible conflicts between the common law and the Financial Sevices Act, and in particular the rule-book regime it has given rise to.

The Risk Committee has produced a Paper high on analysis but short on practical and speedy solutions, except to make the typical British response to an apparently intractable problem, *ie* the recommendation of setting up of another committee or panel. The Law Commission has also produced a fine consultation paper, but we are unlikely to see any immediate changes flowing from it, because of the immense task of carrying all the various interest groups in unison along with any such changes.

Add to this Sir Kenneth Clucas' Report on the regulation of retail markets, and SIB' very own review of certain aspects of investment retailing as it has been inelegantly described, and other formal reviews and reports, and it might well be fair to say that the City's activities are currently the subject of the most analysis and Committee investigation of any area of human endeavour in the United Kingdom. Do not forget also the clamour for committees to be set up on the Lloyds insurance market and company pension funds.

The proverbial man from another planet but blessed with the powers of understanding English but not our persona might well have taken the view that the marvellous system of regulation that had been lowered into place from 1986 onwards had been a catastrophic failure, pleasing no-one, neither those who were regulated, nor those who the regime was designed to protect. On the one hand there have been a succession of scandals culminating most recently in the Maxwell mess and the trials and tribulations of the Lloyds insurance market. Whilst on the other, those who are subject to market regulation have been complaining loudly that the system to which they are subject, is overly complex, too legalistic, and in some areas overlapping and fragmented. Such a system they say will cost Britain dear, with valuable business disappearing to Luxembourg or more worryingly Germany.

Whilst such an analysis is wildly simplistic, and whilst some of the concerns of the regulated are being met in new simpler rule-books, the fact remains that some six years after a massive overhaul of securities and investments regulation in this country, the system is still greatly deficient when measured against the rather high standards that we seem to set ourselves. It is however important to keep one's views on this subject in proportion. The United Kingdom is one of the most effectively and efficiently regulated markets in the world. Take our insider dealing laws as an example; they are undoubtedly the tightest after those of the US. It has been argued that in less rigorously regulated regimes some of the scandals we have had, some of which took place before the Financial Services Act became effective, would have gone by unpunished if not unnoticed.

Like many brilliant pupils who are at or near the top of the class, we could do better. If Government were to start again from scratch with a clean sheet of paper so far as securities and investment regulatory resposibilities are concerned, it would undoubtedly do a number of things differently. It might well heed the comments of Sir David Walker in the SIB annual report, and reduce the number of different regulatory bodies having overlapping regulatory responsibilities and who get involved when something like Maxwell or Blue Arrow occurs. Incidentally, the House of Commons Trade and Industry Committee on Company Investigations suggested much the same thing exactly two years ago.

To be fair the Goverment has taken this issue on board. Those of you who read the fine print in the party political manifestos would have noticed an apparently innocuous two liner in the Tory Party manifesto, stating that on re-election they would move the overall responsibilities for regulating securities and investments markets. At the very time of writing this editorial, packing cases and about fifty DTI staff are moving from one side of Parliament Square to the other. Those activities which fall within the scope of the Financial Services Act have been shifted from the DTI, (which under President Heseltine is espousing with ever greater zeal its role as the Department of Enterprise), to the Treasury. The Treasury has finally won. Back in the early 80's when the coin was being thrown in the air to determine whether DTI or the Treasury should have overall responsibility for the regulation of non-banking financial services, the DTI won, not least because Norman Tebbit, who was Trade and Industry Secretary and a powerful voice within Cabinet, insisted on this. The Bank of England suffered some wild pique but was too gentlemanly to complain too loudly.

A matter of interest for the keen observer of these matters, this shift of responsibilities back to the treasury has set off a number of hares, not only on whether the bank is to take on an enhanced role in regulating financial services, but beyond this as to the precise scope of that role. (*Quaere*, a new super-regulator for the wholesale banking and securities markets formed out of the SIB and the Banking Supervision Department of the Bank.)

Moreover not only does this shift of overall regulatory responsibilities to the Treasury amount to a step towards reducing regulatory overlap and

continued on p 164

Editorial continued from p 142

fragmentation, but it makes eminent sense in the context of the developments taking place at the European Community level. Our continental brethren entrust market regulation to their central banks and banking supervisers, and a number of important EC Directives are drafted on this basis. A number of problem areas arising out of certain proposals contained in some of these directives now stand a better chance of resolution.

So it is *plus ça change* down in the City, but despite the structural changes at one level and the detailed and intelligent analysis and recommendations contained in the welter of reports, what will the practical results be? More of the same, . . . or the setting of totally new attitudes and a completely new posture for the regulation of the markets?

Peter Farmery