

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 293th meeting
at 9:00 a.m. on 27th September 2018
at Clifford Chance LLP, 10 Upper Bank Street, London E14 5JJ

1. **Welcome and apologies**

Attending: David Pudge (Chairman), Mark Austin, Lucy Fergusson, Nicholas Holmes, Chris Horton, Simon Jay, John Adebiyi, Stephen Mathews, Chris Pearson, Richard Spedding, Patrick Speller, Richard Ufland, Martin Webster, Victoria Youngusband and Kath Roberts (Secretary).

Apologies: Mark Bardell, Adam Bogdanor, Robert Boyle, Kevin Hart, Vanessa Knapp, Murray Cox and Liz Wall.

2. **Approval of minutes**

The Chairman reported that draft minutes of the meeting held on 16 July 2018 were circulated to members for comment on 18 September 2018. Members were asked to provide comments to the Secretary.

3. **Matters arising**

3.1 Commission implementing regulation laying down minimum requirements for Shareholder Rights Directive (SRD). The Committee noted that on 4 September 2018, the Commission implementing regulation of 3 September 2018 laying down minimum requirements implementing the provisions of the SRD as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights was published in the Official Journal.

3.2 Draft Registration of Overseas Entities Bill. The Committee noted that on 23 July 2018, BEIS issued a press release on the proposed new beneficial ownership register of overseas entities that own UK property. The Committee noted that BEIS had published a draft Registration of Overseas Entities Bill that would require overseas entities that wish to own land in the UK to take steps to identify their beneficial owner(s) and to register them. The Committee noted that BEIS has also published an overview document on the draft bill that seeks views on how the clauses within the draft bill will be implemented in practice. The consultation closed on 17 September 2018. It was noted that BEIS anticipates that, following Royal Assent and the making of secondary legislation, the register will be operational in 2021. The Committee noted that the CLLS CLC fed comments into a response to the draft bill coordinated by the CLLS Land Law Committee that was submitted on 14 September 2018. A key comment was that the bill does not oblige the Secretary of State to issue guidance on the meaning of significant influence and control in this context unlike in relation to

the PSC regime on which key elements of the Bill are based. In the absence of such guidance, applying certain of the tests would be difficult and there would likely be inconsistency of approach.

- 3.3 Corporate governance reform. The Committee noted that on 19 July 2018, the Companies (Miscellaneous Reporting) Regulations 2018 and explanatory memorandum were published. The Committee noted that the regulations are the same as the draft regulations published on 11 June 2018. It was noted that the regulations were made on 17 July 2018 and, for the most part, come into force on 1 January 2019 and apply in relation to financial years beginning on or after 1 January 2019.

The Committee noted that a Joint Working Group of the Company Law Committees of the Law Society and the CLLS had submitted comments on the BEIS Q&A on the Companies (Miscellaneous Reporting) Regulations 2018 and had submitted a joint response to the FRC's consultation on the Wates Corporate Governance Principles for Large Private Companies.

The Committee noted that on 31 July 2018, the FRC published an updated version of the Guidance on the Strategic Report, which encourages companies to consider wider stakeholders and broader matters that impact performance over the longer term. The Committee noted that the revised guidance has been enhanced to recognise the increasing importance of non-financial reporting while maintaining the key principles of existing guidance. It places a greater focus on the directors' duty to promote the success of the company under s. 172 Companies Act 2006. It was noted that the FRC had also published a feedback statement that summarises comments received on the related consultation paper issued in August 2017.

- 3.4 Brexit statutory instrument: Financial services. The Committee noted that on 16 July 2018, the draft Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 and a draft explanatory memorandum were laid before Parliament. It was noted that these regulations were being made in order to ensure that Binding Technical Standards (BTS) and rules made by the UK's financial services regulators under FSMA continue to operate effectively after the UK's withdrawal from the EU. The Committee noted that these regulations delegate use of the EU (Withdrawal) Act section 8 power to UK financial services regulators (including the FCA and PRA) so they can fix deficiencies in BTS and regulators' rules in advance of exit day and establish the statutory basis on which those regulators will continue to maintain BTS after exit.

- 3.5 Brexit statutory instrument: Consequential amendment of Companies (Authorised Minimum) Regulations. The Committee noted that on 5 September 2018, the draft EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 and explanatory memorandum were laid before Parliament. The Committee noted that these regulations will amend, among other things, references to EEA passporting rights in domestic legislation, which (according to HM Treasury's explanatory information) will become deficient as a result of the UK's exit from the EU. It was noted that consequential amendments will need to be made across both primary and secondary legislation, including to regulation 4 of each of the Companies (Authorised Minimum) Regulations 2008 and 2009. These regulations set out the method by which the authorised minimum can be calculated when a public company with shares denominated in more than one currency reduces its share capital or

cancels its shares. The Committee noted that the proposed amendment would remove the ability for a company to obtain a certified spot rate for a currency conversion from a firm which has permission to carry on the activity of accepting deposits in the UK by virtue of Schedule 3 of FSMA 2000 (EEA passport rights).

- 3.6 Prospectuses: ESMA consults on risk factors and exemptions for takeovers, mergers and divisions. The Committee noted that on 13 July 2018, ESMA announced that it has launched two consultations under the Prospectus Regulation. It is seeking views on: (i) the proposed technical advice on exempt documents produced for the purpose of offers/admission of securities connected to a takeover, merger or division; and (ii) its proposed guidelines on risk factors. The Committee noted that the consultations close on 5 October 2018 and that ESMA will deliver the technical advice to the European Commission and publish the final reports by 31 March 2019.

The Committee noted that the Joint Listing and Prospectus Rules Working Group was preparing responses to these consultations.

- 3.7 Consultation on Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator. The Committee noted that on 21 August 2018, the CLLS CLC submitted a response to the Department for Work and Pensions' consultation on the introduction of enhanced/additional powers for the Pensions Regulator.
- 3.8 Independent review of the Financial Reporting Council (FRC). The Committee noted that on 2 August 2018, the CLLS CLC submitted a response to the Independent Review of the FRC: Call for Evidence.
- 3.9 Consultation on FCA Knowledge Base technical note on periodic financial information. The Committee noted that on 23 July 2018, the Law Society CLC and the CLLS CLC submitted a joint response to the FCA's consultation on the proposed update to technical note FCA/TN/506.1 on periodic financial information and inside information.
- 3.10 European Commission proposes new company law to help companies move across borders. The Committee noted that on 4 September 2018, the Company Law Committees of the Law Society and the CLLS, led by Vanessa Knapp, had submitted a joint response to the European Parliament JURI Committee response to its draft report on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.
- 3.11 LSE consultation on amendments to the Admission and Disclosure Standards. The Committee noted that on 7 September 2018, the Company Law Committees of the Law Society and the CLLS had submitted a joint response to the LSE consultation on proposed changes to the Admission and Disclosure Standards, which were published for consultation and announced in the London Stock Exchange Market Notice 13/18 on 10 July 2018. The Committee noted that on 17 September 2018, the LSE published Market Notice 15/18 containing feedback on Market Notice 13/18. The Committee noted that the LSE states in Market Notice 15/18 that the changes in the consultation document will be adopted in full. It was noted that the notice attaches the amended Admission and Disclosure Standards, which are effective from 1 October 2018.

4. **Discussions**

- 4.1 Revised UK Corporate Governance Code and Guidance on Board Effectiveness. The Committee noted that on 16 July 2018, the FRC published an updated version of the UK Corporate Governance Code, which is effective for financial years starting on or after 1 January 2019 and an updated version of the Guidance on Board Effectiveness, which contains suggestions of good practice to support directors and their advisers in applying the Code. The Committee noted that the FRC also issued a press release and published a feedback statement on the Code, an annex containing a blackline highlighting the changes from the version consulted on in December 2017 and a short document containing the revised Code highlights.

The Committee was pleased to note that a number of comments made by the Committee in its response to the consultation, including those in relation to board composition and the independence of the chair, had been taken on board by the FRC and that the FRC had decided in the new Code to maintain the position under the April 2016 version of the Code (i.e. that at least half the board (excluding the chair) should be non-executive directors considered by the board to be independent and that the chair need only be independent on appointment). In a similar vein, the Committee was pleased to note that the Code allows for flexibility around workforce engagement and that issuers have the option to use engagement methods other than those set out in Provision 5 of the new Code, subject to providing an appropriate explanation for that approach.

The Committee noted that this would be an area to watch as a number of companies may seek to be early adopters of the Code and report on compliance against the new Code in their 2018 annual report.

- 4.2 BEIS consultation on national security and investment review. The Committee noted that on 24 July 2018, BEIS issued a press release announcing proposed new powers to upgrade UK national security merger rules. The Committee noted that BEIS has published a White Paper that sets out how the government will introduce a voluntary notification regime and upgrade its powers to scrutinise investments and address the risks that can arise from hostile parties acquiring ownership of, or control over, businesses or other entities and assets that have national security implications. The Committee noted that BEIS has also published a draft Statutory Statement of Policy Intent. It was noted that the consultation closed on 16 October 2018.

The Chair reported that a proposed meeting between the CLLS CLC and BEIS in August was postponed at BEIS's request but that a meeting with BEIS involving representatives of each of the CLLS CLC and the Law Society CLC was being arranged for October. It was noted that the CLLS Competition Law Committee had already met with BEIS.

It was agreed that the Committee (in conjunction with the Law Society CLC) should respond to the consultation. The Committee discussed a number of concerns that Members had about the proposals set out in the consultation, including:

- The fact that, as currently expressed, the proposed regime is very broad both in relation to the "trigger events" and those areas of the economy that the regime may impact. With regard to the trigger events, concerns were expressed about the fact that acquisition financing could be caught by the regime;
- Whether the Government would have the resources to cope with the number of notifications it may receive. It was estimated that the CMA receives approximately 70 notifications under the current regime. In the White Paper, the Government estimates that it will receive around 200 notifications a year, which figure may itself be an underestimation, especially in the early days of the regime, where parties to a transaction will be seeking upfront comfort or guidance from the Government. Concerns were also raised about which Government department(s) would be responsible for the review. It is unclear whether it would be the CMA or the department dealing with the area of national interest to which the transaction relates;
- The fact that the regime contains no means by which the Government can pre-notify a party that it is intending to block the deal, thereby enabling the party to walk away without there having been some public announcement. Concerns were expressed that foreign investors may be reluctant to invest into the UK if they find themselves potentially exposed to being publicly named in a Government announcement that a potential acquisition has been "called in" for review due to concerns that it might constitute a threat to national security. It was also noted that whilst the regime contemplated a public statement if a deal was to be blocked, it did not contemplate any announcement in relation to deals under review which the Government deems are not to be screened which might hinder the development of a clearer understanding of the Government's approach and concerns. It was noted that third parties seeking to appeal against a transaction not being "called in" will potentially be hindered from doing so if there has been no public notification of the Government's decision;
- It was noted that it was proposed that the regime would not contain safe harbours similar to those established under, for example, the US CIFIUS regime;
- There was a lack of clarity around how the regime would be treated by the Takeovers Panel. Will a condition in relation to a national security assessment clearance under this regime be treated by the Panel in the same way a CMA condition would be?

A meeting of the Working Group would be convened to discuss the above and other concerns and prepare a response to the White Paper following the meeting with BEIS.

- 4.3 Law Commission consultation on electronic execution of documents. The Committee noted that on 21 August 2018, the Law Commission published its consultation on the electronic execution of documents, along with a summary paper and that the purpose of this project is to ensure that the law governing the electronic execution of documents, including electronic signatures, is sufficiently certain and flexible to remain fit for purpose in a global, digital, environment. The Committee noted that the consultation paper discusses the current law of formalities and considers the extent to which it accommodates the electronic execution of documents. The Committee noted that the Law Commission makes provisional proposals for reform, particularly in

relation to the witnessing and attestation of deeds where an electronic signature is used. The Committee noted that the consultation closes on 23 November 2018.

It was noted that whilst the consultation does not cover wills or registered dispositions under the Land Registration Act 2002, it would be helpful if, in the long term, the regime for the execution of documents relating to the disposition of registered land was brought into line with the more general rules on execution, enabling electronic execution of relevant documentation.

The Committee noted that the Law Commission has issued a press announcement confirming its view that electronic signatures can be used to sign formal legal contracts under English law without the need for legislative reform. The Committee agreed with this conclusion.

It was reported that the CLLS/Law Society Joint Working Group on execution would be re-established to consider and respond to this consultation. The Committee agreed that it would be helpful to address, in the response to the consultation, the Joint Working Group's views on the continuing use of deeds and the means by which witnessing of document via electronic execution might be best facilitated.

- 4.4 BEIS response to consultation on corporate governance and insolvency. The Committee noted that on 26 August 2018, BEIS published a response to its March 2018 consultation on insolvency and corporate governance (to which it was noted that a Working Group of the Committee led by Murray Cox had responded).

The response sets out BEIS's proposed actions, subject to further consultation where necessary on the detail. The Committee noted that in BEIS' announcement, it states that it will provide further details on the measures in the autumn. The response also includes BEIS' response to the separate consultation published in 2016 on broader aspects of insolvency law.

The Committee welcomed BEIS' stated intention, in light of responses received pursuant to the consultation, to explore with the relevant legal and accountancy bodies whether there was a case for a fundamental review of the dividend regime. The Committee also noted that a number of the proposals are potentially far-reaching from an insolvency regime perspective but will be subject to further consultation. Given current pressures on Parliamentary time, it was thought unlikely that any of the proposals would be progressed in the short term.

- 4.5 FCA/CLLS Primary Markets Liaison Group meeting. Victoria Younghusband reported back to the Committee on the discussions had at the Liaison Group meeting held on 26 September 2018.

Article 19 MAR: The FCA referred to the publication of an updated page on its website setting out its position regarding Article 19 of MAR and its application to debt issuers. The statement reminds readers that Article 19 requires persons discharging managerial responsibilities within issuers (PDMRs), and persons closely associated with them (PCAs), to notify the FCA and the issuer of relevant personal transactions they undertake in the issuer's shares, debt instruments, derivatives or other linked financial instruments if the total amount of transactions per calendar year

has reached €5,000. The issuer in turn must make that information public within 3 business days.

PDMRs and PCAs are only required to notify under Article 19 when they deal in shares or debt instruments of the issuer which are:

- subject to a request for or approval of admission to trading on an EU trading venue, or
- linked to financial instruments which are themselves subject to a request for or approval of admission to trading on an EU trading venue.

The FCA has confirmed in its updated statement that dealing in instruments that do not fall into these categories does not need to be notified under Article 19. The updated statement can be found at <https://www.fca.org.uk/markets/market-abuse/regulation>.

Buy back of GDRs: The meeting had discussed the application of the buy back safe harbour under MAR for buy backs of GDRs. The FCA had confirmed that the safe harbour is only available for buy backs of shares.

New IPO process: The meeting had discussed a number of procedural issues resulting from the introduction of the new IPO process in July 2018.

FCA opening times over the Christmas period: The FCA referred to the statement published on its website setting out its timescales for reviewing documents over the Christmas and New Year period and highlighted the need for advisers to plan around this timetable.

4.6 Brexit.

The Chairman reported that, at BEIS' request, a small group of individuals drawn from member firms of the Committee and the Law Society CLC visited BEIS' offices to review a draft of the Statutory Instrument (SI) amending the Companies Act 2006 and the SI relating to Societas Europaea.

The Chairman also reported on the outcome of a meeting with BEIS regarding the SI to amend Part 28 of the Companies Act 2006 in relation to takeovers.

5. **Recent developments**

5.1 **Company law**

- (a) PSC register tricky issues' list. The Committee noted that given that the test for beneficial ownership in the draft Registration of Overseas Entities Bill (see item 3.2) is based on the PSC test in Schedule 1A Companies Act 2006, the Law Society CLC and the CLLS CLC are intending to seek to re-engage with BEIS on the PSC register "tricky issues" which that was submitted to BEIS in August 2017. The Committee noted that if BEIS does not respond, the Law Society CLC and the CLLS CLC will consider whether the list should be published in the form of a Q&A (similar to the MAR Q&A).

5.2 Corporate governance

- (a) FRC publishes research on board diversity reporting. The Committee noted that on 17 September 2018, the FRC announced that it had published research conducted for the FRC by the University of Exeter Business School entitled "Board Diversity Reporting in 2018". The Committee noted that the research provides a snap shot of diversity reporting across the FTSE 350 (as at 1 March 2018) and identifies examples that it regards as leading the way in terms of quality and approach.
- (b) Gender pay gap reporting. The Committee noted that on 2 August 2018, the Business, Energy and Industrial Strategy Committee published a report on gender pay gap reporting. The Committee noted that the BEIS Committee also published an announcement, a summary and conclusions and recommendations alongside the report. It was noted that the report recommends a widening of the net in relation to companies required to report and that companies should publish action plans and narrative reports on what they are doing to close the gender pay gap.
- (c) Inside AIM: Preparation for corporate governance changes. The Committee noted that on 26 July 2018, the London Stock Exchange published an edition of Inside AIM that provides guidance on preparing for the corporate governance changes that will affect AIM companies from 28 September 2018. The Committee noted that the guidance addresses some of the common questions received from nomads following the LSE's engagement with nomads in preparation for the changes.

5.3 Reporting and disclosure

- (a) Revised FRC Guidance on the Strategic Report. The meeting noted the publication of this item (which was discussed alongside the documents referred to in item 3.3 above).
- (b) New carbon and energy reporting framework. The Committee noted that the draft Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 and a draft explanatory memorandum were published on 18 July 2018. The Committee noted that the most significant change to the current regime is that carbon and energy reporting will be extended to certain "large" UK unquoted companies, which will be required to report in their directors' report, and "large" UK LLPs, which will be required to report in a new energy and carbon report. The Committee noted that the regulations also extend the current reporting requirements for quoted companies.

5.4 Equity capital markets

- (a) Guidance on how unconnected research analysts can access issuer information in UK IPOs. The Committee noted that on 20 August 2018, the Association for Financial Markets in Europe's (AFME) Equity Capital Markets Division and the European Association for Independent Research Providers (Euro IRP) published guidance on how unconnected analysts can participate in the

IPO process and access information about prospective issuers under the FCA's new rules governing IPOs (which came into force on 1 July 2018). The Committee noted that the AFME/Euro IRP guidance sets out a process by which syndicate banks can facilitate access for unconnected analysts to prospective issuers and contains guidelines that those unconnected analysts gaining access to companies undertaking an IPO are expected to sign.

- (b) Public censure and fine for breaches of the AIM Rules. The Committee noted that on 13 August 2018, the London Stock Exchange published a disciplinary notice in relation to the public censure and fine (£125,000, discounted to £75,000 for early settlement) of MBL Group plc for breaches of AIM Rules 10, 11 and 31 of the AIM Rules for Companies (**AIM Rules**) in connection with failing to notify, without delay, information relating to the significant deterioration in the financial performance of certain subsidiaries.
- (c) Private censures and fines for breaches of the AIM Rules. The Committee noted that on 13 August 2018, the London Stock Exchange published a disciplinary notice in relation to two separate private censures and fines (£75,000, discounted to £50,000 for early settlement in each case) of AIM companies for breaches of the AIM Rules. It was noted that one concerned breaches of AIM Rules 10 and 31 in relation to the AIM company's disclosure of information via social media that should have been notified via an RIS before it was disclosed via social media and that the other concerned breaches of AIM Rules 11 and 31 in relation to the AIM company's approach to providing information to its outgoing nomad in circumstances where the relationship between the AIM company and its nomad had become difficult, resulting in the AIM company delaying the disclosure of price sensitive information.
- (d) FCA Handbook Instrument amending Premium Listing Principle 6 and DTR 7.2. The Committee noted that on 26 July 2018, the FCA made Listing Rules and Disclosure Guidance and Transparency Rules (Miscellaneous Amendments) Instrument 2018 (FCA 2018/41). The meeting noted that this instrument amends: (i) Premium Listing Principle 6 to clarify that Principle 6 prohibits the continuation of false markets as well as their creation; and (ii) DTR 7.2 to make it clearer that the diversity reporting requirements in DTR 7.2.8AR can be satisfied by including a diversity report in a corporate governance statement published in any of the formats that the FCA allows for those statements. The Committee noted that this instrument came into force on 27 July 2018.
- (e) ESMA finalises standards for the implementation of the Prospectus Regulation. The Committee noted that on 17 July 2018, ESMA announced that it has published a final report on draft regulatory technical standards under the Prospectus Regulation.
- (f) Proposed changes to the Prospectus Regulation. The Committee noted that on 12 September 2018, the European Commission published an amended proposal for a regulation amending, among other things, the new Prospectus Regulation. Insofar as the proposal relates to the new Prospectus Regulation, it is substantially unchanged from the version published in September 2017.

The Committee noted that the European Parliament and Council will now discuss the proposal.

5.5 Takeovers

Statements on chain principle offer price for Sky by Disney. The Committee noted that on 29 August 2018: (i) the Takeover Appeal Board published Statement 2018/4 containing its reasons for confirming the Hearings Committee's decision confirming the Panel Executive's determination of The Walt Disney Company's chain principle offer price for Sky; and (ii) the Takeover Panel published Panel Statement 2018/14 setting out the reasons for the Hearings Committee's decision.

5.6 Cases

United Company Rusal Plc v (1) Crispian Investments Limited (2) Whiteleave Holdings Limited [2018] EWHC 2415 (Comm). It was noted that this case concerned a dispute over whether a right of first refusal procedure in an agreement between major shareholders in a company had been validly commenced. The Committee noted that the defendants had argued that the general approach to contractual interpretation should be qualified by the principle (established in case law in the context of construing pre-emption provisions in articles of association) that the right freely to transfer shares can only be removed or restricted by clear words. However, the High Court held that an agreement between some only of the shareholders of a company, which contained share transfer restrictions that were not contained in the company's articles of association, should be interpreted according to usual principles applicable to the interpretation of commercial contracts, without any presumptions or heightened requirements.

6. Any other business

- 6.1 Advertisement for additional Committee member(s). The Chairman reported that an advertisement for an additional Committee member was expected to be published on 8 November with a closing date for applications of 29 November. The Chairman reported that that he would also notify those firms that had previously expressed an interest to him in joining about the vacancy once the advertisement had gone live.
- 6.2 Annual CLLS CLC dinner. The Committee was reminded that the dinner was taking place on Tuesday 2 October 2018 at the offices of Clifford Chance.
- 6.3 Dates for Committee meetings in 2019. The Secretary confirmed that she would circulate a list of dates to Members for the 2019 Committee meetings.

13 December 2018