

**THE CITY OF LONDON LAW SOCIETY  
COMPANY LAW COMMITTEE**

Minutes

for the 269<sup>th</sup> meeting  
at 9:00 a.m. on Tuesday, 20 May 2014  
at Slaughter and May, One Bunhill Row, EC1Y 8YY  
(Tel: 020 7600 1200; Fax: 020 7090 5000)

---

**1. Welcome and apologies**

Attending: William Underhill (chairman); Peter Wilson (secretary); Adam Bogdanor (alternate for Keith Stella); Mark Bardell (alternate for James Palmer); Robert Boyle; Lucy Fergusson; Michael Hatchard; Nicholas Holmes; Chris Horton; Simon Jay; Vanessa Knapp; Stephanie Maguire (alternate for Mark Austin); Stephen Mathews; Andrew Pearson; Chris Pearson; David Pudge; Patrick Speller; Martin Webster; Victoria Younghusband.

Apologies: Mark Austin; James Palmer; Richard Spedding; Keith Stella.

**2. Approval of minutes**

The Chairman noted that draft minutes for the meeting held on 25 March 2014 had been circulated, and asked Committee members to send any comments to Peter Wilson.

**3. Matters arising**

**3.1 Final rule changes in response to FCA CP13/15**

The Committee noted that, on 2 May 2014, the FCA had published the Listing Rules (Listing Regime Enhancements) Instrument 2014 and, on 16 May 2014, the FCA had published related policy statement PS14/8, setting out its response to FCA consultation paper CP13/15. The revised rules had come into effect on 16 May 2014.

It was noted that, on 17 April 2014, prior to the detailed Listing Rule changes and consultation feedback becoming available, the FCA had issued a press release (published on its website) outlining the changes which it would ask the FCA's Board to approve in relation to the cancellation of a premium listing by an issuer with a controlling shareholder. The press release stated that these Listing Rule changes were expected to come into force on 16 May 2014. As a result, the changes would affect cancellations of listing following any such takeover offer then underway. The wording of this press release initially caused some confusion, as it appeared to suggest that a majority vote of independent shareholders would be required prior to delisting, unless the controlling shareholder's takeover offer had obtained 80% acceptances. It took some time before clarification could be obtained from the FCA.

The Committee noted that it was not ideal for Listing Rule changes to apply immediately to ongoing transactions, without ample advance warning or appropriate transitional provisions. This was not the FCA's usual practice, and the Committee hoped that such occurrences would remain very rare.

The Committee then discussed PS14/8 and the amended rules. The Chairman noted that PS14/7 was a helpful policy statement, which responded in detail to many comments made by respondents to the consultation.

The Committee noted the FCA's statement in PS14/8 that new LR 6.1.4DR(2) and (3) were not intended to prevent controlling shareholders from engaging or legitimately disagreeing with a premium-listed company, or from exercising their rights as shareholders. Rather, the FCA stated that it was seeking to prevent influence being exercised improperly and in a way that is unfairly detrimental to minority shareholders. The FCA indicated that in practice its response would depend on the totality of the controlling shareholder's interactions with the listed company. The Committee considered that this statement was helpful.

It was noted that, if a premium-listed company's board of directors (a majority of whom will generally be independent) votes in favour of a particular course of action, then this should limit the risk of independent directors subsequently alleging that such action did not comply with the mandatory independence provisions in the relationship agreement, and so refusing to support a statement of compliance under LR 9.8.4AR. This provides an additional incentive for premium-listed companies with controlling shareholders to enter into dialogue with their independent directors, and address any concerns they may have, in the lead-up to significant board decisions.

The Committee agreed that it should not generally be necessary for premium-listed companies with controlling shareholders to amend their articles of association in order to reflect the new independent director election provisions in LR 9.2.2ER and LR 9.2.2FR. The Committee noted the FCA's statement on page 28 of PS14/8 that premium-listed issuers are not obliged to amend their articles of association provided the articles do not prohibit such elections from taking place.

The Committee noted the FCA's statement on page 28 of PS14/8 that the new independent director election requirement in LR 9.2.2ER can be satisfied through a single vote or a single resolution, so long as it is passed by both the shareholders as a whole and by the independent holders of premium-listed shares alone.

The Chairman noted the FCA's guidance on page 26 of PS14/8 that it would be comfortable with disclosure in "general terms" of independent directors' "less material" dealings with the listed company, its directors, any controlling shareholder or any associates. This wording does not appear in the relevant rule (LR 13.8.17R(1)). The Committee agreed that the FCA should be invited to expand on this guidance.

### 3.2 MAD II and Market Abuse Regulation

The Committee noted that, on 14 April 2014, the Council had adopted a new Regulation on market abuse and a Directive on criminal sanctions for market abuse and insider dealing.

### 3.3 Regulation regarding supplementary prospectuses

The Committee noted that, on 15 April 2014, the European Commission's final delegated Regulation on situations requiring the publication of a supplementary prospectus had been published in the Official Journal.

### 3.4 Omnibus II Directive

The Committee noted that, on 14 April 2014, the Council had announced that it had adopted a draft Directive amending (inter alia) the Prospectus Directive in respect of ESMA's powers.

### 3.5 Government response to "Transparency & Trust" discussion paper

The Committee discussed the Government's response, published on 21 April 2014, to BIS' July 2013 discussion paper on "Transparency & Trust".

### 3.6 Government response to consultation paper on company filing requirements

The Committee noted that, on 21 April 2014, BIS had published the Government's response to its October 2013 consultation paper on the Red Tape Challenge and the requirements for companies to file certain information with Companies House.

One of BIS' proposals was to allow private companies the option of holding some of their company registers at Companies House rather than at their registered office (or single alternative inspection location). However, it was not thought likely that many companies would wish to do so.

### 3.7 Response to FCA CP14/2

The Committee noted that a response to this FCA consultation paper had been submitted by the Listing Rules Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

### 3.8 UKLA Liaison Group

The Chairman reported that he is liaising with the UKLA regarding a date for a possible meeting of this group.

## 4. Discussions

### 4.1 Amendments to Shareholder Rights Directive

The Committee discussed the European Commission's proposed Directive amending the Shareholder Rights Directive, which had been published on 9 April 2014.

The Committee noted the following significant points:

- Related party transactions

The draft amending Directive would require that many related party transactions be announced, and that larger related party transactions be approved by an independent shareholder vote. The draft amending Directive proposes to adopt the IAS 24 definition of a related party. This definition is significantly wider than the definition of a related party in Listing Rule 11, and (unlike Listing Rule 11) the draft Directive provisions contain few exemptions. For example, there are no exemptions for transactions in the ordinary course of business, or intra-group transactions with subsidiaries which are not wholly-owned.

- Intermediaries

The draft amending Directive would oblige intermediaries to: (a) on request, provide a company with the names and contact details of its shareholders; (b) pass on information from the company to its shareholders without undue delay; and (c) facilitate the shareholders' exercise of their rights. The Committee expected that these provisions would have a limited impact in the UK. The shareholders of a UK company will be the registered holders of the shares. It would be rare for intermediaries to be interposed between a UK company and its registered members. It seems that intermediaries will not be obliged to look "behind" the registered member and consider whether other persons or intermediaries may have an interest in the shares.

- Proxy advisors

The draft amending Directive will oblige proxy advisors to adopt measures to "guarantee" that their voting recommendations are accurate and reliable and "based on a thorough analysis of all the information that is available to them". Doubts were expressed that proxy advisors currently have the resources to achieve this as it suggests a detailed analysis of individual companies' proposals will be required.

- Directors remuneration

The provisions in the draft amending Directive regarding directors' remuneration appear to be broadly consistent with the existing UK requirements. However, concerns were expressed that some of the flexibility of the existing UK requirements may be lost. For example, the draft provision allowing new

directors to be paid remuneration outside of the approved policy, subject to the company subsequently obtaining shareholder approval, seems unrealistic.

It was agreed that the Listing Rules Joint Working Party would be asked to monitor the progress of this draft amending Directive.

#### 4.2 FRC consultation paper on the UK Corporate Governance Code

The Committee discussed the FRC's consultation paper proposing various changes to the UK Corporate Governance Code (the "**Code**"), which was published on 24 April 2014. If implemented, the changes would apply to reporting years beginning on or after 1 October 2014. The FRC was also consulting on extracts from its proposed merged guidance on risk and going concern, and on whether companies should be allowed to make certain corporate governance disclosures required by the Code on a website rather than in the annual report. The deadline for responses is 27 June 2014.

The Committee noted the following points:

- Directors remuneration

The FRC proposed to amend Principle D1 of the Code regarding directors' remuneration. The proposed deletion of "attract, retain and motivate" as the objective of executive directors' remuneration was surprising, given this is generally understood to be the aim of all remuneration policies. The amended Principle D1 will instead require executive directors' remuneration to be designed to promote the long-term success of the company.

- Principal risks

The FRC proposed amending C.2 of the Code to require annual reports to disclose additional information regarding the principal risks facing the company, and how they are being managed or mitigated. The FRC noted that imposing such an obligation might create difficulties for companies registered with the US SEC, which are subject to rules that could be seen as overlapping.

It was noted that it should be possible to reconcile the Code's and the SEC's requirements because they have different objectives: the proposed Code provisions aim to provide shareholders with the information to allow them to exercise stewardship, while the SEC's rules aim to warn potential investors of the risks of an investment in the company. Accordingly, it should be possible for the two sets of disclosures to co-exist.

Michael Hatchard noted that the SEC is also conducting a consultation in this area, and agreed to look into this.

- Future viability statement

Proposed new provision C.2.2 of the Code will require the directors to state whether they have a reasonable expectation that the company will be able to

continue in operation and meet its liabilities as they fall due, drawing attention to any qualifications or assumptions as necessary. It will be necessary to ask the FCA to confirm that they will not view such qualifications and assumptions as being inconsistent with a clean working capital statement included in a subsequent prospectus or Class 1 circular.

It was agreed that a working party would be formed to submit a response to the FRC's consultation paper.

## **5. Recent developments**

### **5.1 Company Law**

The Committee noted that, on 9 April 2014, the European Commission had published a proposed Directive on single-member private limited liability companies. The draft Directive will require Member States to provide in their national law for a form of single-member limited liability company, to be known as a SUP (Societas Unius Personae).

The Committee noted the following points:

- Use of the new corporate form would be optional. An EU Member State could in theory make this the only corporate form available under national law, but this was considered extremely unlikely.
- While a SUP may only issue one share, it would be possible to accommodate multiple investors at a holding company level, or through derivatives.
- At incorporation, a SUP will have model form articles of association. However, it would be possible to amend these articles after incorporation.

Vanessa Knapp had some input into these proposals, and would be happy to hear others' thoughts. It was agreed that a working party would be formed to monitor the progress of this draft Directive.

### **5.2 Corporate Governance**

The Committee noted that, on 9 April 2014, the European Commission had adopted, and on 12 April 2014 the Official Journal published, a recommendation on the quality of corporate governance reporting ("comply or explain").

### **5.3 Corporate Social Responsibility**

The Committee noted that, on 29 April 2014, the European Commission had launched an online consultation to seek feedback on the achievements, shortcomings and future challenges of the Commission's activities on corporate social responsibility. The deadline for responses is 15 August 2014.

#### 5.4 Reporting and Disclosure

The Committee noted that, on 26 March 2014, Lord Davies had published his third Davies Review Annual Report regarding women on boards.

The Committee noted that, on 28 March 2014, BIS had published a consultation paper on the UK's implementation of Chapter 10 of the Accounting Directive (2013/34/EU). BIS had also published some supplementary information on 2 May 2014. The deadline for responses was 16 May 2014.

The Committee noted that, on 3 April 2014, the European Parliament had adopted a draft Directive to amend the Statutory Audit Directive and a new Regulation regarding the statutory audit of public interest entities.

The Committee noted that, on 15 April 2014, the European Parliament had adopted a draft Directive amending the Accounting Directive which would require disclosure of non-financial information by certain large companies and public interest entities.

It was agreed that a working party would be formed to monitor the progress of this draft Directive.

The Committee noted that, on 8 May 2014, the Guidelines Monitoring Group had published a consultation paper proposing amendments to the Guidelines for Disclosure and Transparency in Private Equity (Walker Guidelines). The deadline for responses is 30 June 2014.

The Committee noted that, on 13 May 2014, ICSA had published a consultation paper on a simple pro forma contents list for company annual reports. The deadline for responses is 30 May 2014.

#### 5.5 Equity Capital Markets

The Committee noted that, on 14 April 2014, the ABI had published its recommended best practice in relation to lock-up agreements entered into by significant shareholders at the time of an IPO or secondary placing.

The Committee noted that, on 15 April 2014, the European Parliament had adopted a draft Regulation on improving securities settlement in the EU and central securities depositories.

It was noted that Lucy Fergusson and Vanessa Knapp are still members of a working party with BIS regarding the implementation of this draft Regulation.

The Committee noted that, on 6 May 2014, the FCA had published the Prospectus Rules (Regulatory Technical Standards) Instrument 2014. This amended the PRs to refer to the situations requiring the publication of a supplementary prospectus under the new delegated Regulation (see item 3.3 above). The FCA did not consult on these changes, which came into force on 5 May 2014.

## 5.6 AIM Rules

The Committee noted that, on 8 May 2014, the LSE had published AIM Disciplinary Notice 12 indicating that an AIM company had been privately censured and fined £90,000 for breaching Rule 13 (related party transactions) and Rule 31 (directors' responsibility for compliance) of the AIM Rules for Companies.

The Committee noted that, on 13 May 2014, the LSE had published AIM Notice 39, providing feedback on AIM Notice 38 and confirming the resulting changes to the AIM Rules for Companies and AIM Rules for Nominated Advisers, and making some ancillary amendments to the AIM Disciplinary Procedures and Appeals Handbook, which were not consulted on. The changes took effect on 13 May 2014, except for revised AIM Rule 26 which must be implemented by 11 August 2014.

## 5.7 Accounting

The Committee noted that, on 10 Apr 2014, the FRC had published Bulletin 4 regarding recent developments in company law, the Listing Rules and Auditing Standards that affect both the auditor's duties and the wording of auditor's reports on companies' financial statements.

The Committee noted that, on 14 April 2014, the FRC had published a consultation paper proposing revised operating procedures for its Conduct Committee, which reviews the reports and accounts of companies to enforce relevant accounting and reporting requirements. The deadline for responses is 16 June 2014.

The Committee noted that, on 29 April 2014, the FRC had published the final version of its amended Financial Reporting Standard for Smaller Entities. This is effective for companies with financial years ending on or after 30 September 2013 and which file their accounts on or after 1 December 2013.

## 5.8 Europe

The Committee noted that, on 27 March 2014, the European Commission had published a communication to the European Parliament and the Council on "Long-Term Financing of the European Economy".

## 5.9 Cases

The Committee noted the judgments in:

- *Olympus UK Ltd & Ors* [2014] EWHC 1350 (Ch)
- *Thompson v Renwick Group Plc* [2014] EWCA Civ 635
- *Eclairs Group Ltd and another v JKX Oil and Gas plc and others* [2014] EWCA Civ 640
- *Timmel v Aviso Zeta AG* [2014] EUECJ C-359/12

The Court had held that imposing an obligation to register on a website in order to access a prospectus, with registration entailing acceptance of a disclaimer and the obligation to provide an email address, breached Article 29(1) of the Prospectus Regulation. Free access was also restricted to two documents per month. The Court did not rule on the acceptability of a disclaimer alone, and did not consider the wording of the specific disclaimer at issue. The Committee also noted that Article 29(2) of the Prospectus Regulation (which was not considered in this case) expressly contemplates disclaimers which are limited to identifying overseas persons to whom the offer is (or is not) addressed. The Court did not make any reference to Article 29(2).

It was agreed that the Committee should write to ESMA to suggest it adds a Prospectus Q&A confirming that Article 29(2) disclaimers are not affected by *Timmel v Aviso Zeta*, or inform the Committee if it disagrees.

- *Burry & Knight Ltd & Anor v Knight* [2014] EWCA Civ 604

## **6. Any other business**

### **6.1 Company Law Committee annual dinner**

The Chairman noted that the annual dinner may need to be held in September this year. Some proposed dates would be circulated.