

THE CITY OF LONDON LAW SOCIETY

COMPANY LAW COMMITTEE

Minutes

for the 280th meeting
at 9:00 a.m. on Wednesday, 25 May 2016
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); Emma Wilson (Secretary); Mark Austin; Mark Bardell; Robert Boyle; Lucy Fergusson; Anne Kirkwood (alternate for Stephen Mathews); Michael Hatchard; Nicholas Holmes; Simon Jay; Vanessa Knapp; Chris Pearson; David Pudge; Deborah Shaw (alternate for Chris Horton); Richard Spedding; Patrick Speller; Keith Stella; Richard Ufland (alternate for Andrew Pearson); Martin Webster and Victoria Younghusband.

Apologies: Andrew Pearson; Stephen Mathews; and Chris Horton.

2. Approval of minutes

The Committee approved the minutes for the meeting of 23 March 2016.

3. Matters arising

3.1 Response to consultation proposing changes to partnership legislation. The Committee noted that on 24 March 2016, HM Treasury published a summary of responses to its consultation proposing changes to the Limited Partnership Act 1907 to accommodate the use of limited partnerships for private equity investments.

3.2 Delegated regulation supplementing MAR. The Committee noted that on 5 April 2016, the European Commission published delegated regulation (EU 2016/522) supplementing MAR including (i) indicators of market manipulation, (ii) the determination of the competent authority for notifications of delays in disclosing inside information, (iii) notification of PDMR transactions, and (iv) trading during closed periods.

3.3 LSE amends AIM Rules for companies ahead of MAR. The Committee noted that on 13 April 2016, the LSE issued AIM Notice 44 consulting on proposed changes in a marked-up draft of the AIM Rules for Companies ahead of MAR coming into force on 3 July 2016.

- 3.4 HMRC publishes consultation on tackling tax evasion. The Committee noted that on 17 April 2016, HMRC published a consultation document containing draft legislation and draft guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion.
- 3.5 Market Abuse Regulation Instrument 2016/31. The Committee noted that on 28 April 2016, the FCA published the Market Abuse Regulation Instrument 2016/31, which sets out amendments to the FCA Handbook relating to the entry into force of the Market Abuse Regulation, which will apply from 3 July 2016.
- 3.6 Policy statement on the implementation of MAR. The Committee noted that on 28 April 2016, the FCA published a policy statement on the implementation of MAR, which includes feedback on the FCA's earlier consultation papers CP15/35 and CP15/38.
- 3.7 Guidance for PSCs. The Committee noted that on 23 March 2016, BIS published guidance for people with significant control over companies, SEs and LLPs. A revised version of the guidance for companies, SEs and LLPs was published on 12 April 2016, along with a revised version of the guidance for people with significant control, both with minor amendments.
- 3.8 Response to ESMA consultation on Market Abuse Guidelines. The Committee noted that on 31 March 2016, the Market Abuse Joint Working Party submitted a response to ESMA on consultation paper 2016/162. The response is available on the Committee's webpage.
- 3.9 Response to Takeover Panel consultation PCP2016/1. The Committee noted that on 15 April 2016, the Takeovers Joint Working Party submitted a response to the Takeover Panel's consultation PCP 2016/1. The response is available on the Committee's webpage.
- 3.10 Response to Primary Market Bulletin 13. The Committee noted that on 10 May 2016, the Joint Listing Rules Working Party submitted a response to the FCA's Primary Market Bulletin 13. The response is available on the Committee's webpage.
- 3.11 Response to Pre-emption Group request. The Chairman noted that the Committee had responded to the request by the Pre-emption Group (PEG) to assist in drafting separate specimen resolutions for the five per cent. disapplication of pre-emption rights to be used on an unrestricted basis and for the additional five per cent. disapplication in relation to specified acquisitions or capital investments. The specimen resolutions drafted by the Committee were published on 5 May 2016 by the FRC. The Chairman noted that he had received an email of thanks from PEG.
- 3.12 Proposed new offence of corporate failure to prevent economic crime. The Committee noted that on 12 May 2016, the Ministry of Justice published a press release proposing to consult on imposing criminal liability on corporates which fail to prevent economic crimes, such as fraud, false accounting and money laundering.

- 3.13 PSC regime. The Committee noted that on 13 May 2016, BIS published final statutory guidance on the meaning of “significant influence or control” in the context of companies' PSC registers, and its updated draft statutory guidance on the meaning of that phrase in the context of the PSC registers of LLPs.

The Chairman noted that the analysis of some group structures under the PSC regime was causing difficulty. The Chairman asked the members of the Committee to send any difficult issues to him as a list was being prepared which would be sent to BIS with a view to asking BIS to provide some guidance on the issues raised.

- 3.14 Market Abuse Joint Working Party response to FCA Policy Statement PS16/13. The Committee noted that the Market Abuse Joint Working Party had responded to the FCA's recent Policy Statement PS16/13, which was submitted to the FCA and HM Treasury on 17 May 2016.
- 3.15 Draft guidance on electronic signatures. The Committee noted that the joint working party's draft guidance on electronic signatures and related instructions have been sent to Mark Hapgood Q.C. and that the conference with Counsel is expected to take place on 23 June 2014.
- 3.16 Amendments to Tech 02/10. The Chairman noted that work was ongoing on the response.
- 3.17 Market soundings. The Committee discussed market soundings under MAR.
- 3.18 Delegated regulation on regulatory technical standards in relation to market soundings. The Committee noted that on 20 May 2016, the Commission published the final draft text of the delegated regulation supplementing MAR with regard to RTS for market soundings.
- 3.19 MAR – letter to European Commission. The Committee noted that on 25 May 2016, the Market Abuse Joint Working Party sent a letter to the European Commission regarding the implementation of MAR. The letter is available on the Law Society's webpage.

4. Discussions

- 4.1 Availability of information during the IPO process.

The Committee noted that on 13 April 2016, the FCA published a discussion paper (DP 16/3) on the availability of information during the IPO process. The Committee had been asked by the FCA to respond, particularly to liability issues raised in the paper.

The Committee discussed DP 16/3. The discussion included the following points:

- Mark Austin reported that he had attended a meeting with AFME and that AFME was not keen on any of the approaches set out in DP 16/3. He reported that AFME was concerned that if the blackout period were to be removed, it would be difficult to explain to a board that its liability had not increased. Concerns about liability had previously

been cited to boards to explain the need for the blackout period and it would seem that the advisers had changed their view if blackout periods were no longer required. It was a general concern of AFME that there should be no increase in liability if there are changes to the IPO process.

- The Chairman expressed the view that the advice about liability in relation to the blackout period usually came from the banks but that there was no clear legal basis for that view.
- There was a concern that the IPO information process could be very atomised if it was necessary to publish supplemental prospectuses to respond to research although it was suggested that supplemental information could go into the security statement after a registration document had been published.
- There was a concern about Article 68 of the Financial Promotion Order.
- It was suggested that companies would want the intention to float announcement to be published at the same time as the registration document as they would want to be in control of the narrative and would not want the registration document being picked up by the press without further information.
- The Chairman expressed the view that it would be helpful if forward looking information could be included in the prospectus (without being subject to the current stringent rules) as at the moment it is left to the analysts to publish it.

4.2 MAR Implementation

The Committee discussed a number of issues relating to the implementation of MAR in the UK.

4.2.1 Update on activities of Market Abuse Joint Working Party

Victoria Younghusband updated the Committee on the activities of the Market Abuse Joint Working Party. The working party had written to both the FCA and the European Commission in relation to issues concerning the implementation of MAR. The working party was also intending to write to European Issuers, the QCA and the GC100. Victoria Younghusband noted that a member of the FCA was meeting members of the QCA during the morning of 25 May 2016.

The FCA had agreed to a call with members of the Market Abuse Joint Working Party on the afternoon of 25 May 2016.

4.2.2 Insider lists

The Committee discussed whether the approach to insider lists would need to change. Points raised in discussion included the following:

- Some members of the Committee had taken the view that companies should keep “confidential project lists” until the company, following discussions with its advisers, decided that the people on that list had inside information at which point the list would be reclassified as an “insider list”. This is the approach being taken by some companies and some law firms are changing their internal procedures to reflect this

approach on the basis that it could be viewed as unhelpful if there were to be an investigation by the regulator if advisers were keeping insider lists when the company was keeping “confidential project lists”. The view was expressed that the lists were simply a mechanism and would not necessarily be seen as evidential as regards the timing of acquiring insider information.

- The Chairman expressed the view that this approach would require a rigorous analysis of such confidential project list on a regular basis and that this would be too onerous for many companies. There were effectively two risks associated with failing to keep insider lists (a) that information is not announced at the proper time, and (b) that people deal when they have inside information. The first may be dealt with by the ability to delay announcement and whether there is an insider list or not will not affect this analysis. The second, however, means that if the confidential project list has not been reclassified as an insider list at the appropriate time, there is a real risk of people dealing in shares where they have inside information. Furthermore, the decision when to declare that the confidential project list becomes an insider list is not an easy one and people might not make it at the right time. The least risky approach, therefore, was to call such lists “insider lists” and to tell people on that list that they could not deal.
- There was discussion of the point that MAR requires a record of the timing of knowledge of inside information to be made and that this would mean that any confidential project list would need to be reviewed on a frequent basis. The point was also made that it would be possible to advise people on any confidential project lists not to deal.
- The format of lists was discussed. It was noted that an insider list must be in a prescribed format and it was considered whether the confidential list should also be in this format.
- It was noted that if there is no dealing code (the approach which some companies will be taking) then there will be no mechanism for PDMRs or others to require clearance. It is understood that some companies will “invite” people to approach the company secretary if they are intending to deal. It was also noted that the scope of some dealing codes goes beyond PDMRs and that it would be prudent for new dealing codes to prevent people dealing who are on (any equivalent of) a confidential project list and those who are involved in the financial reporting process.
- It was noted that the approach of having dealing codes which extended to people other than PDMRs came close to the hybrid approach which the CLLS had represented to the FCA was too complicated. The Chairman expressed the view that the exceptions should be in the hands of the people who give clearance and that the exceptions in the Model Code were a reasonable place to start when drafting any new dealing code or giving discretion to the company secretary.

4.2.3 Next steps

It was agreed that if no guidance was forthcoming from the FCA or ESMA, the CLLS should provide a consensus view on some of the issues relating to the implementation of MAR which could then be sent to the FCA. The FCA would then have the opportunity

to respond if they disagreed with the approach taken. It was also agreed that companies should be encouraged to seek advice or clearance from the FCA directly.

It was noted that the GC100 and ICSA were working on an industry-led dealing code and that the Committee should liaise with them on this issue and let those bodies know what the Committee's approach was going to be.

Chris Pearson noted that the Takeover Joint Working Party had circulated a list of questions relating to takeovers under MAR. The working party would come to a view and publish responses to those questions before 3 July 2016. Chris Pearson noted that the Takeover Panel had been reluctant to become involved but the Chairman expressed the view that the Panel should be encouraged to approach the FCA on MAR issues. The list of questions and responses would also be sent to the FCA.

4.3 Restrictions on assignment of receivables

The Committee noted that The Business Contract Terms (Restrictions of Assignment of Receivables) Regulations 2015 prohibit, in any contract for the "supply of goods, services or intangible assets" any restriction on the right to assign a "receivable" (being "a right to be paid any amount under a contract"). It was noted that the Regulation had been introduced to prevent restrictions on debt factoring and the purpose was to prevent restrictions on assignment of invoices. The Committee discussed whether the Regulations would apply more broadly to, for example, (a) a contract for the sale of shares, (b) a contract for the sale of assets comprising a business, and (c) a shareholders' agreement (which also provides for a company to issue new shares). The discussion included the following points:

- Whether shares were "intangible assets" within the meaning of the Regulations. It was noted that a business sale would probably be caught.
- That a "receivable" is a right to be paid any amount under a contract. An assignment of, for example, the benefit of warranties under a share purchase agreement would not fall within this definition. The assignment of deferred consideration, however, may be caught.
- Whether shares could be said to be "supplied" under a share purchase agreement and whether there was a difference between a supply and a sale.

It was noted that it was not clear when the Regulations were due to come into effect.

5. **Recent developments**

5.1 Company law

The Committee noted that on 30 March 2016, the Registrar of Companies and Applications for Striking Off (Amendment) Regulations 2016/441 and Explanatory Note were published.

The Committee noted that on 30 March 2016, the Companies (Address of Registered Office) Regulations 2016/423 and Explanatory Note were published.

The Committee noted that on 31 March 2016, the BVCA published a Technical Briefing on the requirement in the SBEE Act 2015 for UK companies and LLPs to keep a public register of people who have significant control over them.

5.2 Corporate Governance

The Committee noted that on 23 March 2016, the EHRC published their six step guide on how to improve board diversity within the frameworks of the Equality Act 2010 and the Corporate Governance Code.

The Committee noted that on 27 April 2016, the FRC published final draft updates to the: UK Corporate Governance Code, its Guidance on Audit Committees, and the Ethical and Auditing standards. It also published a feedback statement summarising the main points raised by respondents to the consultation.

The Committee noted that on 23 May 2016, the FRC published a feedback statement on the UK Board Succession Planning Discussion Paper which it had issued in October 2015.

5.3 Reporting and Disclosure

The Committee noted that on 22 March 2016, the Investment Association published a Productivity Action Plan aimed at boosting UK productivity with long-term investment. A summary report is also available.

The Committee noted that on 10 May 2016, the Companies (Bodies Concerned with Auditing Standards etc.) (Exemption from Liability) Regulations 2016 were published.

The Committee noted that on 19 May 2016, the European Commission published its adopted Regulation and related Annex setting out technical standards under Article 22.1 of the revised Transparency Directive regarding a European electronic access point to regulated information about all listed companies in the EU.

5.4 Equity Capital Markets

The Committee noted that on 1 April 2016, ESMA published an updated version of its Questions and Answers (ESMA/2016/419) on the common operation of the Market Abuse Directive (2003/6/EC).

The Committee noted that on 5 April 2016, the Commission Implementing Regulation (EU) 2016/523 of 10 March 2016 laying down implementing technical standards with regard to the format and template for notification and public disclosure of managers' transactions in accordance with the Market Abuse Regulation was published.

The Committee noted that on 6 April 2016, ESMA published version 24 of its Questions and Answers: Prospectuses.

The Committee noted that on 13 April 2016, the FCA published its interim report (MS15/1.2) on its investment and corporate banking market study.

The Committee noted that on 13 April 2016, the FCA published occasional paper 15 on the factors influencing IPO share allocations to investors, and related potential conflicts of interest issues.

The Committee noted that on 28 April 2016, an amendment to Article 19(1) of the Market Abuse Regulation (EU) No 596/2014 was adopted by the European Parliament which has been published in Article 56 of the Benchmark Regulation and is expected to enter into force on 3 July 2016.

5.5 UKLA

The Committee noted that on 22 April 2016, the FCA published Handbook Notice No 32, and the Enforcement Guide (Transparency Regulations 2015) Instrument 2016 (FCA 2016/36).

5.6 Accounting

The Committee noted that on 13 April 2016, the European Commission adopted a proposal for a Directive amending the Accounting Directive to require large, multinational companies to publish an annual report disclosing their profit and tax accrued and paid in each EU member state and certain tax-haven jurisdictions on a country-by-country basis.

The Committee noted that on 18 April 2016, the FRC published a guidance document in final form for directors of companies that do not apply the UK Corporate Governance Code, including factors to consider when making an assessment of the solvency and liquidity risks facing a company that might constitute principal risks for disclosure in the strategic report.

The Committee noted that on 13 May 2016, the Limited Liability Partnerships, Partnerships and Groups (Accounts and Audit) Regulations 2016 and explanatory memorandum were published.

The Committee noted that on 11 May 2016, BIS published the government's response to its consultation paper relating to the implementation of Directive 2014/56/EU amending the Statutory Audit Directive and Regulation (EU) No. 537/2014 on the statutory audit of public interest entities. On 12 May 2016, BIS published a further draft of the related Statutory Auditors and Third Country Auditors Regulations 2016.

5.7 Cases

The Committee noted the following cases:

Hut Group Ltd v Nobahar-Cookson [2016] EWCA Civ 128. The Court of Appeal clarified the correct interpretation of a contractual time limit for notifying a breach of warranty claim in a share purchase agreement. It resolved the ambiguities in the clause by adopting the narrowest of the available interpretations and held there was no reason to disapply the contra proferentem rule.

Vinergy International (PVT) Ltd v Richmond Mercantile Limited FZC [2016] EWHC 525 (Comm). The High Court has held that it is a matter of construction whether a clause requiring notice and a cure period applies to a party terminating a contract for repudiatory breach at common law; there is no general principle that it should.

Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd and another [2016] EWCA Civ 396. The Court of Appeal has indicated, in obiter comments, that including an anti-oral variation clause in a contract will not prevent subsequent variation of the contract orally or by conduct.