

THE CITY OF LONDON LAW SOCIETY  
COMPANY LAW COMMITTEE

Minutes

for the 279<sup>th</sup> meeting  
at 9:00 a.m. on Wednesday, 23 March 2016  
at Slaughter and May, One Bunhill Row, EC1Y 8YY  
(Tel: 020 7600 1200; Fax: 020 7090 5000)

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**1. Welcome and apologies**

Attending: William Underhill (Chairman); Emma Wilson (Secretary); Mark Austin; Mark Bardell; Lucy Fergusson; Michael Hatchard; Simon Jay; Vanessa Knapp; Elaine O'Donnell (alternate for Robert Boyle); Andrew Pearson; Chris Pearson; David Pudge; Richard Spedding; Patrick Speller; Keith Stella; Jeffrey Sultoon (alternate for Nicholas Holmes); Elizabeth Wall (alternate for Stephen Mathews); Victoria Younghusband; and Khasruz Zaman (alternate for Chris Horton).

Apologies: Robert Boyle; Nicholas Holmes; Chris Horton; Stephen Mathews; and Martin Webster.

The Chairman wished to record the Committee's thanks to Peter Wilson, the previous Secretary. The Chairman welcomed Emma Wilson as the new Secretary.

**2. Approval of minutes**

The Chairman apologised for the absence of minutes for previous meetings. He would make efforts to rectify this before the next meeting.

**3. Matters arising**

**3.1 Statutory guidance on the PSC register**

The Committee noted that on 27 January 2016, BIS published amended statutory guidance for companies and statutory guidance for LLPs on the meaning of significant influence or control in the context of PSC registers.

**3.2 Non-statutory guidance on the PSC register**

The Committee noted the fifth version of the non-statutory guidance on the PSC register, "Register of People with Significant Control – Guidance for Companies, Societas Europaeae and Limited Liability Partnerships", was published on 4 March 2016.

The Chairman noted that the revised guidance contained an amendment to the section in Chapter 7 dealing with rights which are only exercisable in certain circumstances. The

revised guidance was amended to add “an option to acquire shares” as an example of such a right.

The Chairman noted that the working group that had been assisting with BIS with the guidance had not been consulted on this change and the Chairman reported that he had written to BIS as he thinks that this amendment is misconceived. The reference to “rights” in paragraph 22 of Schedule 1(A) of the Small Business, Enterprise and Employment Act 2015 should be viewed in the context of the other provisions that refer to a person holding or controlling a right. In this context, it is not appropriate for it to cover a right to acquire a right i.e. a right to acquire a share.

### 3.3 Amendments to the Listing Rules and the Disclosure and Transparency Rules

The Committee noted that on 29 January 2016, the FCA published the Listing Rules and Disclosure and Transparency Rules (Miscellaneous Amendments) Instrument 2016 (FCA 2016/6), following FCA consultation CP15/28. This instrument came into force on 29 January 2016.

### 3.4 Regulatory Technical Standards under Prospectus Directive and Omnibus II Directive

The Committee noted that on 4 March 2016, Regulation (EU) 2016/301 was published in the Official Journal of the EU. This sets out regulatory technical standards under provisions of the Prospectus Directive amended by the Omnibus II Directive (2014/51/EU), and also amends the Prospectus Regulation. The Regulation came into force on 24 March 2016.

### 3.5 Regulatory technical standards under the Market Abuse Regulation

The Committee noted that on 8 March 2016, the European Commission published a delegated regulation supplementing the Market Abuse Regulation (“**MAR**”) with regard to regulatory technical standards for the conditions applicable to buyback programmes and stabilisation measures. On 10 March 2016, the European Commission published a delegated regulation with regard to insider lists.

### 3.6 Draft guidance on electronic signatures

Elizabeth Wall updated the Committee on the status of the instructions to Mark Hapgood Q.C. and associated draft practice note on electronic signatures which have been prepared by a joint working party of the Company Law and Finance Committees of the Law Society and of the CLLS.

### 3.7 Response to CP 15/35 on implementing MAR

The Committee noted that the MAR Joint Working Party had responded to CP15/35.

### 3.8 Response to FCA consultation CP 15/38

The Committee noted that the Joint Listing Rules Working Party had responded to the FCA consultation CP 15/38.

3.9 Response to HM Treasury Consultation on Financial Services and Markets Act 2000 (Market Abuse Regulation 2016)

The Committee noted its response in support of the CLLS Regulatory Committee response to the HM Treasury consultation on Financial Services and Markets Act 2000 (Market Abuse) Regulation 2016.

3.10 Response to HM Treasury consultation on the CSDR

The Committee noted that the CREST Joint Working Party had responded to the HM Treasury consultation (published on 8 December 2016) on the Central Securities Depositories Regulation (Regulation (EU) No 909/2014).

The Chairman requested volunteers for the CREST Joint Working Party.

3.11 Written statement to Parliament on “red tape” reduction target

The Committee noted the written statement to Parliament by the Secretary of State for Business on 3 March 2016 setting “red tape” reduction targets. The Committee also noted that regulatory provisions that implement new or changed obligations arising from EU Regulations, Decisions and Directives, and other changes to international commitments and obligations, except in cases of gold-plating, were excluded from the red tape targets.

The Chairman asked the members of the Committee to consider whether there were any regulatory provisions which could be abolished and asked that they be sent to the Chairman and the Secretary so that a list could be compiled. Members of the Committee put forward some examples of areas of law which might be looked at.

**4. Discussions**

4.1 ESMA consults on guidelines under MAR

The Committee noted that on 28 January 2016, ESMA published a consultation paper on guidelines addressed to persons receiving market soundings and on the legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public. Points raised in discussion included the following:

- There was a discussion about the status of ESMA guidance and whether the FCA would expect companies to follow it or produce its own guidance. The Committee concluded that the FCA expected ESMA guidance to be followed but that where there are areas of ambiguity that could be problematic for participants in UK markets, the FCA should be encouraged to produce its own guidance. It was noted that there was flexibility in the ESMA guidance with, for example, statements that the guidance is not exhaustive which provides an opportunity to encourage the FCA to adopt a less restrictive approach.

- The Committee discussed the question, which appears to be addressed in the proposed guidance, of when public disclosure is required while an issuer is in the course of preparing its results. Announcements are not in practice made (unless expected results are materially out of line with the market's expectations) and that appears to be acceptable but the reason why that is the case is not clear. It was suggested that there are two possible explanations, either there is no inside information or there is inside information but the issuer is entitled to delay. There were differing views in the Committee with regard to which explanation was to be preferred. It was noted that regulators have not explained their view.
- The Chairman expressed the view that it was likely that the process of finalising results, making the expectations concrete, would give rise to inside information but that there should be an ability for a company to delay announcement. A member of the Committee gave the example of a board representative of a significant shareholder who had obtained information that the results of the company were in line with market expectations. The shareholder would be unable to trade in the company's shares which suggests that even where results are in line with expectations, that is inside information.
- The view was expressed that very few sets of results were completely in line with market expectations. It was also noted that even though, for example, the headline profit figure might be in line with expectations, other aspects of the results might contain information which investors would find useful in deciding whether or not to deal in a company's shares and which could be inside information. It was noted that companies have close periods so that they do not have to decide whether or not there is inside information in these kinds of markets.
- It was, however, pointed out that when results are being produced there will be discussions with auditors and a clear picture of the full results does not emerge until a late stage. A concern was also expressed that on the reasoning proposed by the Chairman, if information obtained through the year (e.g. in management accounts) confirmed market expectations, that might be regarded as inside information in which case it would be very difficult for PDMRs to deal at any stage of the year.

The Chairman agreed to pass on the issues raised in the discussion to the Listing Rules Joint Working Party as they finalised the draft response to the ESMA.

After a discussion of the question whether a bank contacting purchasers in connection with an auction sale of part of a business of a listed company could be considered to be a market sounding under MAR, David Pudge and Lucy Fergusson agreed to produce a note on behalf of the Committee with a view to its being shared with the FCA.

Jeffrey Sultoon suggested it may be worth speaking to other jurisdictions to see how they understood the requirement.

#### 4.2 Takeover Panel publishes consultation on communication and distribution of information during an offer

The Committee noted that on 15 February 2016, the Code Committee of the Takeover Panel published PCP 2016/1: The communication and distribution of information during an offer. Chris Pearson noted that the Takeover Joint Working Party had had a call in the previous week and that the response would be finalised in the ten days or so after the meeting.

### 5. **Recent developments**

#### 5.1 Company law

The Committee noted that on 8 February 2016, the Companies Act 2006 (Amendment of Part 21A) Regulations 2016 and explanatory memorandum were published. The regulations are intended to correct a drafting error in section 790 of the Companies Act 2006. The regulations came into force on 5 April 2016.

The Committee noted that on 9 February 2016, the draft Registrar of Companies and Applications for Striking Off (Amendment) Regulations 2016 and draft explanatory memorandum were published. The regulations came into force on 6 April 2016.

The Committee noted that on 9 February 2016, the draft Companies (Address of Registered Office) Regulations 2016 and draft explanatory memorandum were published. The regulations came into force on 6 April 2016.

The Committee noted that on 1 March 2016, HM Treasury published a consultation on insurance linked securities. Chapter 3 of the consultation proposes the creation of a new protected cell company regime in the UK.

The Committee noted that on 11 March 2016, the Small Business, Enterprise and Employment Act 2015 (Commencement No 4), Transitional and Savings Provisions Regulations 2016/321 were published.

The Committee noted that on 17 March 2016, the European Public Limited Liability Company (Register of People with Significant Control) Regulations 2016 (SI 2016/375) and Explanatory Memorandum were published. On 18 March 2016, the Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016 and Explanatory Memorandum were published. On 21 March, The Register of People with Significant Control Regulations 2016 and Explanatory Memorandum were published.

The Chairman reported that there had been a request by the GC 100 and Investor Group for views on areas that should be considered in a forthcoming review of The Directors' Remuneration Reporting Guidance. The Chairman reported that he intended to convene a meeting of the working group in the following week and noted that comments were requested by Monday 4 April 2016.

The Chairman reported that the Pre-emption Group had requested assistance in drafting specimen resolutions for the disapplication of pre-emption rights implementing

the PEG guidelines that allow an additional 5% disapplication for specified acquisitions or capital investments.

Investors had indicated a preference for two template resolutions: one that authorises a 5 per cent. disapplication for general corporate purposes and a second that authorises an additional 5 per cent. disapplication when used in connection with an acquisition or specified capital investment. The Committee had been asked to assist PEG with drafting of the specimen resolutions to reflect this approach.

## 5.2 Reporting and Disclosure

The Committee noted that on 7 February 2016, the Government announced it had appointed the Chair of GlaxoSmithKline, and former Chair of RBS and Sainsbury's, Sir Philip Hampton, to lead an independent review on increasing representation of women in the executive level of FTSE 350 companies.

The Committee noted that on 12 February 2016, the Government published its response to the consultation paper on implementing the mandatory gender pay gap reporting duty under section 78 of the Equality Act 2010 and a new consultation paper on the associated draft regulations, which are expected to come into force on 1 October 2016.

The Committee noted that on 23 February 2016, the Climate Control Standards Board published a review of FTSE 350 companies' environmental reporting and greenhouse gas emission disclosures in annual reports.

The Committee noted that on 16 February 2016, BIS published a consultation paper on implementing into UK law the requirements of Directive 2014/95/EU which amends the Accounting Directive (2013/34/EU).

The Committee noted that on 7 March 2016, the Business & Human Rights Resource Centre published a register of the slavery and human trafficking corporate statements released to date, to comply with section 54 of the Modern Slavery Act 2015.

The Committee noted that on 21 March 2016, the Private Equity and Reporting Group published The Guidelines for Disclosure and Transparency in Private Equity Reporting.

## 5.3 Equity capital markets

The Committee noted that on 8 February 2016, ESMA published an opinion on Turkish laws and regulations on prospectuses.

The Committee noted that on 10 March 2016, the European Commission published its feedback statement on the consultation on the review of the Prospectus Directive.

The Committee noted that on 14 March 2016, AFME issued an alert for market participants on block trade procedures and the application of US securities law namely, the Volcker Rule and the Investment Company Act 1940.

The Committee noted that on 18 March 2016, the FCA published the Prospectus Rules Sourcebook (Omnibus 2 Directive Regulatory Technical Standards) Instrument 2016 which amends the Prospectus Rules sourcebook to align it with Regulation (EU) 2016/301 setting out regulatory technical standards under the provisions of the Prospectus Directive as amended by the Omnibus II Directive.

The Committee noted that on 18 March 2016, the FCA published its twelfth quarterly consultation paper (CP16/8) and that comments were requested by 18 May 2016.

The Committee noted that on 18 March 2016, the FCA had published its twelfth quarterly consultation paper (CP 16/8). Lucy Fergusson agreed to look at the paper to see whether the Listing Rules Joint Working Group was required to respond.

The Committee noted that on 15 March 2016, the first EU Council Presidency compromise on the proposed Prospectus Regulation was published.

#### 5.4 Accounting

The Committee noted that on 19 February 2016, BIS published the Government's response to its consultation on proposed changes to the financial reporting requirements for LLPs and qualifying partnership and on 8 March 2016, published the draft Limited Liability Partnerships, Partnerships and Groups (Accounts and Audit) Regulations 2016 and the explanatory memorandum.

The Committee noted that on 28 January 2016, the FRC published a report on extended auditor's reports covering 278 reports from the FTSE 350.

The Committee noted that on 8 March 2016, the FRC published a letter of advice to audit committee chairs in response to requests for guidance on how matters such as volatile asset prices and uncertainty over interest rates in certain jurisdictions should be dealt with in annual reports and accounts.

The Committee noted that the ICAEW had published Tech XX/16, an exposure draft containing updated guidance on realised and distributable profits under the Companies Act 2006.

Elizabeth Wall noted that the Law Society were preparing a response to the ICAEW and the Chairman requested volunteers for a joint working party.

#### 5.5 Miscellaneous

The Committee noted the upcoming referendum on 23 June 2016 concerning whether Great Britain will remain in the European Union. The Committee noted that they will not consider any further items relating to the referendum unless there is a vote to leave.

The Committee noted that on 4 March 2016, BIS published a discussion paper on enhancing transparency of beneficial ownership information of foreign companies that buy land or property in England and Wales or enter into public procurement contracts in England. The Chairman noted that this was largely a real estate issue and suggested

that the Committee provide support to the CLLS Real Estate Committee with regard to company law issues should such support be required. The Chairman agreed to contact the Chair of the Real Estate Committee.

**6. Any other business**

The Committee noted a proposal by the Office of Tax Simplification in its document “Small Company Taxation Review”, dated March 2016, to consider proposals for “sole enterprises enterprise personal assets” (or “SEPA”) vehicles which would protect the assets of an individual without a separate legal identity.