

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 294th meeting
at 9:00 a.m. on 28th November 2018
at Clifford Chance LLP, 10 Upper Bank Street, London E14 5JJ

1. **Welcome and apologies**

Attending: David Pudge (Chairman), Mark Austin, Adam Bogdanor, Robert Boyle, Murray Cox, Lucy Fergusson, Mike Flockhart (for Mark Bardell), Kevin Hart, Nicholas Holmes, Simon Jay, Vanessa Knapp, Chris Pearson, Robert Stirling, Richard Spedding, Liz Wall, Martin Webster, Victoria Younghusband and Kath Roberts (Secretary).

Apologies: Mark Bardell, Chris Horton, John Adebiyi, Stephen Mathews, Patrick Speller and Richard Ufland.

2. **Approval of minutes**

The Chairman reported that draft minutes of the meeting held on 27 September 2018 were circulated to members for comment on 20 November 2018. Members were asked to provide comments to the Secretary.

3. **Matters arising**

- 3.1 The Companies (Miscellaneous Reporting) Regulations 2018 Q&A. The Committee noted that on 8 November 2018, BEIS published updated Companies (Miscellaneous Reporting) Regulations 2018 Q&A. It was noted that the Q&A, last published in June 2018, sets out how and when companies will be affected by the new corporate governance reporting requirements in The Companies (Miscellaneous Reporting) Regulations 2018.

The Committee noted that the regulations were made on 17 July 2018 and that, whilst they apply in relation to financial years beginning on or after 1 January 2019, this is subject to one exception with regard to the requirement that companies should illustrate the impact of share price increases on executive pay outcomes. The Q&A make clear that this requirement applies to any new remuneration policies brought forward by companies from 1 January 2019 (see Part C, Q1 of the Q&A).

The Committee discussed the new section 172(1) statement and how this might apply to subsidiaries of a larger listed group. It was noted that, whilst qualifying subsidiaries would have to prepare their own statement, in circumstances where the parent is also preparing a statement and is providing a fuller explanation of the relevant policies affecting employees, the environment, suppliers, etc, the Q&A states that it may be acceptable for the subsidiary to provide less detail in its own report and, where possible, cross refer to the parent company's statement (Part D, Q11 of the Q&A).

- 3.2 New carbon and energy reporting framework. The Committee noted that the Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 were made on 6 November 2018 and that an explanatory memorandum had also been published alongside the Regulations.
- 3.3 Regulations relating to the restoration of a company to the register by the court. The Committee noted that the Third Parties (Rights Against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018 were made on 2 November 2018 and that an explanatory memorandum had also been published alongside the Regulations. The Committee noted that it has previously considered these Regulations which allow restoration of a company to the register in order that an insurer can bring proceedings in the name of the company.
- 3.4 BEIS consultation on national security and investment. The Committee noted that a Joint Working Party of the Company Law Committees of the CLLS and the Law Society led by Simon Jay had submitted a response dated 16 October 2018 to the BEIS National Security and Investment consultation on proposed legislative reforms. SJ reported that he had since followed up with BEIS as to when they might respond but no information had been provided on this.
- 3.5 ESMA consultation on risk factors and takeover exempted document. The Committee noted that a Joint Working Party of the Company Law Committees of the CLLS and the Law Society had submitted responses each dated 5 October 2018 to the ESMA consultations on: (i) the draft technical advice on minimum information content for prospectus exemption; and (ii) the draft guidelines on risk factors under the Prospectus Regulation.
- 3.6 Consultation on FCA Knowledge Base Technical Note on periodic financial information. Victoria Younghusband reported that she had spoken to Mike Norton at the FCA seeking an update on the potential timing for the publication of the response to the consultation.

4. **Discussions**

- 4.1 Takeover Panel consultation on asset valuations. The Committee noted that on 17 October 2018, the Code Committee of the Takeover Panel issued Panel Statement (2018/17) announcing it had published a public consultation paper (PCP 2018/1), setting out proposed amendments to the Takeover Code with regard to asset valuations. It was noted that the Code Committee proposed replacing the current Rule 29 with a new Rule 29 to codify existing practice as applied by the Panel Executive, clarify certain aspects of Rule 29 and provide a more logical framework. The Committee noted that the consultation closes on 7 December 2018. Chris Pearson reported that there was another call of the Joint Takeovers Working Party scheduled to discuss the PCP, but that the Working Party was largely supportive of the proposals set out in the PCP.

The Committee discussed the publication of The Takeovers (Amendment) (EU Exit) Regulations 2019 which amend Schedule 28 of the Companies Act in order to on-shore the Takeovers Directive (**TD**). The Regulations largely copy across relevant sections of the TD, including the general principles set out in Article 3 of the TD. The Committee noted that the shared jurisdiction provisions in the TD will not apply post-

Brexit, meaning that certain companies, currently within the scope of the Takeovers Code, would fall outside of it. This would result in some quirks, for example, a bid for a Luxembourg-registered company with its shares listed on the LSE will not be regulated at all, as neither the Luxembourg regulator nor the Panel would have jurisdiction. Takeover Panel approach to post-offer undertakings (POU).

The Committee discussed members' experiences and understanding of the Panel's approach to POUs.

- 4.2 Brexit. The Committee noted the publication of certain SIs intended to address deficiencies of retained EU law arising from the withdrawal of the UK from the EU in relation to the Companies Act 2006.

5. Recent developments

5.1 Corporate governance

- (a) GC100 guidance on directors' duties. The Committee noted that following an invitation from BEIS, on 23 October 2018, the GC100 published guidance for directors on their duty under section 172 Companies Act 2006 and wider stakeholder considerations. The guidance aims to provide practical help to directors on their performance of the section 172 duty.

The Committee agreed that the guidance was likely to be useful to issuers on the basis that it contained a number of helpful and practical steps that boards can take to help them discharge their section 172 duty, including how to embed into the habits and behaviours of the company a culture which is consistent with the company's strategy in relation to its stakeholders (for example, in relation to directors' and management training and directors' induction).

The meeting noted the FRC's press release announcing that it is launching a major project to examine the future of corporate reporting (see item 5.2(a) below).

- (b) Hampton-Alexander Review's 2018 report. The Committee noted that on 13 November 2018, the Hampton-Alexander Review published its third annual report on improving gender balance in FTSE leadership. The Committee noted that the FTSE 100 are on track to meet the target of women holding one third of board level positions by 2020, but that more work needs to be done among the FTSE 350.
- (c) Launch of the Wates Principles. The Committee noted that on 12 November 2018, the FRC announced that the Wates Corporate Governance Principles for Large Private Companies would be launched on 12 December 2018.
- (d) Boardroom behaviour and the QCA Corporate Governance Code. The Committee noted that on 9 November 2018, the Quoted Companies Alliance issued a press release announcing that the QCA and the Non-Executive Directors' Association had published a paper on boardroom behaviour and the QCA Corporate Governance Code.

- (e) Proxy voting guidelines updates. The Committee noted that on 19 November 2018, the ISS announced that it had published updates to its UK proxy voting guidelines for 2019. It was noted that the updates will apply to shareholder meetings on or after 1 February 2019. In addition, the Committee noted that on 14 November 2018, Glass Lewis announced the publication of its 2019 proxy paper guidelines for the UK.

The Committee noted the inclusion by ISS of an additional exception to the general recommendation to vote in favour of proposals to ratify the external auditors' appointment in circumstances where the lead audit partner has been linked with a significant auditing controversy and, where they are engaged in the audit of other public companies, this track record will be raised for investor attention (even if no issues have been raised at the company itself).

The Committee also noted the change to Glass Lewis' proxy paper guidelines on board and committee responsiveness, where Glass Lewis may, in certain circumstances, hold committee chairs and members accountable by recommending a vote against their re-election where they have failed to adequately address shareholder concerns.

It was reported that, in the United States, the SEC has convened a staff roundtable to look at the proxy process as a whole, including the possible regulation of the proxy advisory industry. In particular, on 14 November six U.S. Senators had introduced a bill that would amend the Investment Advisers Act of 1940 to require proxy advisory firms to register as investment advisers. The Committee agreed to keep a watch on the progress of any such legislation.

- (f) Revised IA Principles of Remuneration. The Committee noted that on 22 November 2018, the Investment Association (IA) had issued a press release announcing the publication of the 2018 Principles of Remuneration that set out investor expectations and best practice for how companies should pay their top executives in line with the new Corporate Governance Code. It was also noted that the IA had published an open letter to the Chairs of Remuneration Committees of FTSE 350 companies outlining the key changes to the Principles of Remuneration and highlighting the IA's areas of focus for the 2019 AGM season.

The Committee noted the IA's view that pensions contributions for executive directors should be in line with those given to the rest of the workforce and that new executives should be appointed on this level of contribution, with incumbent directors' contribution rates being reduced over time to that available to the majority of the workforce. It was noted that the IA does not expect executives to be awarded compensation for this change. It was further noted that the IA was of the view that malus and clawback provisions should include a specific set of triggers and that broadly drawn triggers, such as "gross misconduct", would no longer be sufficient.

5.2 Reporting and disclosure

- (a) FRC to examine the future of corporate reporting: The Committee noted that on 30 October 2018, the FRC issued a press release announcing that it is

launching a major project to examine the future of corporate reporting. The press release is a call for volunteers to join an advisory group to support the project. The FRC states that, as part of the project, it will review current financial and non-financial reporting practices, consider what information investors and other stakeholders require, the purpose of corporate reporting and the annual report and the different types of corporate communications produced by companies. The Chairman reported that he had written to the FRC to offer the Committee's assistance to the advisory group.

- (b) FRC annual open letter and annual review: The Chairman reported that on 24 October 2018, the FRC published its annual open letter to Audit Committee Chairs and Finance Directors, which draws on findings from its Annual Review of Corporate Governance and Reporting 2017/18. It was noted that in the letter the FRC calls for improvements in key areas of corporate reporting, including key accounting judgements and estimates, eliminating basic errors and how companies have applied the Principles of the Corporate Governance Code.
- (c) Lab report on performance metrics: The Committee noted that on 7 November 2018, the FRC's Financial Reporting Lab (**Lab**) published a report on performance metrics that contains guidance for companies on the presentation of performance metrics in their reporting following calls for clarity from investors.
- (d) Lab report on business model reporting and risk and viability reporting: The Committee noted that on 18 October 2018, the Lab published a report on business model reporting and risk and viability reporting. It was noted that, overall, the Lab found that investors still feel there is more to be done to make business model, risk and viability disclosures more valuable and that while there have been some positive developments, investors continue to emphasise the need for reporting to be more consistent and more clearly linked throughout the annual report.
- (e) PRI and ICGN discussion paper on corporate ESG reporting. The Committee noted that on 18 October 2018, the Principles for Responsible Investment and the International Corporate Governance Network published a press release and a joint discussion paper covering the investor agenda for corporate environmental, social and governance (**ESG**) reporting. It was noted that the discussion paper presents the preliminary outputs from a group of leading global investor organisations on a range of ESG reporting issues.
- (f) Gender pay gap reporting: The Committee noted that on 24 October 2018, the government published a report that summarises the data reported by employers under the first year of the Gender Pay Gap Information Regulations 2017, along with findings from related research conducted by the Government Equalities Office.
- (g) BEIS consultation on ethnicity pay reporting. The Committee noted that on 11 October 2018, BEIS published a consultation on ethnicity pay reporting. It was noted that the paper sets out options and asks questions on what ethnicity pay information should be reported by employers and which employers should

be expected to report. It was further noted that the consultation suggests that employers with more than 250 employees should be required to report, which would align with the threshold for gender pay gap reporting. It was noted that the consultation closed on 11 January 2019. The Committee agreed that it would not respond to this consultation.

- (h) Climate change. The Committee noted that over September and October 2018, several papers had been published on climate change: (i) the Task Force on Climate-related Financial Disclosures (**TCFD**) published its 2018 status report that provides an overview of the extent to which companies in their 2017 reports included information aligned with the core TCFD recommendations published in June 2017; (ii) the PRA published a report that examines the financial risks from climate change that impact UK banks, building societies and PRA-designated investment firms and assesses how banks are responding to these; (iii) the PRA published a consultation paper on a draft supervisory statement that sets out its expectations regarding firms' approaches to managing the financial risks from climate change (consultation closes on 15 January 2019); and (iv) the FCA published a discussion paper on climate change and green finance (feedback is requested by 31 January 2019). Richard Ufland confirmed that the Joint Listing and Prospectus Rules Working Group was preparing a response to item (iv) above.
- (i) FRC review of reporting by smaller listed and AIM companies. The Committee noted that on 6 November 2018, the FRC issued a press release announcing that it has published a report setting out its findings of a thematic review of smaller listed and AIM company disclosures in their annual reports and accounts. It was noted that the press release states that, according to the report, smaller companies should provide more specific disclosures of significant accounting judgements and more quantitative information on key sources of estimation uncertainty.
- (j) IFRS 9 and IFRS 15 FRC thematic review findings. The Committee noted that on 5 November 2018, the FRC published two thematic reviews to help companies improve the quality of their corporate reporting in relation to the new accounting standards IFRS 9 "Financial Instruments" and IFRS 15 "Revenue from Contracts with Customers".

5.3 Equity capital markets

- (a) Confirmation of changes to the AIM Disciplinary Procedures and Appeals Handbook. The Committee noted that on 1 October 2018, the London Stock Exchange (**LSE**) published AIM Notice 54 which notice provides feedback on the LSE's consultation published in July 2018 that proposed changes to the AIM Disciplinary Procedures and Appeals Handbook and confirms the resulting changes to the Handbook and consequential amendments to the AIM Rules for Companies and AIM Rules for Nominated Advisers. It was noted that the LSE had published an extract to the notice that sets out the amendments to the AIM Rules.

5.4 MAR

- (a) Updated ESMA MAR Q&A. The Committee noted that on 1 October 2018 and 12 November 2018, ESMA had published updated versions of its Q&A on MAR. In addition, the Committee noted that on 1 October 2018, ESMA added three new questions and answers relating to the delay of disclosure of inside information by a credit or financial institution to preserve financial stability under Article 17(5) MAR. It was further noted that on 12 November 2018, ESMA added one new question and answer on the application of the prohibition contained in Article 19(11) MAR to issuers. Victoria Youngusband agreed to update the Joint Working Group MAR Q&A to reflect the Q&A on Article 19(11).
- (b) Consultation on FCA Knowledge Base Technical Note on periodic financial information. See discussion in relation to item 3.6 above.
- (c) ESMA report on sanctions under MAR. The Committee noted that on 15 November 2018, EMSA published its first annual report concerning administrative and criminal sanctions as well as other administrative measures issued by National Competent Authorities under MAR.

5.5 Accounting

- (a) BEIS Committee inquiry on the future of audit. The Committee noted that on 12 November 2018, the BEIS Committee announced the launch of an inquiry examining the future of audit. It was noted that the inquiry will begin at the start of 2019 and will focus on the likely impact of the CMA market study of the audit sector (see item 5.5(b)) and the review of the FRC in improving quality and competition in the audit market and reducing conflicts of interest. It was further noted that the BEIS Committee intends to feed into the CMA study and ensure audit reform is linked to coherent reform of the wider corporate governance agenda (including the findings of the Kingman review once published).
- (b) CMA launches a review of the statutory audit sector. The Committee noted that on 9 October 2018, the Competition and Markets Authority (CMA) issued a press release announcing the launch of a detailed market study of the statutory audit sector to examine concerns that it is not working well for the economy or investors. It was noted that this follows growing concerns about statutory audits, in particular following the collapse of Carillion and the criticism of those charged with reviewing the organisation's books, as well as recent poor results from reviews of audit quality. The Committee noted that the market study notice, invitation to comment (which closed on 30 October 2018) and CMA press release can be found on the statutory audit market study webpage.

5.6 Takeovers

- (a) Brexit no deal SI and Takeover Panel consultation paper. As discussed at item 4.1 above, it was noted that the draft Takeovers (Amendment) (EU Exit) Regulations 2019 will make the changes required to Part 28 Companies Act

2006 to enable the UK takeovers regime to operate outside the EU framework of the Takeovers Directive (2004/25/EC) in the event of a no deal Brexit. It was noted that on 5 November 2018, the Code Committee of the Takeover Panel published PCP 2018/2 on the proposed changes to the Takeover Code relating to the UK's withdrawal from the EU and that the consultation closes on 17 December 2018. Chris Pearson reported that he would convene a meeting of the Joint Takeovers Working Party to review these documents and, if appropriate, respond to the PCP.

- (b) Compliance with Takeover Code Rule 15(b). The Committee noted that on 3 October 2018, Chris Pearson received an email from the Takeover Panel that highlights that there have been a number of recent cases where Rule 15(b) has not been properly complied with. This email was circulated to members of the Committee on 4 October 2018.
- (c) David King's challenge to the Takeover Panel's contempt of court proceedings rejected. The Committee noted that on 14 November 2018, the Outer House of the Scottish Court of Session issued an opinion rejecting a challenge brought by Mr King against contempt of court proceedings issued against him by the Takeover Panel. It was noted that the Takeover Panel had applied to the court to find Mr King guilty of contempt of court due to his failure to comply with the court's order dated 22 December 2017 (as confirmed on appeal) that required Mr King to make a mandatory offer pursuant to Rule 9 of the Takeover Code for Rangers International Football Club plc within 30 days.

5.7 Miscellaneous

Modern slavery. The Committee noted that on 18 October 2018, the Home Office published its 2018 UK Annual Report on Modern Slavery that provides an overview of modern slavery in the UK and explains how the UK has responded to this threat over the last 12 months. It was noted that the Home Office had also published a press release announcing that it is writing directly to chief executives of 17,000 businesses telling them to open up about modern slavery in their supply chains, or risk being named as in breach of the law.

5.8 Cases

- (a) Liberty Partnership Limited v (1) Geoffrey Tancred (2) Gillian Tancred [2018] EWHC 2707 (Comm). The Committee noted that the High Court held that an SPA executed as a deed by an individual that complied with the formalities in section 1 Law of Property (Miscellaneous Provisions) Act 1989 was a specialty within the meaning of section 8 Limitation Act 1980 even if it had not been sealed. It was noted that, therefore, as section 8 provides for a limitation period of 12 years for actions on a specialty (as opposed to six years for actions on simple contracts (see section 5 Limitation Act 1980)), the 12 year limitation period applied to the SPA in the same way as if it had been sealed.
- (b) (1) Astor Management AG (2) Astor Resources AG v Atalaya Mining Plc & others [2018] EWCA Civ 2407. The Committee noted that the Court of Appeal had to consider the proper construction of a contractual trigger event to

determine whether deferred consideration had become payable. It was noted that the Court of Appeal considered whether a "principle of futility" existed. The meeting noted the decision of the Court of Appeal in which it held that in certain circumstances a condition precedent may, as a matter of construction and in light of subsequent events, no longer apply or may cease to have effect – for example, if a condition precedent required a regulatory approval, but a law was passed that meant that the approval was no longer required, the condition precedent would simply fall away and become inoperative. Subject to this, the Court of Appeal confirmed that ordinary rules of contract interpretation applied and that there is no principle of law or interpretative presumption that enables a contractual precondition to the accrual of a right or obligation to be disapplied just because complying with it is considered by the court to serve no useful purpose. The meeting noted that the Court of Appeal rejected the argument that the condition precedent to obtain a senior debt facility was satisfied by intra-group funding and confirmed that describing the debt facility as "senior" was a relevant factor when interpreting the condition precedent.

- (c) Fawaz Al-Hasawi v Nottingham Forest Football Club Ltd [2018] EWHC 2884 (Ch). The Committee noted that the High Court reversed a Master's decision that an entire agreement clause in a share purchase agreement, which had no wording negating reliance on representations or excluding liability for misrepresentation, excluded claims in misrepresentation when construed in the context of the share purchase agreement as a whole. The Committee noted that the case serves as a reminder that clear words are needed to exclude misrepresentation claims and that the High Court decision was consistent with views expressed by members when the earlier decision had been discussed.
- (d) Cool Seas (Seafoods) Limited v Interfish Limited & others [2018] EWHC 2038 (Ch). The Committee noted that this is a rare example of a case in which a majority shareholder succeeded in an unfair prejudice petition under section 994 Companies Act 2006. It was noted that a majority shareholder will normally have the power to remedy any unfairly prejudicial conduct of the company's affairs by other means, for example, by removing any directors that have committed any wrongdoing and bringing legal proceedings. However, the Committee noted that in this case, the majority shareholder was not able to remedy the harm caused by the directors' breaches of duty because the shareholders' agreement contained a reserved matters provision that provided that the consent of the minority shareholder was required for the commencement of proceedings by the company. The minority shareholder refused to give its consent and as such, no "self-help" remedy was available to the majority shareholder in these circumstances.

6. Any other business

- 6.1 *Committee membership changes:* The Chairman reported that Simon Jay was retiring and stepping down from the Committee and that, accordingly, this would be his last meeting. On behalf of the Committee, the Chairman offered his thanks to Simon for his contribution to the work of the Committee over his many years as a member. It was noted that Sam Bagot would be replacing Simon on the Committee. With regard to the vacancy for a new Committee member, the Chairman reported that he had

received a number of strong applications for the position and that he had asked Vanessa Knapp, as the sole independent member of the Committee, to assist him in reviewing the applications.

- 6.2 *CLLS events*: Kevin Hart reported that the annual CLLS Committee members' dinner would be held on Monday 21 January. He also reported that the CLLS was intending to hold a conference in May focusing on litigation and arbitration issues post-Brexit. An agenda would be circulated in due course if members or others in their respective firms were interested in attending.

25 February 2019