

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 309th meeting
at 9:00 a.m. on 26th May 2021

1. **Welcome and apologies**

In attendance: John Adebisi; Mark Austin; Sam Bagot; Edward Baker; Adam Bogdanor; Robert Boyle; Lucy Fergusson; Chris Horton; Vanessa Knapp; Stephen Matthews; John Papanicola; Jon Perry; Caroline Rae; Richard Spedding; Patrick Speller; Allan Taylor; Liz Wall; Martin Webster; Victoria Younghusband; David Pudge (Chair); and Juliet McKean (Secretary).

Apologies: Tom Brassington and Nicholas Holmes.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 31 March 2021 was circulated to members on 28 April 2021. The Chair noted that no comments had been received on the draft minutes and, therefore, they were considered settled.

3. **Matters arising**

3.1 *Dormant Assets Bill.* The Chair reported that, following the Government's response to its consultation on expanding the Dormant Assets Scheme that was published early this year, the Dormant Assets Bill was introduced in the House of Lords on 12 May 2021. Robert Boyle, who had led on the Committee's response to the consultation, noted that the Bill reflects the proposals in the Government's response.

3.2 *Financial Services Bill receives Royal Assent.* The Chair reported that on 29 April 2021 the Financial Services Bill received Royal Assent, becoming the Financial Services Act 2021. It was noted that the Act contains a number of measures relating to PDMR dealings, insider lists and market abuse, which come into force on 29 June 2021. It was reported that the most notable change for issuers is that the Act amends UK MAR to require issuers to disclose PDMR dealings to the market within two working days of those transactions having been notified to them by their PDMRs or PCAs - as opposed to within three business days of the transaction taking place. It was also reported that the Act clarifies that issuers **and** any persons acting on their behalf or on their account are required to maintain an insider list – this change to UK MAR (which currently uses "or") is to remove the confusion around whether issuers' advisers are also required to draw up their own insider list (i.e. separate to the issuer's insider list). It was noted that this change reflects market practice.

3.3 *National Security and Investment Bill receives Royal Assent.* The Chair reported that on 29 April 2021 the National Security and Investment Bill received Royal Assent,

becoming the National Security and Investment Act 2021. The Chair noted the following in respect of the Act:

- Despite efforts made by the Committee and the Law Society, the Act has been passed largely in the same form as the Bill. However, one key amendment is that the 15% threshold for shares/votes for the mandatory notification regime has been removed (leaving the 25%, 50% and 75% thresholds and the trigger event of the acquisition of voting rights that enable the person to secure or prevent the passage of any class of resolution governing the affairs of the entity).
- Certain of the sector definitions have helpfully been narrowed following the consultation process.
- The new regime is due to commence by the end of 2021. However, a significant number of statutory instruments need to be consulted on and passed before the regime comes into force. In addition, the Statement of Policy Intent is due to be published for consultation in July.

3.4 *Ministerial statement on Lord Hill's recommendations.* The Chair reported that on 19 April 2021 the Chancellor issued a written ministerial statement setting out how the Government intends to take forward the six key recommendations directed towards HM Treasury made in Lord Hill's review of the UK's listing regime. It was reported that the Chancellor, amongst other things, confirmed that: (i) the Government will bring forward a public consultation on the UK's prospectus regime later this year; (ii) he will convene a group to consider how to improve the efficiency of further capital raising by listed companies; and (iii) BEIS will take forward the recommendation as to how technology can be used to improve retail investor involvement in corporate actions and their undertaking of an appropriate stewardship role.

3.5 *Pension Schemes Act 2021.* The Chair reported that on 22 April 2021 the Committee submitted a response to the Pensions Regulator's consultation on its approach to the investigation and prosecution of the new criminal offences under the Pension Schemes Act 2021. It was noted that the Committee's response endorsed the response submitted by the Association of Pension Lawyers which had shared a copy of its response to the consultation with the Committee.

3.6 *Law Commission's 14th Programme of Law Reform.* The Chair reported that he had sent a letter to the Law Commission in April registering the Committee's support for the Law Commission's proposal to review the law of deeds and variation of contracts as part of the Law Commission's 14th Programme of Law Reform.

3.7 *BEIS consultation on requiring mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs.* The Chair noted that on 5 May 2021 a joint working group of the Committee, the CLLS Planning and Environmental Law Committee and the Law Society submitted a response to the BEIS consultation on requiring mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs.

4. **Discussions**

- 4.1 *FCA/CLLS CLC Liaison Committee call on 10 May 2021.* Victoria Younghusband provided an update of those matters discussed on the call.
- 4.2 *Takeover Panel publishes Response Statement on conditions to offers and the offer timetable.* The Chair reported that on 31 March 2021 the Takeover Panel published Panel Statement 2021/5 announcing the publication by the Code Committee of Response Statement 2020/1, which sets out amendments to the Takeover Code in relation to conditions to offers and the offer timetable that take effect on 5 July 2021. The Chair noted that the Panel's response was broadly consistent with the Joint CLLS CLC and Law Society CLC Takeovers Working Group's response to the Panel's consultation (PCP 2020/1). It was noted that the individual responses received from respondents to PCP 2020/1 and Instrument 2021/1, which makes the amendments to the Code adopted in RS 2020/1, were also published. It was also noted that the Joint Takeovers Working Group is preparing a draft specimen set of offer terms and conditions reflecting the revised Takeover Code rules.
- 4.3 *FCA consultation paper on SPACs.* Noting that this consultation had been discussed with the FCA on the call referred to in minute 4.1 above, the Chair reported that on 30 April 2021 the FCA published a consultation paper (CP21/10) on proposed changes to aspects of the Listing Rules that apply to special purpose acquisition companies (SPACs). It was noted that the FCA is proposing to remove the presumption of suspension for a SPAC's listed shares when the SPAC identifies a potential acquisition where certain criteria are met in respect of the SPAC. It was also noted that the FCA states that by setting clear conditions under which it will not look to suspend, its rules will provide strong investor protection, give greater certainty for issuers and align more closely with standards in other international markets. The Chair noted that the initial views of the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes, had been shared with the FCA on the FCA/CLLS CLC Liaison Committee call on 10 May 2021 (see minute 4.1 above) and that the Joint Prospectus and Listing Rules Working Group is preparing a formal response to this consultation, which will be submitted by 28 May 2021 (being the consultation closing date).
- 4.4 *FCA issues warning notice to Carillion (in liquidation) and unnamed executive directors.* The Chair reminded members of the Committee that on 13 November 2020 the FCA announced that it had issued a warning notice to Carillion and certain unnamed executive directors. The Chair reported that, in the notice, the FCA states that it considers that Carillion breached: (i) Article 15 MAR (market manipulation) by disseminating information that gave false or misleading signals as to the value of its shares; (ii) Listing Rule 1.3.3R (prohibition on publication of misleading information) by failing to take reasonable care to ensure that its announcements were not misleading, false or deceptive and did not omit data likely to affect the import of the information; (iii) Listing Principle 1 (procedures, systems and controls) by failing to take reasonable steps to establish and maintain adequate procedures, systems and controls to enable the company to comply with its obligations under the Listing Rules; and (iv) Premium Listing Principle 2 (acting with integrity) by failing to act with integrity towards its holders and potential holders of its premium listed shares. It was noted that the FCA states that it considers that the relevant unnamed executive directors were knowingly concerned in the above breaches. It was also noted that the

warning notice is not a final decision of the FCA but indicates the FCA's intention to take action for the conduct referred to in the notice - in this case, a public censure as opposed to a financial penalty is proposed. The Chair also reported that on 14 January 2021 the Insolvency Service issued a press release stating that it had applied to the High Court for director disqualification orders against eight directors and former directors of Carillion. The Committee discussed what it saw as the key aspects of this decision by the FCA.

- 4.5 *AGMs as Covid-19 restrictions continue to be eased.* The Chair led a discussion on market practice. See also the case at item 5.9(a).

5. **Recent developments**

The Committee noted the following additional items in sections 5.1 to 5.9 which were set out in the agenda but which time did not allow them to consider, other than the Chair briefly reported on items 5.2(c) and 5.9(a) and the Committee briefly discussed the 'headcount' test issue raised in the case in item 5.9(c) (noting that there is a question around whether this test is fit for the modern world and that it had been removed as a strict test in jurisdictions such as Australia and Hong Kong; it was expected that the Law Commission will be considering whether this test should be reformed in due course following its scoping study on intermediated securities) and the decision in item 5.9(d).

The Chair also reported that the FRC has recently published research on workforce engagement under the UK Corporate Governance Code that provides a useful summary of how companies are engaging with their workforce in order to satisfy the Code requirements.

5.1 **Company law**

- (a) *Companies House resumes same day service for change of name and incorporation.* On 22 April 2021, Companies House updated its 'Coronavirus guidance for Companies House customers' webpage to note that customers can once again use the same day filing service to electronically file a change of company name or incorporate a company. Companies House notes that applications must be made before 11.00 am and that applications made after 11.00 am will be processed on the next working day. All other same day services remain suspended until further notice.
- (b) *Automatic Companies House filing extensions granted by CIGA 2020 ended.* On 25 March 2021, Companies House announced that the automatic extensions in respect of accounts, confirmation statements and event-driven filings granted by the Corporate Insolvency and Governance Act 2020 (**CIGA 2020**) would come to an end for filing deadlines that fall after 5 April 2021. For accounts filing deadlines that fall after 5 April, eligible companies can still apply for a 3 month extension which will be granted for companies that cite Covid-19 issues in their application – although, companies that have already had their accounts deadline extended will not be eligible, as the law only allows a maximum filing period of 12 months.

5.2 Corporate governance

- (a) *Better Business Act campaign.* The mission of the 'Better Business Act' campaign is to change UK law to make sure every single company in the UK, whether big or small, aligns the interests of their shareholders with those of wider society and the environment. Its objective is to amend s.172 of the Companies Act 2006 (CA 2006) in line with these principles.
- (b) *Corporate Governance Code increases reporting on remuneration practices.* On 12 May 2021, the FRC published a report on changes in remuneration reporting following the UK Corporate Governance Code 2018 following research conducted by the FRC and The University of Portsmouth. The research suggests that companies are better aligning their board remuneration policy and practices with long-term shareholder interests. The research assessed a sample of FTSE 350 companies to determine the extent to which they have applied requirements set by the updated Corporate Governance Code in 2020.
- (c) *Glass Lewis overview on 'Say on Climate' votes.* On 27 April 2021, Glass Lewis published its initial observations and considerations when evaluating management and shareholder proposed resolutions dealing with 'Say on Climate' for the 2021 proxy season. Glass Lewis notes that given the broad variety of proposals and the lack of standardisation on how shareholders should evaluate each of the climate plans submitted to a vote, it will continue to maintain a case-by-case approach on this issue. Glass Lewis states that it intends to codify its approach in advance of the 2022 proxy season, following investor, corporate and stakeholder engagements.
- (d) *ecoDa Corporate Governance Guidance and Principles for Unlisted Companies in Europe.* On 21 April 2021, the European Confederation of Directors' Associations published an updated version of its Corporate Governance Guidance and Principles for Unlisted Companies in Europe (along with a short version and a self-evaluation questionnaire which companies can use to periodically measure their corporate governance performance).

5.3 Reporting and disclosure

- (a) *Proposal for a Corporate Sustainability Reporting Directive.* On 21 April 2021, the European Commission announced the adoption of a proposal for a Corporate Sustainability Reporting Directive, which would amend the existing reporting requirements of the Non-Financial Reporting Directive. This proposal is part of a package of measures to help improve the flow of money towards sustainable activities across the European Union. The proposal: (i) extends the scope of the EU's sustainability reporting requirements to all large companies and all companies listed on regulated markets (except listed micro-enterprises); (ii) requires the audit of reported information; (iii) introduces more detailed reporting requirements, and a requirement to report according to mandatory EU sustainability reporting standards; and (iv) requires companies to digitally 'tag' reported information, so it is machine readable and feeds into the European single access point envisaged in the capital markets union action

plan. The Commission has also published a Q&A on the proposed new directive, the text of communication on EU taxonomy, corporate sustainability reporting, sustainability preferences and fiduciary duties and a factsheet on EU sustainable finance April package.

- (b) *FRC publishes summaries of its corporate reporting reviews.* On 26 March 2021, the FRC published, for the first time, summaries of its corporate reporting reviews. This increased transparency is aligned with a recommendation made in the Kingman review that the FRC's reviews should be made publicly available. Due to company law requirements, summaries can only be published with the consent of the company. However, as part of the audit and corporate governance consultation, BEIS is consulting on proposals to allow the regulator to publish summaries without the consent of companies, once sufficient safeguards around confidential information are in place.

5.4 Equity capital markets

- (a) *ESMA clarification on disclosure obligations for UK issuers post Brexit.* On 31 March 2021, ESMA announced the publication of a public statement clarifying the application of the Transparency Directive requirements by UK issuers with securities admitted to trading on regulated markets in the EU.
- (b) *Updated Q&A on the Prospectus Regulation.* ESMA updated its Q&A on the Prospectus Regulation (**PR**) on 31 March 2021 and 5 May 2021. On 31 March, ESMA announced the addition of four new Q&As on: (i) the application of the exemption in Article 1(5)(b) PR in a situation concerning non-transferable securities; (ii) the application of the PR where shares can be exchanged for global depository receipts (and vice versa); (iii) dissemination of amended advertisements; and (iv) the status of transferable securities. On 5 May, ESMA announced the addition of three new Q&As on: (i) the application of Article 4(1) of the CRA Regulation to credit rating disclosure in prospectuses; (ii) how to determine home Member State in the context of global depository receipts over shares; and (iii) the publication of supplements to prospectuses when new audited annual financial information is published by a non-equity issuer.
- (c) *PMB No. 33.* On 29 March 2021, the FCA published Primary Market Bulletin No. 33 that contains, amongst other things, information on: (i) Brexit-related changes for EEA audit firms; (ii) the FCA's new online portal for submitting major shareholding notifications (TR-1 Forms); (iii) the FCA's review work on issuers' compliance with major shareholding notifications and deficiencies observed in reporting total voting rights; and (iv) the FCA's response to feedback received on the FCA's review of delayed disclosure of inside information (published in PMB No. 31).
- (d) *Prospectus Regulation.* On 26 March 2021, the Commission delegated regulation supplementing the Prospectus Regulation as regards the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division was published in the Official Journal. The regulation

entered into force on the twentieth day following its publication in the Official Journal.

5.5 **MAR**

- (a) See minute 3.2 and item 5.4(c) above.

5.6 **Accounting**

- (a) *FRC thematic review on interim reporting.* On 18 May 2021, the FRC announced the publication of a thematic review on interim reporting, ahead of the 2021 interim reporting season. The review highlights examples of good practice in company's interim reporting and areas where further improvements are required. The FRC reviewed the reports of 20 quoted companies across a range of industries to assess the quality of interim reporting. Overall, the FRC was pleased with the quality of interim reports, with most companies taking into account FRC Covid-19 recommendations to enhance their disclosures.

5.7 **Takeovers**

- (a) *Takeover Panel publishes amendments to Takeover Code to replace gender specific terms.* On 15 April 2021, the Takeover Panel issued Panel Statement 2021/7 announcing the publication of Instrument 2021/2, which makes amendments to the Takeover Code to replace gender specific terms with gender neutral terms. The amendments do not materially alter the effect of the provisions in question and, therefore, have been made without formal consultation. The amendments will take effect on 5 July 2021 - the same day that the amendments to the Code made by Instrument 2021/1 (see minute 4.2) will take effect.
- (b) *Next Director General of the Takeover Panel.* On 15 April 2021, the Takeover Panel announced that Ian Hart will be the next Director General of the Takeover Panel. Ian will take up his appointment on 1 July 2021 and will be on a two year secondment from UBS.

5.8 **Miscellaneous**

- (a) *Director disqualification.* On 12 May 2021, the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill was introduced to Parliament (Explanatory Notes were also published). The Bill includes new powers extending the scope of the current investigation and enforcement regime under the Company Directors Disqualification Act 1986 to include former directors of dissolved companies, without it being necessary to first restore the company to the register. These measures were originally consulted on in the BEIS 2018 consultation on Insolvency and Corporate Governance.
- (b) *HMRC stamp duty procedures.* On 30 April 2021, HMRC updated its guidance on completing a stock transfer form to confirm that where stamp duty has been paid on a stock transfer form (**STF**) since HMRC introduced its new stamp duty processes in March 2020 due to Covid-19, that STF is duly stamped for all purposes – HMRC states that documents do not need to be

resubmitted to be stamped under the previous physical stamping system. In its guidance on stamp duty reliefs and exemptions on share transfers, HMRC also confirms the same in respect of relief from stamp duty that HMRC has granted since HMRC introduced its new stamp duty processes for claiming reliefs in March 2020. The references to 'temporary' have also been removed, indicating that the temporary stamp duty measures are now permanent.

- (c) *FCA proposals to strengthen its financial promotion rules for high-risk investments*. On 29 April 2021, the FCA announced the publication of a discussion paper (DP21/1) on strengthening its financial promotion rules for high-risk investments and firms approving financial promotions. The discussion paper seeks views on three areas where changes could be made to address harm to consumers from investing in inappropriate high-risk investments. The three areas of focus are the classification of high-risk investments, the segmentation of the high-risk investment market and the responsibilities of firms which approve financial promotions.

5.9 Cases

- (a) *Hertfordshire County Council and others v Secretary of State for Housing, Communities and Local Government [2021] EWHC 1093 (Admin)*. The High Court held that the Local Government Act 1972 (LGA), which governs meetings of local authorities and includes reference to the 'place' of such meetings, to people being 'present' at them and to the persons who may 'attend', does not permit local authority meetings to take place virtually. The court held that primary legislation would be required to allow virtual meetings under the LGA. Although there are distinguishing features given the specific wording used in the LGA, there is a potential to read across to shareholder meetings and section 311 CA 2006.
- (b) *Sir Henry Royce Memorial Foundation v Mark Gregory Hardy [2021] EWHC 714 (Ch)*. The High Court held that a request made by a member to a company for access to the register of members under section 116 CA 2006 was invalid. The original request did not contain the information required by section 116(4)(d) CA 2006 and the court held that the invalid notice could not be corrected by sending the additional information by email (as the member had done so) – although the court noted that it would have been possible for the member to send a further valid request. The High Court also held that the notice was invalid because one of its purposes was not a 'proper purpose' within section 117(3) CA 2006.
- (c) *Re GW Pharmaceuticals plc [2021] EWHC 716 (Ch)*. In an application for an order convening a meeting of members to consider a proposed scheme of arrangement, the High Court considered how votes should be counted for the purposes of the 'headcount' test in section 899(1) CA 2006 in a situation where a single member might split its vote or appoint multiple proxies. This was particularly relevant in this case as 97.4% of the scheme shares were held by one depositary. The High Court held that, on the facts of the case, the appropriate solution to the 'headcount' test issue was to treat a holder of scheme shares that casts a vote both for and against the scheme as voting in favour of the scheme if that holder casts more votes for the scheme than

against the scheme, and otherwise that it should be treated as voting against the scheme. This would apply whether such votes were cast directly by the member splitting its vote or by appointing multiple proxies on its behalf. The High Court noted that adopting this approach may improve the prospects of the scheme achieving the necessary majority in number at the court meeting. However, it noted that if any issues arise in this respect which might be said to have affected the result of the court meeting, or otherwise go to the fairness of the voting on a dissenting member, the court would be able to deal with these issues at the sanction hearing when exercising its discretion.

- (d) *Re William Hill PLC [2021] EWHC 967 (Ch)*. The High Court sanctioned a transfer scheme of arrangement under Part 26 CA 2006 to give effect to an agreed takeover of William Hill PLC by a US operator, which was its partner under a joint venture agreement. The High Court held that shareholders voting to approve the scheme had not been misled by a failure to disclose the precise terms of a "poison pill" in the joint venture agreement between William Hill PLC and the bidder.

10 June 2021