

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 311th meeting
at 9:00 a.m. on 29th September 2021
by telephone

1. **Welcome and apologies**

In attendance: John Adebisi; Mark Austin; Sam Bagot; Edward Baker; Adam Bogdanor; Lucy Fergusson; Nicholas Holmes; Chris Horton; Vanessa Knapp; Stephen Matthews; John Papanicolaou; Jon Perry; Patrick Speller; Allan Taylor; Liz Wall; Martin Webster; Victoria Younghusband; David Pudge (Chair); Juliet McKean (Secretary); and Julie Farley (alternate for Caroline Rae).

Apologies: Robert Boyle; Tom Brassington; Caroline Rae; and Richard Spedding.

2. **Approval of minutes**

A draft of the minutes of the meeting held on 21 July 2021 was circulated to members on 11 September 2021. The Chair asked members to send any comments on the minutes to the Secretary in the next couple of days, otherwise the minutes would be considered settled.

3. **Matters arising**

3.1 *FCA new rules on SPACs.* The Chair reported that on 27 July 2021 the FCA announced the publication of final rules and changes to the FCA's Listing Rules for certain SPACs, which came into force on 10 August 2021. It was noted that the FCA Policy Statement PS21/10 summarises the feedback the FCA received to its consultation, sets out the FCA's policy response and contains the amendments made to the FCA Technical Note on cash shells and SPACs. It was also noted that the changes largely reflect the changes proposed by the FCA in its consultation, other than the FCA has: (i) lowered the minimum amount a SPAC would need to raise at initial listing from £200m to £100m; (ii) introduced an option to extend the proposed two year time-limited operating period (or three year period if extended with shareholder approval) by six months, without the need to get shareholder approval (however, the additional six months will only be available in limited circumstances and is intended to provide more time for a SPAC to conclude a reverse takeover where a transaction is well-advanced); and (iii) modified its supervisory approach to provide more comfort prior to admission to listing that an issuer is within the guidance which disapplies the presumption of suspension, rather than only at the point of an announcement.

3.2 *National Security and Investment Act 2021.* The Chair noted that as the Committee was informed at the meeting held in July by Chris Blairs, Deputy Director at the

Investment Security Unit, BEIS announced on 20 July 2021 that the new national security regime pursuant to the National Security and Investment Act 2021 (**NSI Act**) would commence on 4 January 2022 and published the following documents: (i) the first set of guidance documents on the NSI Act (i.e. an overview of the NSI Act; how the NSI Act could affect people or acquisitions outside the UK; how the NSI Act works alongside regulatory requirements; and guidance for higher education and research-intensive sectors); (ii) a draft of the notifiable acquisition statutory instrument, which sets out the proposed descriptions of the 17 sectors subject to the mandatory notification requirements; and (iii) a consultation on the draft statement of policy intent that describes how the SoS expects to use the call-in power in the NSI Act. The Chair reported that the Committee submitted a response to the consultation on the draft statement of policy intent on 30 August 2021.

The Committee also noted that a draft of the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021, and related explanatory memorandum, have also been published and that these regulations specify, for the purpose of calculating monetary penalties on businesses for certain offences under the NSI Act, that a business includes a sole trader, how turnover is to be assessed and when a business is deemed to be controlled by another business for the calculation of turnover. It was noted that a draft of these regulations and a draft of the notifiable acquisition statutory instrument mentioned above were laid before Parliament on 6 September 2021, and will come into force on 4 January 2022.

- 3.3 *HMT consultation on a power to block listings on national security grounds.* The Chair reported that on 24 August 2021 the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes, submitted its response to HMT's consultation on a power to block listings on national security grounds. The Chair also reported that members of the working group had attended a virtual meeting with HMT on 29 July 2021 to discuss the working group's views on the proposed power ahead of the response being submitted.
- 3.4 *Law Commission discussion paper on corporate criminal liability.* The Chair reported that on 31 August 2021 the Committee submitted its response to the Law Commission's discussion paper on corporate criminal liability. The Chair noted that in the response the Committee states that it supports the conclusions made in a draft of the response to the discussion paper prepared by the CLLS Corporate Crime and Corruption Committee, although the Committee's response also raises some additional points which focus on certain of the company law aspects of the issues raised in the discussion paper. The Chair thanked Martin Webster and Vanessa Knapp for their work in helping with preparing the Committee's response.
- 3.5 *FCA consultation on enhancing climate-related disclosures by standard listed companies.* The Chair reported that on 10 September 2021 a joint working group of the Committee, the CLLS Planning & Environmental Law Committee and the Law Society Company Law Committee, led by Chris Horton, submitted its response to the FCA's consultation on enhancing climate-related disclosures by standard listed companies.
- 3.6 *FCA consultation on reforms to improve the effectiveness of UK primary markets.* The Chair reported that on 14 September 2021 the Joint Prospectus and Listing Rules

Working Group, led by Nicholas Holmes, submitted its response to the FCA's consultation on reforms to improve the effectiveness of UK primary markets.

- 3.7 *HMT consultation on review of the UK prospectus regime.* The Chair reported that on 24 September 2021 the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes, submitted its response to HMT's consultation on the review of the UK prospectus regime. The Chair also reported that members of the working group had attended a virtual meeting with HMT on 13 September 2021 to discuss the working group's views on the prospectus regime ahead of the response being submitted.

4. **Discussions**

- 4.1 *Updated ESMA Q&As on the Market Abuse Regulation.* The Chair reported that on 6 August 2021 ESMA published an updated version of its Q&As on the Market Abuse Regulation that includes new Q&As on: (i) the interaction between MAR and the Credit Rating Agencies Regulation (1060/2009) - credit ratings, rating outlooks and information relating thereto are presumed to be inside information until disclosure to the public; (ii) disclosure to the public of credit ratings and inside information - credit ratings, rating outlooks and information relating thereto are no longer to be considered inside information once disclosed on the public website of the credit rating agency; and (iii) distribution of subscription ratings and disclosure of inside information - credit ratings are no longer to be considered inside information once disclosed to a distribution list of subscribers. The Chair led discussions on whether these new Q&As result in any change in practice for issuers where an issuer is informed of a rating change by a credit ratings agency usually with 24 hours' notice before the agency publishes the change.
- 4.2 *DWP consultation on the draft Notifiable Events (Amendment) Regulations 2021.* The Chair reported that on 8 September 2021 the Department for Work and Pensions (**DWP**) published a consultation on a draft of the Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021 that: (i) provide for the addition of two new notifiable events and the removal of wrongful trading as a notifiable event for the purposes of the current notifiable events regime pursuant to section 69 of the Pensions Act 2004 – the two new notifiable events being: (a) the intended sale of a material proportion of the business or assets of a scheme employer (material proportion being a proportion that accounts for more than 25% of either the scheme employer's consolidated revenues or gross assets); and (b) the intended granting or extending of a relevant security by a scheme employer over its assets such that the debt would get priority over the scheme on an employer insolvency; and (ii) set out the three events that the new duty under section 69A of the Pensions Act 2004 is proposed to apply to, being the two proposed new notifiable events plus an existing one. It was noted that the consultation closes on 27 October 2021. See also item 5.8(a).
- 4.3 *FCA consultation on diversity and inclusion on company boards and executive committees.* The Chair reported that on 28 July 2021 the FCA announced the publication of a consultation on proposals to improve transparency for investors on the diversity of listed company boards and their executive management teams that would amend the: (i) Listing Rules to require listed companies to publish annually a 'comply or explain statement' on whether they have achieved certain proposed targets for gender and ethnic minority representation on their boards and data on the gender

and ethnicity composition of their boards and most senior level of executive management; and (ii) DTRs to require companies to ensure any existing disclosure on diversity policies addresses key board committees and also considers broader aspects of diversity, such as ethnicity, sexual orientation, disability and lower socio-economic background. The Chair noted that a working group of the Committee, led by Nicholas Holmes, is preparing a response to this consultation, which is due to be submitted by 20 October 2021. It was further noted that subject to consultation feedback and FCA Board approval the FCA will seek to make relevant rules by late 2021 and proposes that the new Listing Rules and DTRs would apply to accounting periods beginning on or after 1 January 2022. See also item 5.2(d).

- 4.4 *'oneNDA for M&A' project.* The Chair reported that the oneNDA project has produced a standard NDA for use in B2B procurement processes and that a number of law firms were involved in its creation and it is backed by a large number of corporates and financial institutions. The Chair also reported that oneNDA has recently approached law firms and others to kick off its next standardisation project, which is to build an M&A-specific 'bolt-on' to the oneNDA, resulting in a standard document for use industry-wide on M&A transactions. The Chair led discussions on the new oneNDA project.
- 4.5 *Better Business Act campaign.* The Chair reported that the note that considers the pros and cons of amending directors' duties under the Companies Act 2006 in the way proposed by the Better Business Act campaign and suggestions on possible alternative approaches to propose, which has been prepared by a working group of the Committee led by Lucy Fergusson, has been updated since the meeting of the Committee held in July. Lucy Fergusson led discussions on the changes that have been made to the note and the next steps.

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 5.1(a), 5.3(e), 5.3(f), 5.7(a) and the cases at item 5.9.

5.1 **Company law**

- (a) *Dematerialisation of shares.* On 16 September 2021, the Government published a policy paper announcing a package of proposed regulatory reforms as part of the second phase of the Government's response to recommendations made by the Taskforce on Innovation, Growth and Regulatory Reform on how the UK can reshape its approach to regulation following Brexit. The proposed reforms include the dematerialisation of the minority of shares that are held in paper – stating that it is more expensive and takes longer for holders of paper shares to trade them and there is a risk of certificates going astray. The paper notes that the Government will work with industry, regulators and shareholders in the medium term to determine the best mechanism for converting these paper shares into electronic form, while preserving the rights of existing shareholders.
- (b) *Companies House same day services.* On 19 July 2021, Companies House updated its guidance on filing Companies House Form SH19 (statement of

capital for reduction supported by solvency statement or court order) to announce that a same day service is now available for a private limited company filing a Form SH19 where it has reduced its capital supported by a solvency statement via the 'Upload a document to Companies House' service. The same day service requires the Form SH19 and relevant supporting documents to be uploaded by 11 am. On 23 August 2021, Companies House updated its COVID-19 guidance for Companies House customers to note that the cut off time for using a same day service to electronically file a change of company name or incorporate a company (software filing only) has changed from 11 am to 3 pm.

5.2 Corporate governance

- (a) *FRC lists successful signatories to the UK Stewardship Code.* On 6 September 2021, the FRC announced the publication of a list of successful signatories to the UK Stewardship Code.
- (b) *Updated ICGN Global Governance Principles.* On 3 September 2021, the International Corporate Governance Network (**ICGN**) published its updated ICGN Global Governance Principles.
- (c) *Employment Bill (Private Members' Bill).* On 26 August 2021, the Employment Bill was published on the UK Parliament website, following its presentation and first reading in the House of Commons as a Private Members' Bill on 21 June 2021. The Bill includes an amendment to the CA 2006 to insert a new section 155A (Companies required to have worker representative directors). New section 155A would require regulations to be made that would require qualifying companies to have at least one director who is a worker representative director who would be responsible for bringing the perspective of a worker to the boardroom (rather than for directly representing the interests of the company's workers). The regulations would also require qualifying companies to ensure that its board has a minimum of worker representative directors and that these directors comprise at least one third of membership of the board. A qualifying company is one that: (i) has 250 or more workers; (ii) has 100 or more workers who have triggered the right to have worker representative directors through a prescribed legal procedure; or (iii) made a pre-tax profit of £2.5 million or more in the last year for which accounts are published.
- (d) *FRC research report on board diversity and effectiveness in FTSE 350 companies.* On 20 July 2021, the FRC announced the publication of its research report on board diversity and effectiveness in FTSE 350 companies, which has been published in conjunction with London Business School, Leadership Institute and SQW. The research has found that the effort to diversify boards pays benefits in terms of boardroom culture and performance and the FRC press release states that to maximise these benefits boards should recognise that change takes time and that diversity without active inclusion is unlikely to encourage new talent to the board.

5.3 Reporting and disclosure

- (a) *FRC review findings on viability and going concern disclosures.* On 22 September 2021, the FRC announced the publication of the findings of its review of companies' viability and going concern disclosures which found there were several areas where viability and going concern reporting could be improved. The FRC states that uncertainties that impact viability or going concern should be clearly explained to stakeholders and, when considering how to improve reporting in this area, companies should maintain a focus on providing more informative company specific disclosure which is clear and concise and avoids unnecessary clutter. The FRC also encourages companies to extend the period over which they assess their viability and provide longer term information where possible.
- (b) *FRC Lab survey results and resources for electronic reporting for annual financial reports.* On 9 September 2021, the Financial Reporting Lab (**FRC Lab**) announced the publication of the results of its May 2021 survey that asked companies and service providers to comment on their preparations for the introduction of structured electronic reporting for annual financial reports (DTR 4.1.14) as part of the UK's implementation of the European Single Electronic Format. The survey results show that UK companies have begun to put the right steps in place to meet the requirements, but still have some important outstanding actions. The FRC Lab has also published a list of resources to help companies understand and implement the requirements.
- (c) *FRC findings of its review on Streamlined Energy and Carbon Reporting.* On 8 September 2021, the FRC announced the publication of the findings of its review of reporting on emissions, energy consumption and related matters under the new Streamlined Energy and Carbon Reporting (**SECR**) rules which came into effect on 1 April 2019. The FRC's review considers how a sample of companies and LLPs have complied with the new SECR requirements, highlights examples of emerging good practice and outlines the FRC's expectations for future reporting.
- (d) *FRC Lab report on reporting on risks, uncertainties, opportunities and scenarios.* On 2 September 2021, the FRC Lab announced the publication of a report on reporting on risks, uncertainties, opportunities and scenarios. This report outlines what investors want to understand from corporate reporting on risks, uncertainties, opportunities and the use of scenarios, provides several practical examples of corporate reporting that better meet investors' needs and includes high-level insight into how investors would like reporting on resilience to develop. The FRC Lab has also published a one-page summary of the report.
- (e) *FRC feedback statement on the future of corporate reporting discussion paper.* On 30 July 2021, the FRC published a feedback statement to its discussion paper on the future of corporate reporting which was published in October 2020. The next step for the FRC is to consider how best to develop some of the ideas generated from the discussion paper and feedback over the short, medium and long term. Some of the thinking in the thought leadership paper is inextricably linked to the Government's audit and corporate

governance reform agenda and the transformation of the FRC into ARGAs. The evidence base that the FRC has collected will inform ARGAs's strategy for corporate reporting and promote improvements and innovation, exploring best practice with a wide range of stakeholders.

- (f) *FRC Lab report on reporting on stakeholders, decisions and section 172.* On 19 July 2021, the FRC Lab announced the publication of a report on reporting on stakeholders, decisions and section 172. This report highlights that information on stakeholders and on decisions can help investors understand how a company is progressing in fulfilling its purpose and achieving long-term success and that section 172 statements can be a helpful bridge between the two types of information. The report also outlines what investors want to see reported in these areas and provides examples from current reporting practice that reflect possible helpful ways of addressing these needs. The FRC Lab has also published a summary of the questions for companies to consider in determining what information to report on stakeholders and decisions which meets investors' needs.

5.4 **Equity capital markets**

- (a) *FCA Quarterly Consultation Paper No. 33.* On 3 September 2021, the FCA published Quarterly Consultation Paper No. 33. Amongst other things, the FCA is consulting on consequential changes to the Prospectus Regulation Rules and Listing Rules to align with changes to the FCA Knowledge Base in relation to the prospectus regime that were proposed in Primary Markets Bulletin No. 34. The closing date for these proposed changes is 11 October 2021.
- (b) *Updated ESMA Q&As on the Prospectus Regulation.* On 16 July 2021 and 27 July 2021, ESMA published updated versions of its Q&As on the Prospectus Regulation.
- (c) *ESMA statement on disclosure and investor protection guidance on SPACs.* On 15 July 2021, ESMA announced the publication of a public statement on the prospectus disclosure and investor protection issues raised by SPACs.

5.5 **MAR**

- (a) See item 4.1.

5.6 **Accounting**

- (a) *FRC consultation on proposals to strengthen the UK Audit Firm Governance Code.* On 26 August 2021, the FRC announced the publication of a consultation on proposals to update and strengthen significantly the UK Audit Firm Governance Code in support of the FRC's objectives to promote high-quality audit and audit market resilience. The press release states that the proposals will strengthen the Audit Firm Governance Code in key areas of accountability and firm resilience and emphasise the importance of long-term sustainability, people, culture and employee engagement, in line with the UK Corporate Governance Code. The consultation closes on 18 November 2021.

5.7 Takeovers

- (a) *Takeover Panel decides against amending the Takeover Code in relation to shadow bids.* On 28 July 2021, the Takeover Panel published Panel Statement 2021/14 on disclosure of takeover approaches. In the statement the Code Committee states that it has concluded that it should not make any changes to the existing regime under Rule 2 regarding the disclosure of takeover approaches.
- (b) *Minor amendments to the Takeover Code.* On 15 July 2021, the Takeover Panel published Panel Statement 2021/11 announcing minor amendments to the Takeover Code which took effect on 2 August 2021, including amendments made to reflect the renaming of Institute of Chartered Secretaries and Administrators as The Chartered Governance Institute UK & Ireland.

5.8 Miscellaneous

- (a) *Pension Schemes Act 2021: Third commencement regulations.* On 24 August 2021, the Pension Schemes Act 2021 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2021 were made. These regulations bring into force a number of the provisions of the Pension Schemes Act 2021 on 1 October 2021. The regulations also contain transitional and saving provisions in relation to certain provisions of the Act being brought into force by these regulations.
- (b) *BEIS consultation on reforming competition and consumer policy.* On 20 July 2021, BEIS published a consultation on reforming competition and consumer policy, which closes on 1 October 2021. BEIS is proposing a wide range of reforms to the UK competition regime, including to revise the current jurisdictional thresholds for the merger control regime and to strengthen the Competition and Markets Authority's information collection and related sanctioning powers for companies that slow down or obstruct investigations.
- (c) *HMRC summary of responses on the modernisation of the stamp taxes on shares framework.* On 20 July 2021, HMRC published a summary of the responses it received to its call for evidence (published in July 2020) on the principles and design of a new stamp duty and stamp duty reserve tax (SDRT) framework to inform a longer-term modernisation of stamp duty and SDRT. HMRC states that the call for evidence was well received with agreement that modernisation is much needed and majority support for a single tax for listed and unlisted securities that is self-assessed, with digitisation and movement away from the traditional paper stamping methods. It also states that there was very strong support for measures that would reduce the length of time between a transaction being completed and company share registers being updated. The summary sets out HMRC's response and next steps.

5.9 Cases

- (a) *TMO Renewables Limited (in Liquidation) v (1) Timothy Yeo (2) David Weaver (3) Desmond Reeves (4) Michael McBraida (5) Maxwell Audley [2021] EWHC 2033 (Ch).* The High Court held that the defendant directors

had exercised their power to allot certain shares in TMO Renewables Limited (TMO) for an improper purpose in breach of the directors' duty under section 171 CA 2006. On the facts, the Court determined that the defendant directors had allotted shares with a view to defeating shareholder resolutions aimed at changing control of the board of directors of TMO at a requisitioned shareholders' meeting (and not to raise capital which is the purpose for which the power to allot shares is conferred) – it was common ground that if this was the primary or dominant purpose, then that was an improper purpose. The defendant directors were also held to have breached their section 172 CA 2006 duties in respect of authorising the allotment of certain of the shares because the directors had not been concerned with whether the investor would be able to pay for the shares despite TMO being on the brink of entering insolvency – the shares had been issued as fully paid but on terms that the investor promised to pay the subscription price within two years. The decision is lengthy and much of it is concerned with determining whether the defendant directors had breached their directors' duties based on the facts rather than considering points of law in detail.

- (b) *Harcus Sinclair LLP and another v Your Lawyers Ltd [2021] UKSC 32*. In order to determine whether a non-compete undertaking is a reasonable restraint of trade and, therefore, enforceable, it must be both: (i) reasonable between the parties; and (ii) not contrary to the public interest. To be reasonable between the parties the undertaking must protect the legitimate interests of the party seeking its protection (the **promisee**) and go no further than is reasonably necessary to protect those legitimate interests. In considering a question of law that arose on the facts of this case, the Supreme Court held that when determining the legitimate interests of the promisee the Court can take into account the parties' non-contractual intentions, or what they contemplated would occur, as a consequence of entering into the contract, assessed objectively at the time the contract was made (as well as the contractual obligations of the parties). Therefore, the Supreme Court held that, in respect of a non-compete undertaking in an NDA entered into between two law firms, the Court could take into account, when determining the promisee's legitimate interests, the parties' non-contractual intentions to collaborate informally on a group litigation as a consequence of entering into the NDA, even though the NDA did not include any legally binding obligations on the parties to collaborate – the promisee law firm had legitimate interests in protecting its own proposed group claim from the promisor law firm setting up a rival group claim. The Supreme Court also held that the non-compete undertaking was not a solicitor's undertaking.

6. **Any other business**

It was agreed that the dates for next year's meetings would be circulated following the meeting. It was noted that, COVID-19 restrictions permitting, the aim would be to revert to in-person meetings next year.

19 October 2021