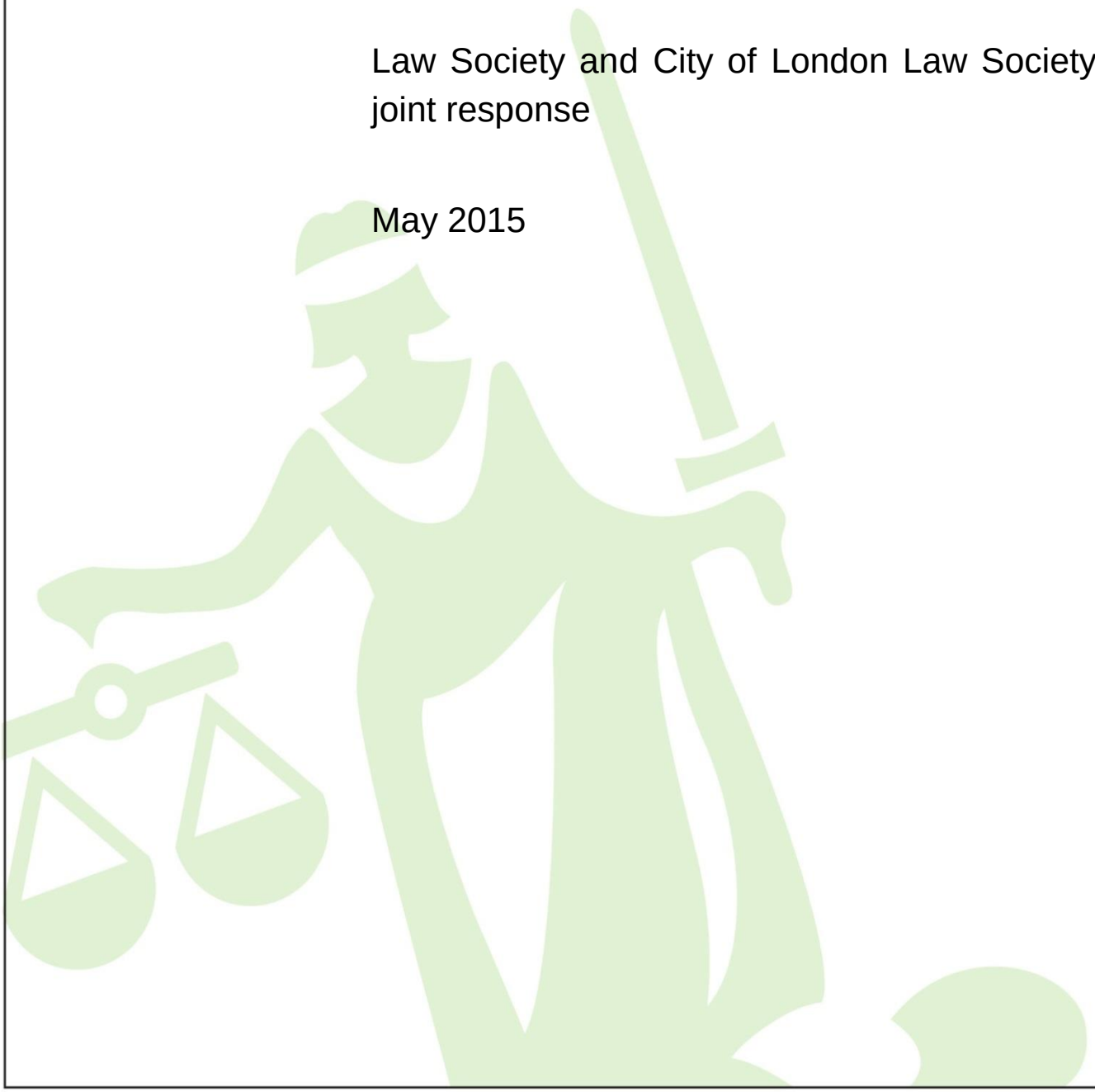
The City of London Law Society

The Law Society

HMT and FCA consultation on the implementation of the Transparency Directive Amending Directive (CP15/11)

Law Society and City of London Law Society joint response

May 2015



Joint Working Party Response to consultation on the implementation of the Transparency Directive Amending Directive (2013/50/EU) and other Disclosure Rule and Transparency rule changes

Introduction

The comments set out in this paper have been prepared jointly by the Listing Rules Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

The Law Society of England and Wales is the representative body of over 160,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee.

The City of London Law Society ("**CLLS"**) represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The Listing Rules Joint Working Party is made up of senior and specialist corporate lawyers from both the Law Society and the CLLS who have a particular focus on the Listing Rules and the UK Listing Regime.

We welcome the opportunity to respond to the joint consultation on, among other things, the implementation of the Transparency Directive Amending Directive (the "**TDAD**") by HM Treasury and the Financial Conduct Authority dated March 2015.

General comments

Generally we note and welcome the approach taken of copying out the text of the TDAD as far as possible. In some places there are some differences between the wording of the rules and the text of the TDAD that have the potential to cause confusion.

Given that the changes consulted on will lead to a number of changes to the current position it would be very helpful if a public alert to the market could be issued setting out the practical impact of the amendments to the rules, for example drawing attention to the fact that interests in non-physically settled financial instruments will need to be disclosed for non-UK incorporated issuers (which is not currently the case). Without such an alert, we think it is likely that market participants will not be aware of the impact of the changes. In addition, since changes to a number of the Technical Notes dealing with DTR5 (UKLA/TN/540.1 – UKLA/TN/551.1) will also be required, we would hope that the UKLA will consult on revised versions of these Technical Notes with a view to the updated guidance coming into effect at the same time as the amendments to DTR5. The "Disclosures of Contracts for Difference – Questions & Answers: Version 3" published by the FSA in November 2010 (the "**2010 Q&A**"), as well as the earlier Versions 1 and 2, were invaluable to market participants in understanding the scope of the UK contracts for differences disclosure regime. The 2010 Q&A has not been incorporated into the UKLA's Technical Notes, but we think it would be very helpful if a revised version of the Q&A reflecting the new regime could be published, and where appropriate its contents could be reflected in the Technical Notes as well.

In addition, some of ESMA's statements in its Final Report dated 29 September 2014 on the draft RTS under the revised Transparency Directive (ESMA Ref. 2014/1187) (the "**ESMA Final Report**") are helpful to understanding the RTS, and could usefully be incorporated into or at least referred to in FCA guidance.

It would be helpful if UKLA could consult on consequential changes to the Technical or Procedural Notes and/or any new guidance at the same time as it consults on amendments to the Handbook. This would enable consideration by market participants of the full picture of any change in the rules and make the consultation process more efficient and transparent. In particular, there is a need for guidance, which could be set out either in the rules or in Technical Notes, on two key points that are made clear in the ESMA Final Report: (i) that the 'similar economic effects' regime only applies in relation to rights/interests/instruments relating to already issued shares (paragraphs 148-149 of the ESMA Final Report); and (ii) that instruments subject to 'external' conditions must nevertheless be disclosed under the 'similar economic effects' regime (paragraphs 155-157 of the ESMA Final Report). It is not clear whether the UKLA's position in relation to these two points is the same as, or different from, the position adopted by ESMA. The UKLA should acknowledge ESMA's position explicitly and provide guidance to avoid confusion.

Responses to specific questions

HMT Questions

1 Do you agree that relying on the existing court-based procedure in section 380 of FSMA is adequate to enable the FCA to carry out the sanctioning powers referenced in Article 28b(1)(b) of the TD?

We agree.

2 Do you agree with the approach taken to make the UK compliant with the requirements of Article 28(2) of the TD relating to applying sanctions to "the members of administrative, management or supervisory bodies of the legal entity concerned"?

We agree.

3 Is the approach envisaged by which the FCA can suspend voting rights through application to the Court appropriate? Are there alternative approaches that would be more suitable?

Yes, it is appropriate for the FCA to apply to Court to suspend voting rights.

4 Do you think that the FCA should only be empowered to suspend voting rights in the case of the most serious breaches, as this consultation is proposing?

Yes.

5 How should a 'most serious breach' be defined in the transposition of the TDAD?

It would be sensible to take a range of factors into account, the most important including, whether or not the breach was committed deliberately or recklessly and the extent to which the issuer, the market or other stakeholders were misled by the failure to disclose. Factors relevant to the latter consideration would include the size of the holding, the length of time for which the breach persisted and any other relevant circumstances, such as whether the failure to disclose could have an impact on a bid or tender offer, or the decisions of a regulator etc.

6 Do you agree with the Treasury's proposed approach to transposing the requirements relating to the publication of decisions?

A decision against a party has, among other things, a large reputational impact. In view of this we would suggest making the default position under the rules that published decisions will be anonymised. Any change from this default position should be subject to an explicit decision-making process.

7 Disregarded holdings

We agree with the suggested approach.

FCA Questions

1 Do you agree with the proposal to delete DTR5.3.1R(2), DTR5.3.1R(3), DTR5.3.1R(4) and DTR5.3.1R(5) and to include the new RTS?

Yes. We note the insertion of proposed new DTR5.1.3B EU. We agree that it is helpful to include specific parts of the RTS where relevant. However, for ease of reference, it would also be helpful, where relevant, if there were additional guidance to explain the references to Articles of the Transparency Directive. Alternatively, for example it would be helpful if the note referring to the articles of the Transparency Directive at the end of DTR5.1.3R was reorganised so as to make clear precisely which article of the Transparency Directive each DTR provision derives from.

2 Do you agree with our proposal to include a new definition of "trading book" for the purposes of the DTRs?

Yes.

3 Do you agree with the proposal to make a consequential amendment to DTR5.3.1R(1)(b) to remove the cross reference to the current client-serving intermediary exemption and to remove the exception for non-UK issuers?

Yes. However, we have the following comments:

The phrase "qualifying financial instrument" is not used in the amended Transparency Directive. Following the amendment of article 13, the remaining references to that phrase could be removed throughout DTR5 and replaced with either "financial instruments within

DTR5.3.1R(1)(a)" (e.g. in DTR5.3.3G(1)) or "financial instruments within DTR5.3.1R" (e.g. in DTR5.2.3G and DTR5.3.4R). DTR5.3.1R(1)(a) and (b) could then be redrafted to essentially "copy out" the wording of article 13.1(a) and (b) (but shortening article 13.1(a) to end with the words: "…or the discretion as to the holder's right to acquire *shares* of an *issuer*"). This would allow DTR5.3.2R to be deleted and, by removing the need for a cross reference in DTR5.3.1R, would make it clearer and easier to understand.

4 Do you agree with our proposal to delete DTR5.7.1R(4) and reword DTR5.7.1R(3) to reflect the Article 13(1)(a) and (b) text, to clarify DTR5.7.1R(1), and to include new notification requirements in DTR5.3.5R to reflect the Article 13(1) text?

We think that DTR5.3.5R would be clearer if it read as follows:

> "A person making a notification in accordance with DTR5.1.2R must, if their holding includes financial instruments within DTR5.3.1R:
>
> (1) include a breakdown between holdings of financial instruments within DTR5.3.1R(1)(a) and holdings of financial instruments within DTR5.3.1R(1)(b); and…"

We also suggest that the provisions in new DTR5.3.5R should instead be within DTR5.7, as these rules will be easier to navigate and understand if all provisions dealing with what has to be included in a notification are set out in the same place.

5 Do you agree with our proposal to delete DTR5.3.1R(2A) and DTR5.3.1AG? Do you agree with our proposal to delete FCA specific guidance set out in DTR5.3.3G(2) and rely on the new RTS? Do you agree with our proposal to include a new DTR5.3.2AG and to make amendments to DTR5.3.2R(1) and to remove the link to MiFID in DTR5? Do you agree with our proposal to delete DTR5.8.2R(4) and include a new DTR5.3.3AR and rely on the new RTS?

We note that these changes will result in the deletion of the provisions dealing with nil-paid rights. Although paragraph 3.13 of the consultation paper suggests that nil-paid rights are outside the scope of the UK contracts for difference regime, the existing DTR5.3.1R(2A) is drafted as an exemption and not as guidance. Our understanding is that the FCA has previously taken the position that its rules catch financial instruments relating to shares whether or not already in issue, and therefore do cover instruments like nil-paid rights, subject to DTR5.3.1R(2A) (see for example questions 15 and 19 in the 2010 Q&A, and the response beneath paragraph 2.6 of FSA policy statement PS 09/3).

On the other hand, the ESMA Final Report is clear that only financial instruments relating to shares in issue are caught (see paragraphs 148 and 149). To avoid uncertainty as to whether the deletion of DTR5.3.1R(2A) and DTR5.3.1AG means nil-paid rights (and other instruments relating to unissued shares) are not within scope, or are within scope and not exempt, it would be helpful if the FCA could provide explicit guidance. The 2010 Q&A give useful guidance on what types of instruments are within the scope of the current regime, and it would be helpful if similar guidance could be given on how the rules derived from the TDAD apply in the UK context.

Rather than deleting DTR5.3.3G(2)(a), we would prefer that this was shortened and rewritten to mirror the similar wording in paragraph 142 of the ESMA Final Report (which

was endorsed in paragraph 143). We think it would be helpful, especially for non-lawyers and investors based outside the UK, to retain a very broad overview of what 'similar economic effects' may mean. Such an overview could be provided in separate guidance, but we think it would be more visible if it was included within DTR5.

In relation to notification of instruments, the RTS catches a broad range of instruments such as pre-emption agreements and states that disclosure must be made with reference to a delta adjusted model. It is not clear how this would apply to something like a pre-emption agreement so there may be considerable uncertainty as to how to comply with the requirements.

Regarding the changes proposed to DTR5.3.2R(1), see our response to question 3 above.

6 Do you agree with our proposal to reflect the amendments to the TD and extend the deadline to publish half-yearly financial reports and the period of time for which financial reports are publicly available, and to make amendments to DTR4.1.4R, DTR4.2.2R(2) and DTR4.2.2R(3)?

Yes.

7 Do you agree with the proposal to apply revised DTR4.1.4R and DTR4.2.2R(3) only to reports published on or after the date new rules enter into force?

Yes.

8 Do you agree with our proposal to update DTR6.4.1R and DTR6.4.2R, to include a new DTR6.4.3R and DTR6.4.4R and to amend the Glossary definitions of "Home State" and "Host State" to reflect the changes to the rules on home Member State?

Yes, subject to the following comments.

In the Glossary definition of "Home State":

(i) All references to "Home Member State" should be changed to "Home State".

(ii) All references to "securities" in paragraphs (b) and (c) and the final paragraph should be italicised.

(iii) In paragraph (b):

(a) the word "among" should be deleted to be consistent with the drafting of paragraph (c);

(b) "shall remain" should be changed to "remains" to be consistent with the drafting of paragraph (a);

(iv) In the final paragraph, "*issuers' securities*" should be changed to "*issuer's securities*".

DTR6.4.1R(1) should be amended to read:

> "an *issuer* whose *Home State* is the *United Kingdom* in accordance with the first indent of article 2.1(i)(i) of the *TD*; and".

However, in relation to DTR6.4.1R, it would be preferable if the relevant text of the amended Transparency Directive was included, rather than a cross reference. In general, including the relevant text of the amended Transparency Directive is more helpful than including a cross reference, especially as there is no consolidated version of the Transparency Directive generally available.

In the introductory wording to DTR6.4.4R, "*issuers' securities*" should be changed to "*issuer's securities*".

9 Do you agree with our proposal for a new transitional provision DTR TP1(26)?

Yes.

In the fourth column “securities” should be italicised.

10 Do you agree with our proposal to implement the stabilisation exemption in a new rule DTR5.1.3R(7)?

We welcome the amendment to DTR5 to implement the exemption in Article 9(6)(a) of the Transparency Directive in relation to shares acquired for stabilisation purposes.

11 Do you agree with our proposal to amend DTR5.1.3R(1),(2),(3) and (4) to reflect new Article 13(4) and the revised Article 9(6) of the TD?

Yes.

(i) In DTR5.1.3R(1)(b), (2)(b) and (3)(b), "*shares* underlying *financial instruments*" should be changed to "*shares* related to *financial instruments*" to be consistent with the reference to recital 2 of the RTS in DTR5.1.4A EU.

(ii) For consistency, the introductory words in DTR5.1.3R (4)(b) should be amended to read:

> "*shares* ~~underlying~~ related to *financial instruments* within DTR5.3.1 R to the extent that such *financial instruments* are ~~held~~ acquired by a *credit institution* or *investment firm* provided that:"

12 Do you agree with our proposal to amend the Glossary definition of “issuer” to reflect the amendments made to the definition of “issuer” in the TD and to make a consequential change to the Glossary definition of “shareholder”?

The definitions of issuer in paragraphs (2A) and (2B) do not "copy out" the revised definition in article 2.1(d) of the amended Transparency Directive (even though paragraph 3.29 of the consultation paper suggests this is the UKLA’s aim). The glossary definition of "person" is wider than the entities specified in the amended Transparency Directive definition of issuer in that, as well as covering natural persons and legal entities, it covers "persons unincorporated" such as partnerships and unincorporated associations. This also applies to the amended glossary definition of “shareholder”.

13 **Do you agree with proposal to delete DTR6.1.2R and rely on the UK provisions which implement the relevant parts of the Shareholders' Rights Directive and Market Abuse Directive requirements?**

Yes.

14 **Do you agree with the consequential amendment proposed to LR17.5.2R?**

Yes.

15 **Do you agree with our proposal to delete DTR6.1.11R following the removal of the provision from the TD?**

Yes.

16 **Do you agree with the consequential and minor changes we propose to DTR5.8.3R and DTR4.4.1R?**

Yes.

17 **Do you agree with the amendments proposed to be made to the Glossary definitions?**

Yes, subject to our points on the definitions of Home State, issuer and shareholder (see questions 8 and 12 above).

18 **Do you agree with our analysis that, other than the transitional provisions in respect of DTR6.4.2R, DTR6.4.3R and DTR6.4.4R, no other transitional provisions are required in the DTRs as a result of the TDAD amendments to the TD?**

Consideration needs to be given to transitional provisions in relation to DTR5. There will be some changes to the current position and issuers will need to consider their position. If the new provisions in DTR5 come into force on 26 November 2015, will all investors have to consider their existing holdings and re-notify as necessary within the few business days after that date, or will the new provisions only apply to changes in interests from and after that date? In addition to any formal transitional provision included in the DTRs, we think that the UKLA should also provide a public alert to the market, in advance of the provisions coming into force, as to how the transition will operate.

19 **Do you agree with our proposed treatment of stock lending transactions for the purposes of the Article 9 notification regime (set out in the proposed DTR5.1.5R(1)(e)) and our proposal to apply the EU minimum thresholds?**

It would be helpful to include by way of guidance worked examples on whether disclosures of stock loan transactions need to be aggregated with other holdings and if so how this works in practice.

The commentary at paragraphs 5.14 and 5.15 of the consultation paper is helpful and could usefully be preserved in a Technical Note.

20 **Do you agree with our proposed deletion of DTR5.1.5R(1)(d) and our proposed amendment to DTR5.1.5R(2)(e), which allow all investment managers to make vote holder notifications at the EU minimum thresholds?**

Yes.

21 **Do you agree with our proposal to amend DTR4.4.8R, DTR5.11.4R and DTR6.1.16R to reference the Article 23(1) provision in its entirety and to make consequential amendments to DTR4.4.9G, DTR5.11.5G and DTR6.1.17G?**

Yes.

22 **Do you agree with our proposal to delete DTR5.11.6R, to make the consequential change to DTR5.1.2R to remove reference to the Article 23 exemption and to include new provisions in DTR5.5.1AR, DTR5.6.1CR and DTR5.8.12R(3) to make reference to the third country exemption in the revised DTR5.11.4R?**

Yes.

23 **Do you agree with our analysis of removing the client serving intermediary exemption from the DTRs?**

No comment.

24 **Do you agree with our analysis of the impact of applying the notification regime to stock lending transactions?**

No comment.

25 **Do you have any further comments on the costs of notifying stock lending transactions?**

No comment.

26 **Do you agree with our analysis of the impact of deleting DTR5.1.5R(1)(d) and amending DTR5.1.5R(2)(e)?**

No comment.

If you have any questions on this submission please contact Lucy Fergusson (Lucy.fergusson@linklaters.com) or Renee Turner (Renee.Turner@LawSociety.org.uk).

