THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 271st meeting
at 9:00 a.m. on Tuesday, 23 September 2014
at Slaughter and May, One Bunhill Row, EC1Y 8YY
(Tel: 020 7600 1200; Fax: 020 7090 5000)

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## 1. Welcome and apologies

Attending: William Underhill (chairman); Peter Wilson (secretary); Mark Austin; Robert Boyle; Linda Davies (alternate for Michael Hatchard); Lucy Fergusson; Nicholas Holmes; Chris Horton; Simon Jay; Vanessa Knapp; Stephen Mathews; James Palmer; Guy Potel (alternate for Andrew Pearson); David Pudge; Richard Spedding; Keith Stella; Martin Webster; Victoria Younghusband.

Apologies: Michael Hatchard; Andrew Pearson; Chris Pearson; Patrick Speller.

## 2. Approval of minutes

The Chairman noted that draft minutes of the meetings held on 20 May 2014 and 22 July 2014 had been circulated. It was assumed that Committee members had provided any comments on these, and so the draft minutes (as amended) would be taken as approved.

## 3. Matters arising

### 3.1 Regulation on securities settlement and CSDs

The Committee noted that, on 23 July 2014, the Council had adopted a draft Regulation on improving securities settlement in the EU and central securities depositories. On 28 August 2014 the new Regulation had been published in the Official Journal.

The new Regulation entered into force on 17 September 2014. Article 3(1) (effectively imposing compulsory dematerialisation for admitted or traded shares of EU issuers) will apply from 1 January 2023 for new securities and from 1 January 2025 for existing securities. Article 5(2) (requiring T+2 settlement) will generally apply from 1 January 2015, although UK markets are implementing T+2 settlement on 6 October 2014.

The Committee also noted Article 3(2) (effectively requiring electronic settlement for all transactions executed under the LSE's rules). LSE Market Notice N08/14 states that, to facilitate compliance with Article 3(2), the LSE will work with affected issuers and amend its rules with effect from 5 January 2015. On the Main Market, this will only affect a limited number of securities admitted before 2000 (as the LSE's Admission & Disclosure Standards have required securities to be eligible for electronic settlement since 2000).

It was noted that Vanessa Knapp and Lucy Fergusson are members of a working party with BIS regarding the implementation of this Regulation. Additional members would be welcome. Any interested Committee members should contact Vanessa or Lucy.

3.2 Response to Takeover Panel consultation paper PCP 2014/1

The Committee noted that a response to PCP 2014/1 had been submitted by the Takeovers Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

3.3 "Transparency & Trust" / Small Business, Enterprise and Employment Bill

An update was provided to the Committee regarding the current position in relation to the provisions of the Small Business, Enterprise and Employment Bill implementing the Transparency and Trust proposals.

3.4 UKLA Liaison Group

The Chairman reported on the UKLA Liaison Group meeting which was held on 28 July 2014.

James Palmer mentioned that the Listing Authority Advisory Panel (which he chairs) has raised the *Hannam* decision with the UKLA. The UKLA is giving some thought to its guidance in light of *Hannam* and the changes made by the new Market Abuse Regulation (MAR).

3.5 ESMA consultation papers concerning MAR

The Committee discussed the draft response, prepared by the MAR joint working party, to ESMA's two consultation papers on draft technical standards relating to MAR and on draft technical advice to the EC on possible delegated acts concerning MAR. The deadline for responses to both consultations is 15 October 2014.

The Chairman commented that the draft response should highlight that the market sounding regime is a safe harbour, and so compliance with its requirements should not be mandatory where the market sounding does not involve the disclosure of inside information.

The Committee noted the importance of issuers (and their representative bodies) also submitting responses to these consultation papers. The Committee understands that the GC100 will put in a submission, and that EuropeanIssuers and the Quoted Companies Alliance are considering doing so.

The Chairman asked Committee members to send any further comments on the draft response to Victoria Younghusband as soon as possible.

## 4. Discussions

4.1 Takeover Panel consultation paper PCP 2014/2

The Committee noted that, on 15 September 2014, the Code Committee of the Takeover Panel had published PCP 2014/2 on post-offer undertakings and intention statements. The deadline for responses is 24 October 2014.

The Chairman noted that he had advised the Takeover Panel in relation to the proposals set out in this PCP. Accordingly, he thought that others should lead the discussion of PCP 2014/2 and decide how the Committee should respond.

James Palmer informed the meeting that Philip Robert-Tissot of the Takeover Panel had called him to propose a meeting to discuss PCP 2014/2. Various Committee members were interested in participating, including members of the Takeovers Joint Working Party. It was agreed that James Palmer would arrange such a meeting.

The Committee supported the distinction drawn in the PCP between post-offer undertakings (which would bind the giver of the undertaking) and post-offer intention statements (which would only be required to be an accurate statement of current intention and to be made on reasonable grounds). This would represent a welcome relaxation of the current approach taken to statements of intention under Note 3 on Rule 19.1 of the Takeover Code.

However, the Committee had some concerns in relation to the details of the Takeover Panel's proposals, including the following:

- A post-offer undertaking will not be permitted to include qualifications and conditions relating to material changes of circumstances, or unspecified events of force majeure. Instead, the giver of the undertaking will be required to describe with precision the circumstances in which the giver will be excused from compliance. It may not be easy to anticipate all of these circumstances, and by disclosing them the giver of the undertaking may reveal commercial-in-confidence information.

- The Takeover Panel's proposed power to require the giver of a post-offer undertaking to appoint a supervisor to monitor its compliance may impose a disproportionate cost upon a smaller company which wishes to give such an undertaking.

4.2 Proposed new offence of corporate failure to prevent economic crime

The Committee noted that, on 2 September 2014, the Attorney-General said in a speech at the Cambridge International Symposium on Economic Crime that the Government is considering "the creation of an offence of a corporate failure to prevent economic crime, modelled on the Bribery Act section 7 offence". At the same event, the Director of the SFO said in a speech that he favoured the "amendment of S7 of the Bribery Act to create the offence of a company failing to prevent acts of financial crime by its associated persons", and said this idea "appears to be gaining traction".

It was agreed that a working party would be formed to monitor developments and consider possible next steps.

4.3 FRC changes to the UK Corporate Governance Code and guidance on risk management and internal control

The Committee noted that, on 17 September 2014, the FRC had published a feedback statement setting out revisions to the UK Corporate Governance Code. On the same day, the FRC had published merged guidance on risk management, internal control and related financial and business reporting, and related supplementary guidance for banks.

It was noted that the FRC had not accepted many of the points raised in the Committee's response to its consultation on the Code.

The Committee noted with great concern that Provision E.2.4 of the Code has been amended (without prior consultation) to require that a GM notice and related papers be sent to shareholders "at least 14 working days" before the meeting. This obligation is not subject to any exceptions, and conflicts with the usual notice period under s.307A of the Companies Act 2006 (which requires notice to be received by shareholders 14 clear calendar days before the meeting). William Underhill is endeavouring to contact the FRC to ask why this change was made.

The Committee noted that new provision C.2.2 of the Code requires the directors to state in the annual report whether they have a reasonable expectation that the company will be able to continue in operation and meet its liabilities as they fall due over a period considered appropriate by the directors. When giving this statement, the directors are obliged to draw attention to any qualifications or assumptions as necessary.

It was not clear how much detail should be disclosed in the company's annual report regarding the assumptions and qualifications underlying the 'viability' statement.

In its April consultation paper, the FRC indicated that the period of time to be covered by the 'viability' statement is a matter for the board's judgement, "taking into account the investment cycle". It was not entirely clear what this meant, although the intention may simply be for companies to disclose their business planning period and provide a 'viability' statement in respect of that period.

As mentioned at the Committee meeting on 20 May 2014, the Committee thought that the UKLA should be asked to confirm that they will not view any qualifications and assumptions in a 'viability' statement that is reproduced in or incorporated by reference in a prospectus or Class 1 circular as being inconsistent with a clean working capital statement in that document.

4.4 Strategic report amendments to CA 2006

*Impact upon dividends*

Vanessa Knapp raised an issue relating to the deletion of s.837(1)(b) of the Companies Act 2006 by the Companies Act 2006 (Strategic Report and Directors' Report)

Regulations 2013. As a result of this deletion, where a company elects (under s.426 of CA 2006) to only send its strategic report to shareholders, it had been suggested that it is not clear that the company's financial statements for that year will constitute its "last annual accounts" for the purposes of calculating its distributable profits. This is because those financial statements will not have been "circulated to members" in accordance with s.423 of CA 2006 (as required by s.837(1)(a) of CA 2006).

The Committee thought the better view was that a company which only circulates its strategic report to members is still treated as having "circulated" its financial statements. This is because the company's obligation (under s.837(1)(a)) to circulate its financial statements in accordance with s.423 of CA 2006 is, by reason of s.423(6), subject to its option to instead provide the strategic report under s.426 of CA 2006. Accordingly, the Committee did not consider that it was necessary to raise this issue with BIS.

Vanessa Knapp asked Committee members to contact her if, on reflection, they feel that action is needed regarding the deletion of s.837(1)(b). Otherwise, she will take no further action.

*Financial Promotion Order issue*

The Chairman noted that Article 59 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 does not include a strategic report within the categories of information that may be communicated by a company without breaching the restriction on financial promotions in s.21 of the Financial Services and Markets Act 2000. Every time a company provides a copy of its strategic report to someone who may be an investor, this might be regarded as a financial promotion. If no exemption applies, then an offence under s.25 of FSMA 2000 may be committed, and any investment agreement may be unenforceable under s.30 of FSMA 2000.

It seemed that this issue may have been overlooked when strategic reports were introduced. The Chairman had raised this issue with BIS in early April, who referred it to Treasury Legal Advisers. Unfortunately neither body has shown much interest since then.

The Committee noted this issue, and agreed that it was a concern.

## 5. Recent developments

5.1 Company Law

The Committee noted that, on 8 September 2014, the European Commission had launched a consultation to gather ideas on possible changes to the Small Business Act for Europe, publishing a consultation document and online questionnaire. The deadline for responses is 15 December 2014.

5.2 Corporate Governance

The Committee noted that, on 23 July 2014, the Equality and Human Rights Commission had published guidance on the equality law framework for appointments to boards, focussing specifically upon appointments of women.

The Committee discussed the EHRC's guidance and some issues which may arise in practice, e.g. identifying when candidates for board appointment may be "equally qualified", which is necessary in order for selection on the basis of gender to be lawful. The Committee also noted that the EHRC does not believe that it is lawful to address under-representation by long-listing or short-listing only female candidates if this is to the detriment of male candidates. The situation will differ if an objective assessment demonstrates that the best qualified candidates for a short-list are all women.

The Committee noted that, on 28 July 2014, the IMA (following its June merger with ABI Investment Affairs) had published its share capital management guidelines. These cover directors' power to allot shares, own share repurchases, scrip dividends and issuance of shares by investment trusts.

The Committee noted that, on 29 July 2014 the ABI had made available via IVIS its transaction guidelines (dated 27 June 2014) setting out the expectations and views of ABI members on IPOs, secondary offerings, and corporate governance during corporate transactions. These build on recommendations in the ABI's July 2013 reports on "Encouraging Equity Investment" and "Improving Corporate Governance and Shareholder Engagement".

The Committee thought that the parts of the ABI's guidelines relating to equity capital markets transactions were unlikely to result in significant changes to market practice. However, the proposals regarding corporate governance may find support from other bodies. Some of these proposals could be seen as starting to undermine the principle of a unitary board. The Committee agreed to monitor developments in this area.

5.3 Reporting and Disclosure

The Committee noted that, on 23 July 2014, the FCA had published consultation paper CP14/12 on removing the requirement for issuers to publish interim management statements (reflecting changes to the Transparency Directive). The deadline for responses was 4 September 2014.

The Committee doubted that the abolition of IMSs would make much difference in practice, given that issuers will remain subject to DTR 2. However, issuers may wish to consider voluntarily issuing IMS-like announcements around the end of the first and third quarters. A regular, well-ordered reporting process might help to minimise the risk of having to issue unscheduled trading updates, and may also help to manage market expectations regarding the performance of the issuer's business.

The Committee noted that, on 24 July 2014, the CMA had published for consultation a draft order resulting from its market investigation of statutory audit services for large

companies, together with a notice of intention and draft explanatory notes. The deadline for responses was 24 August 2014.

The Committee noted that, on 31 July 2014, the Guidelines Monitoring Group (GMG) had published a feedback statement on its May 2014 consultation on amending the Walker Guidelines, and a revised version of Part V of the Walker Guidelines. The revised Guidelines apply to portfolio companies with financial years ending on or after 30 September 2014.

The Committee noted that, on 31 July 2014, the GMG had published a revised version of its guidelines on good practice reporting by private equity portfolio companies under the Walker Guidelines.

The Committee noted that, on 12 August 2014, the FRC's Financial Reporting Lab had published a report on clear and concise reporting, based on its review of annual reports of FTSE 350 companies with year ends between 30 September and 31 December 2013.

The Committee noted that, on 21 August 2014, BIS had published its response to its consultation on the UK's implementation of Chapter 10 of the Accounting Directive, under which large companies and public interest entities active in the extractive or logging industries must publish annual reports on payments they make to governments. The Government intends to lay regulations before Parliament in Autumn 2014, requiring reports on payments made in financial years beginning on or after 1 January 2015.

The Committee noted that, on 26 August 2014, the FCA had published consultation paper CP14/17 on the UK's implementation of certain changes to the Transparency Directive, under which issuers active in the extractive or logging industries must publish annual reports on payments they make to governments. The FCA proposes to align its new rules with BIS' new regulations (mentioned above). The deadline for responses is 7 October 2014.

The Committee noted that, on 1 September 2014, BIS had published a consultation paper on the UK's implementation of Chapters 1 to 9 of the Accounting Directive. The deadline for responses is 24 October 2014.

Article 16.1 of the Accounting Directive permits Member States to only require small companies to provide up to 13 specified notes to their financial statements. However, a small company is still required to consider if its financial statements provide a true and fair view of its financial position (and to comply with applicable accounting standards). As a result, a small company may need to provide additional notes. This uncertainty is not ideal.

It was agreed that a working party would be formed to consider whether a response should be submitted to this consultation.

The Committee noted that, on 8 September 2014, IOSCO had published a proposed statement of its expectations for issuers with respect to their use of non-GAAP financial measures. The deadline for responses is 5 December 2014.

5.4 Public M&A

The Committee noted that, on 8 September 2014, the European Commission had launched a consultation on possible improvements to the existing EU legal framework for cross-border mergers and a possible framework for cross-border divisions of companies, and published a consultation questionnaire. The deadline for responses is 1 December 2014.

5.5 Europe

Vanessa Knapp mentioned that, on 6 August 2014, the European Commission had issued a request for tender document in relation to a proposed study regarding the possible harmonisation of conflict of laws rules in the company law area. The deadline for responses is 30 September 2014.

The Committee noted that the study will be required to provide statistics which will be difficult to obtain. In order to generate relevant data, there is a danger that unjustified assumptions may be made.

Vanessa Knapp will send a link to the request for tender document to Peter Wilson to circulate, and the Committee will await further developments.

5.6 UKLA

The Committee noted that, on 6 August 2014, the FCA had published Primary Market Bulletin No. 8. This launched a consultation on six draft new Technical Notes, nine updated Technical and Procedural Notes, and the proposed deletion of one existing Technical Note. The Bulletin also summarised feedback and linked to final Technical and Procedural Notes consulted on in Primary Market Bulletins 6 and 7 and a blackline showing material changes from the consultation drafts. The deadline for responses to the new consultation is 1 October 2014.

It was noted that 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 was preparing a response to this consultation.

The Committee noted that, on 5 September 2014, the FCA had published consultation paper CP14/18. Chapter 3 proposes various changes to the LRs, PRs and DTRs. The deadline for responses is 5 November 2014.

It was assumed that the Listing Rules Joint Working Party would review CP14/18 and, if appropriate, submit a response.

5.7 Equity Capital Markets

The Committee noted that, on 31 July 2014, a Regulation imposing sanctions relating to Russia had been published in the Official Journal (and took effect on 1 August). On 12 September 2014, an amending Regulation expanding these sanctions had been published in the Official Journal (and took effect that day).

Since 1 August, before the UKLA will allocate any prospectuses, supplements, circulars, requests for guidance, etc., it has required confirmations that the issuer does not fall within Article 5 of the Regulation. The LSE requires a similar confirmation for admissions to trading on its markets. On 18 September 2014, the LSE published AIM Notice 40, requiring AIM companies to inform their nomad immediately if they fall within the Regulation.

The Committee noted that, on 5 September 2014, the LSE had published Market Notice N07/14 reminding LSE member firms that the standard settlement period will reduce from T+3 to T+2 on 6 October 2014.

5.8 Accounting

The Committee noted that, on 23 July 2014, the FRC had published amendments to Financial Reporting Standard 101: Reduced Disclosure Framework, to reflect changes made to EU-adopted IFRS.

The Committee noted that, on 1 September 2014, the FRC had published a consultation paper on proposed changes to accounting standards for small entities as a result of the implementation of the Accounting Directive. The deadline for responses is 30 November 2014.

5.9 Cases

The Committee noted the judgments in:

- *Heritage Oil & Gas Ltd & Anor v Tullow Uganda Ltd* [2014] EWCA Civ 1048
- *Patel v Mirza* [2014] EWCA Civ 1047
- *Shafi v Rutherford* [2014] EWCA Civ 1186
- *Almer Beheer BV & Anor v Van* den *Dungen Vastgoed BV & Anor* [2014] EUECJ C-441/12

The Committee noted that the Court of Appeal's decision in *Shafi* showed how hard it is to draft completion accounts provisions in a sale agreement that will operate as intended. In light of *Shafi*, the completion accounts provisions should make it clear that, even if the target's past accounts do not comply with accounting standards, the completion accounts must be prepared on the same basis (if that is what is intended). Alternatively or additionally, the provisions should set out a list of specific accounting principles that must be applied.