THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 273rd meeting
at 9:00 a.m. on Tuesday, 27 January 2015
at Slaughter and May, One Bunhill Row, EC1Y 8YY
(Tel: 020 7600 1200; Fax: 020 7090 5000)

---

1. Welcome and apologies

Attending: William Underhill (chairman); Peter Wilson (secretary); Mark Austin; Mark Bardell; Robert Boyle; Lucy Fergusson; Michael Hatchard; Nicholas Holmes; Rob Hutchings (alternate for Martin Webster); Simon Jay; Vanessa Knapp; Stephen Mathews; Kate Norgett (alternate for David Pudge); Andrew Pearson; Chris Pearson; Richard Spedding; Patrick Speller; Keith Stella; Jo Weston (alternate for Chris Horton); Victoria Younghusband.

Apologies: Chris Horton; David Pudge; Martin Webster.

2. Approval of minutes

The Chairman noted that draft minutes for the meeting held on 25 November 2014 will be circulated for comment in due course.

3. Committee personnel changes

The Chairman noted that:

- James Palmer has left the Committee following his appointment as Senior Partner of Herbert Smith Freehills.
- Mark Bardell has joined the Committee in James' place.
- Chris Pearson has succeeded James as the Chairman of 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.

4. Matters arising

4.1 Small Business, Enterprise and Employment Bill (**SBEE Bill**) implementation plan.

The Committee noted that, on 15 January 2015, BIS had published a provisional implementation plan for Parts 7 and 8 of the SBEE Bill, with dates for each phase of implementation. On 17 November 2014, Companies House had published a similar outline plan without provisional dates.

4.2 Ministerial statement on PSC register

The Committee noted that, on 15 January 2015, a Ministerial statement was made regarding the proposed new register of people with significant control (PSC register) which is proposed in the SBEE Bill. This announced BIS' publication of draft terms of reference for a working group (led by Peter Swabey of ICSA) to prepare non-statutory guidance to support implementation of the PSC register, and the Minister's intention to form a panel of company law specialists to prepare statutory guidance on the meaning of "significant influence or control".

The Chairman noted that the Law Society of England and Wales had been invited to nominate someone to serve on the working group. The Chairman indicated that he would see if it is possible for the Committee to participate in, or contribute in some way to, the development of the non-statutory and statutory guidance.

4.3 BIS consults on corporate directors

The Committee noted that, on 27 November 2014, BIS had published a consultation paper on the scope of exceptions to the prohibition of corporate directors, which is proposed in the SBEE Bill. The deadline for responses was 8 January 2015, and the Committee had submitted a response. The Chairman thanked all those involved in its preparation, and especially Martin Webster.

4.4 Takeover Panel response statement RS 2014/2

The Committee noted that, on 23 December 2014, the Code Committee of the Takeover Panel had published RS 2014/2 on post-offer undertakings and intention statements. The related amendments to the Takeover Code took effect on 12 January 2015.

Chris Pearson noted that the Panel had moved a fair way towards what the Takeovers Joint Working Party had sought in its response (noted at the last Committee meeting), and that post-offer undertakings and intention statements are expected to be very rare. The Panel has provided some flexibility in relation to events of force majeure, and events having a financial effect on the relevant party or its assets. However, in each case the requirements of Rule 19.7(c) must be satisfied, which may not always be easy.

4.5 Further response to FCA consultation paper CP14/21 on the sponsor regime and other matters

The Committee noted that a further response had been submitted 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 joint working party's initial response had been noted at the last Committee meeting.

4.6 Response to ESMA consultation paper on draft technical standards under the revised Prospectus Directive

The Committee noted that a response had been submitted 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.

4.7 Draft technical standards under the revised Transparency Directive

The Committee noted that, on 17 December 2014, the European Commission had published a draft Regulation adopting ESMA's proposed regulatory technical standards on major shareholdings under the revised Transparency Directive. The Regulation is intended to apply from 26 November 2015.

5. Discussions

5.1 Prohibition on using cancellation schemes for takeovers

The Committee noted that, on 12 January 2015, drafts of the CA 2006 (Amendment of Part 17) Regulations 2015, explanatory memorandum, and information and impact note had been published, followed by revised draft Regulations on 16 January 2015. The draft Regulations were foreshadowed in the Autumn Statement on 3 December 2014, and will amend section 641 of CA 2006 to prevent companies from reducing their share capital as part of a scheme of arrangement to effect a takeover. For Code takeovers, the Regulations will not apply to schemes effecting a Rule 2.7 announcement made on or before the date of the Regulations.

The Committee noted that the draft Regulations have already been laid before Parliament, and so doubted that any opportunity existed to respond to them. It was suggested that the Government hopes the Regulations will be made in February.

Committee members wondered if parties would seek to develop takeover scheme structures which are not caught by the draft Regulations. The first few post-Regulation takeover schemes may give some indication of this.

5.2 Myners report on IPOs and bookbuilding

The Committee noted that, on 18 December 2015, BIS had published a report reviewing IPOs and bookbuilding in future HM Government primary share disposals. The review was conducted by a panel led by Lord Myners. Some of the report's recommendations (in section 9) extend to all primary share disposals, not just those undertaken by Government.

The Committee noted that some of the report's proposals were similar to those made in the ABI's report on "Encouraging equity investment", published in July 2013. That report did not appear to have led to changes in market practice. One Committee member suggested that none of the major investment banks seemed minded to be the first to change the IPO process, e.g. by adopting the French model of publishing a registration document early and using this during pilot fishing, or by shortening the

blackout period for connected analysts' research. The FCA also did not appear to have a great appetite to amend its rules (COBS 12.2.12G) and guidance (UKLA/TN/604.1) to remove references to blackout periods. However, a future Government share disposal might be able to accelerate changes to the IPO process.

5.3 Davis report and FCA response

The Committee noted that, on 10 December 2015, the FCA had published Simon Davis' report of his inquiry into the events of 27/28 March 2014 at the FCA, and the FCA's response. The report relates to the press briefing of information in the FCA's 2014/15 business plan in relation to historic products sold by insurance companies.

The Committee discussed the following recommendations which were included in the report:

- The final version of an FCA annual Business Plan should only be made available publicly to all market participants at the same time.

  The Committee noted that this could restrict FCA pre-briefings of affected companies.

- The FCA should substantially improve its procedures relating to (amongst other matters) the identification of price-sensitive information

In its response, the FCA stated that it accepted all of the report's recommendations.

5.4 Proposed amendment to SBEE Bill regarding takeovers

The Committee noted that, on 19 January 2015, a Grand Committee of the House of Lords considered (but did not adopt) amendment 60A to the SBEE Bill proposed by the Labour Party. This would have required disclosure of the offeree board's reasons for forming its opinion on the offer, including its views on the matters specified in section 172 of the CA 2006. The debate on the amendment is recorded in Hansard.

The Government's response during debate indicated that directors of UK target companies and bidders should comply with their duties at all times, including during takeovers. Those duties include their duty under section 172 of CA 2006. Accordingly a target board, when forming its opinion on a takeover offer as required by Rule 25.2 of the Takeover Code, would need to consider the matters listed in section 172.

The Committee doubted that the legal position was so clear-cut. Some members were sceptical that the target directors were subject to directors' duties when giving an opinion under Rule 25.2. Rule 25.2 requires the target directors to give their bona fide opinion on the offer, rather than to approve a specific corporate action to be undertaken by the target (which would be subject to directors' duties). The opinion need not even recommend that the offer be accepted or rejected. Such opinions are given in the context of the target financial adviser's advice under Rule 3.1, and accordingly tend to focus upon the financial aspects of the offer and the other matters set out in Rule 25.2(a), although Note 1 on Rule 25.2 recognises that wider factors may be taken into

account. If the target directors believe that the offer represents the best price that target shareholders are likely to obtain for their shares, then those Committee members believed the directors' opinion should say so.

The situation may be more complex for offers by way of a scheme of arrangement. For a scheme, target directors will need to consider whether to approve specific corporate actions, e.g. asking the court to convene a scheme meeting and pursuing the scheme approval process. A scheme circular (unlike an offer document) is also subject to LR 13.3.1R, which requires the inclusion of a board recommendation and all information necessary to allow target shareholders to make a properly informed decision.

6. Recent developments

6.1 Company Law

The Committee noted that, on 27 November 2014, the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2014 and explanatory memorandum had been published. The Regulations come into force on 31 January 2015.

The Committee noted that, on 12 January 2015, the Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 and explanatory memorandum had been published. The draft Regulations come into force on 31 January 2015.

The Committee noted that, on 9 December 2014, the ICSA Registrars Group had published its proposed model for the full dematerialisation of UK transferable securities to comply with the CSD Regulation (No. 909/2014). Article 3(1) of the Regulation (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.

The paper on the proposed model makes it clear that the ICSA Registrars Group would like dematerialisation to commence before 2023 (partly to reduce costs). The proposed model would leave the register of members broadly as it is for certificated shareholders. However, instead of share certificates being issued, shareholders would be issued with a unique 16-digit reference number called a 'holder key'.

Lucy Fergusson and Vanessa Knapp reported that they had attended a meeting regarding the proposed model on 23 January 2015. Matters discussed included:

- What happens if the shareholder loses the 'holder key'?
- The proposed model does not cater for a variety of corporate actions which issuers may undertake. For example, if a certificated shareholder accepts a takeover offer, at present they must submit their share certificate with the acceptance form. This should stop the shareholder from entering into further dealings, e.g. agreeing to sell their shares to a third party or a counter-bidder.

However, the proposed model does not include a mechanism to 'lock down' a person's shareholding, and prevent further dealings.

- Security and cybercrime issues, e.g. the risk of unauthorised dealings if the 'holder key' is obtained by a thief or hacker.

Vanessa and Lucy are members of a working party with BIS on the implementation of the CSD Regulation. Additional members would be welcome. Kate Norgett expressed interest in joining the working party. If Committee members know of anyone at their firm who may be interested in joining, they should contact Vanessa or Lucy.

The Committee noted that, on 19 December 2014, the Bank Recovery and Resolution (No. 2) Order and explanatory memorandum had been laid before Parliament. These provisions came into force on 10 January 2015.

The Committee noted that, on 13 January 2015, drafts of the Companies Act 2006 (Amendment of Part 18) Regulations 2015 and explanatory memorandum had been published. The draft Regulations are intended to come into force on 6 April 2015.

6.2 Corporate Governance

The Committee noted that, on 8 December 2014, the NAPF had published its Corporate Governance Policy and Voting Guidelines 2014-15.

The Committee noted that, on 7 January 2015, ISS had published its first standalone UK and Ireland Proxy Voting Guidelines. The guidelines are effective for meetings held on or after 1 February 2015.

The Committee noted that, on 15 January 2015, the FRC had published a report on compliance with the UK Corporate Governance Code and the Stewardship Code (and related matters) over the last 12 months. This indicates that the FRC intends to publish a discussion document on board succession planning in Spring 2015. The FRC also expressed concerns regarding the quality of investors' implementation of, and adherence to, the Stewardship Code. This will be an area of focus for the FRC in 2015.

6.3 Reporting and Disclosure

The Committee noted that, on 25 November 2014, BIS had published draft industry guidance on the Reports on Payments to Governments Regulations 2014 (dated 5 November 2014) for consultation purposes. The deadline for responses was 17 December 2014.

The Committee noted that, on 8 December 2014, the final Reports on Payments to Governments Regulations 2014 and explanatory memorandum had been published. The Regulations apply to financial years beginning on or after 1 January 2015.

The Committee noted that, on 2 January 2015, the FCA had published policy statement PS15/1 on the partial implementation of the revised Transparency Directive. New DTR 4.3A applies to financial years beginning on or after 1 January 2015.

The Committee noted that, on 27 November 2014, BIS had published a consultation paper and draft regulations proposing a new duty for large companies to report on their payment practices. The deadline for responses is 2 February 2015.

The Committee noted that, on 5 December 2014, the Guidelines Monitoring Group had published its seventh report reviewing the private equity industry's conformity with the Walker Guidelines.

The Committee noted that, on 8 December 2014, the FRC had published a press release stating that its Conduct Committee expects to see high quality disclosure regarding complex supplier arrangements in annual and interim reports and accounts. The Committee will include this as an area of focus when it reviews audits and accounts during 2015.

The Committee noted that, on 18 December 2014, the GC100 and Investor Group had published a statement relating to its directors' remuneration reporting guidance published in 2013.

6.4 Contract law

The Committee noted that, on 6 December 2014, BIS had published a consultation paper on the proposal to nullify contractual terms imposing conditions or restrictions on the assignment of certain receivables. BIS also published a draft of the Business Contract Terms (Restrictions on Assignment of Receivables) Regulations 2015. The deadline for responses is 11 February 2015.

BIS seems strongly inclined to proceed with this proposal, and has pointed to other jurisdictions where such contractual terms have been nullified (e.g. the United States). One point of possible concern to the Committee is that, in the consultation paper, BIS proposes to make no special provision with respect to set-off. Set-off is made difficult by the introduction of a third party who is assigned a right to payment, and BIS' proposal is intended to facilitate such assignments.

The Chairman will review these consultation materials and consider whether a working group should be formed to prepare a response.

6.5 Public M&A

The Committee noted that, on 2 January 2015, the Takeover Panel had published Panel Statement 2015/1.

The Committee noted that, on 5 January 2015, the Code Committee of the Takeover Panel had published Panel Statement 2015/2 and Instrument 2015/1. The instrument came into effect on 10 January 2015.

6.6 FSMA

The Committee noted that, on 15 December 2014, the Payments to Governments and Miscellaneous Provisions Regulations 2014 and explanatory memorandum had been

published. The Regulations come into force on various dates starting on 14 December 2014.

6.7 UKLA

The Committee noted that, on 27 November 2014, the FCA had published Primary Market Bulletin No. 9.

This had launched a consultation on three amended Technical Notes. The deadline for responses was 12 January 2015. The Committee noted that a response had been submitted 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 Committee noted that, on 6 January 2015, the FCA had published a final notice imposing a fine of £231,000 on Execution Noble & Company Limited for breaching LR 8.3.5R(1) and 8.7.8R(1)(a).

The Committee noted that, on 20 January 2015, the FCA had published a final notice imposing a fine of £539,800 on Reckitt Benckiser Group Plc (**RB**) for breaches of LR 9.2.8R, LR 7 and DTR 3.

The Committee noted the following points in relation to this final notice:

- The breaches of the Model Code and DTR 3 identified by the FCA focussed upon dealings by two PDMRs:

  - A third party custodian used shares held from time to time in PDMR A's brokerage account as security for a credit facility, initially without PDMR A's knowledge. PDMR A was unaware that this constituted a dealing under the Model Code, and the initial grant of security appeared to have occurred prior to the FSA's statement on 9 January 2009 that granting security over shares was covered by DTR 3. When RB was informed of this issue in September 2012, it promptly notified the FCA.

  - RB then checked the shareholdings of all PDMRs, and identified a disposal by PDMR B which it had not been informed of. PDMR B believed that he had sought Model Code clearance orally and that this was granted orally or by email. However, RB had no record of Model Code clearance being obtained or DTR 3 notification being given. The FCA noted that it was possible that PDMR B had failed to seek clearance or to notify RB.

- While the FCA accepted that RB had certain policies and procedures in place (e.g. a share dealing policy), the FCA considered these were insufficient to satisfy the Listing Principles obligation to maintain adequate procedures, systems and controls. In reaching this conclusion, it seemed the FCA may have placed considerable weight upon the fact that specific breaches of the Model Code and DTR 3 had been identified (regarding PDMR A and PDMR B).

- In the case of PDMR B, the fact that PDMRs sometimes sought Model Code clearance orally appeared to have counted against RB, as this raised doubts as to whether its written records were complete. The situation would have been clearer if clearance requests and grants were invariably in writing.

The Committee noted the importance of reviewing and testing policies and procedures to ensure that they remain compliant. In addition, if an issuer adopts requirements under LR 9.2.9G which go beyond the Model Code, then it appears that a failure to comply with those requirements may well constitute a breach of the Listing Principles.

The Committee also noted the large size of the fine levied upon RB, and the FCA's increasing reliance upon the Listing Principles and Premium Listing Principles when taking enforcement action. This is a very difficult area for issuers, as the Principles are drafted in general terms but a breach has potentially very serious consequences.

A Committee member raised an aspect of the *Hannam v FCA* case regarding the definition of inside information. The Tribunal held that the test of whether an event is "reasonably expected to occur" is whether there is a "realistic prospect" of it occurring. It seems that some brokers have taken the view that the "realistic prospect" test will only be satisfied if there is at least a 5 per cent. chance of the event occurring. This approach struck the Committee member as misconceived and overly simplistic.

The Committee agreed that the Tribunal's judgment in *Hannam* provides no support for a percentage-based approach to the "realistic prospect" test.[1]

6.8 Accounting

The Committee noted that, on 17 December 2014, BIS had published a discussion paper on auditor regulation. The deadline for responses is 19 February 2015.

The Chairman will review this consultation paper and consider whether a working group should be formed to prepare a response.

The Committee noted that, on 18 December 2014, the FRC had published a consultation paper on auditing and ethical standards, in light of the proposed implementation of Directive 2014/56/EU amending the Statutory Audit Directive and the application of Regulation (EU) No. 537/2014 regarding the statutory audit of public interest entities. The deadline for responses is 20 March 2015.

The Committee noted that, on 15 December 2014, the FRC had published for comment a financial reporting exposure draft (FRED 57) proposing amendments to FRS 101 (Reduced Disclosure Framework). The deadline for responses is 20 March 2015.

---

[1] Paragraph 76 of the judgment states: "there can be a realistic prospect of circumstances coming into existence or of an event occurring without it being more likely than not that they will do so. We do not, in any case, find it of help to attempt to approach the question on the basis of assessing percentage chances" (emphasis added).

6.9 Europe

The Committee noted that, on 19 December 2014, ESMA had published a consultation paper on proposed regulatory technical standards under the revised Transparency Directive regarding a European electronic access point to regulated information about all listed companies in the EU. The deadline for responses is 30 March 2015.

6.10 Cases

The Committee noted the judgments in:

- *Ramsay v Love* [2015] EWHC 65 (Ch) (20 January 2015)
- *Sebry v Companies House & Anor* [2015] EWHC 115 (QB) (26 January 2015)