THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 283rd meeting
at 9:00 a.m. on Wednesday, 25 January 2017
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); Emma Wilson (Secretary); Mark Austin; Lucy Fergusson; Nicholas Holmes; Chris Horton; Antonia Kirkby (alternate for Mark Bardell); Vanessa Knapp; Michael Hatchard; Tim Lewis (as alternate for David Pudge); Stephen Mathews; Andrew Pearson; Chris Pearson; Richard Spedding; Patrick Speller; Keith Stella; Martin Webster and Victoria Younghusband.

Apologies: Mark Bardell, Simon Jay and David Pudge.

2. Approval of minutes

3. Matters arising

3.1 FCA Consultation Paper CP16/38 and response. The Committee noted that on 28 November 2016, the FCA published CP16/38 setting out its proposals to ensure the FCA Handbook is consistent with ESMA's guidelines. On 6 January 2017, the Listing Rules Joint Working Party submitted a response to the FCA on consultation DP 16/38.

3.2 FCA Quarterly Consultation No.15 (16/39) and response. The Committee noted that on 2 December 2016, the FCA published its fifteenth quarterly consultation paper (16/39) which includes proposed changes to add new rules to DTR 6.2 requiring issuers to classify regulated information according to a list of categories in section B of the Annex to the Delegated Regulation. On 4 January 2017, the Listing Rules Joint Working Party submitted a response to the FCA on consultation CP 16/39.

3.3 FRC recommendations to BEIS Select Committee. The Committee noted that on 7 December 2016, FRC Chief Executive Stephen Haddrill wrote to the BEIS Select Committee further outlining the FRC's position and recommendations in response to the Committee's inquiry into corporate governance. The recommendations involve changes to the current corporate governance code, and regulatory reforms.

3.4 ESMA: Market Abuse Regulation (MAR) updated Q&A. The Committee noted that on 20 December 2016, ESMA updated its Q&A on MAR. New questions and answers have been added to section 2 relating to Manager's transactions and section 3 relating to investor recommendations.

3.5 Reform of Limited Partnerships Act 1907. The Committee noted that on 16 January 2017, HM Treasury issued an announcement that it had published a revised draft legislative reform order on proposed amendments to the Limited Partnerships Act 1907 in respect of private investment funds.

3.6 Brexit and corporate citizenship. The Committee noted that Vanessa Knapp has co-authored an article with John Armour, Holger Fleischer and Martin Winner on the effect of Brexit on companies. It is published at SSRN and will shortly be available in the European Business Organisation Law Review.

Vanessa noted that after Brexit and because of the consequent loss of freedom of establishment, where companies incorporated in the UK have their "seat" elsewhere and come before courts which apply the "real seat" theory, then such courts will no longer have to recognise those companies as companies. Rather, such companies may be treated by the court as unincorporated partnerships with the loss of limited liability for shareholders.

It was noted that the real seat theory applied in, inter alia, Germany, Austria, France and the Netherlands (where there was a special regime for foreign companies which would apply to UK-incorporated companies after Brexit). Vanessa asked that members of the Committee inform her if they came across any other examples.

Vanessa noted that there had been some academic commentary that this issue could be rectified by those countries which employed the real seat theory treating UK companies existing at the point of Brexit as companies. It was noted, however, that other countries are not necessarily focussed on finding a solution to this problem. It was also suggested that the issue could be dealt with as part of any transitional arrangements between the UK and the EU. If the issue is not solved by these means, the alternative for UK-incorporated companies is to re-incorporate in another Member State, for example by means of a cross-border merger (while that regime remains available to UK-incorporated companies).

Vanessa also mentioned that the note discussed the cross-border merger regime and how this would be affected by Brexit.

4. Discussions

4.1 BEIS Green Paper on Corporate Governance reform. On 29 November 2016, BEIS published the Green Paper on executive pay, stakeholders, and corporate governance in large private businesses. The deadline to respond to the Green Paper is 17 February 2017.

The Chairman noted that he (and others from the Committee) had attended the GC100 Conference on corporate governance. The Chairman noted that BEIS had emphasised the following points:

- The consultation was an attempt to rebuild public trust in companies. Transparency was one of the ways of achieving this objective.

- Company disclosures need to be comprehensible not only to shareholders and the City but to a wider group of stakeholders.
- Any measures implemented following the consultation need to be practicable.
- Any measures implemented following the consultation should retain the useful elements of the existing system.
- The unitary board, the principle of comply or explain and strong shareholder rights would be kept. There was no push for employees or consumers on boards.

The Chairman noted that the Committee's response to the consultation should reflect these points.

The Chairman noted that the Committee should try to ensure that any measures implemented by the consultation avoid unintended harmful consequences and solutions which could be manipulated to avoid the results that the Government is intending to achieve. Any new regime also needed to be enforceable, simplify the existing regime and to maintain competitiveness.

The Chairman remarked that a junior minister had spoken at the GC100 conference and that the speech conflated business with companies. The point was made from the floor that there was a difference between business and companies and if the object was to get business to behave ethically, reform of corporate governance may not be the answer. The Chairman thought that this was a useful point to draw out in the Committee's response.

The Chairman noted that the FRC had indicated in a letter to BEIS on 30 November 2016 that the FRC should have powers to test effectively the quality of governance information. The letter points out that the FRC currently only has powers to monitor the strategic report and financial information and only to enforce against accountants, actuaries and auditors. The letter states that this should be rectified and the powers should extend to other directors. The letter also suggests the implementation of a code of ethics for directors, sitting alongside the codified statutory duties, which should be enforceable by the FRC.

Vanessa Knapp mentioned that a letter from the IOD, ICSA, the ICGN and the TUC had been reported in the Financial Times that day and that it was proposing a new regulator to enforce governance obligations.

The Chairman commented that he thought that the Committee should argue that a regulator is not appropriate. Under English law, the shareholders control a company and if a shareholder-centric system is maintained a regulator would not deliver substantive changes to board decision making (although it would make the decision making process less efficient).

The Committee discussed corporate governance regimes for large private companies and whether the existing UK Corporate Governance Code (or parts of it) should be applied to them. The Committee discussed applying the Code to private companies. The comply or explain regime would function less well in the context of a limited

company with controlling shareholders as opposed to in listed companies where there was a diverse shareholder base.

The Committee also discussed whether the intended audience for any reporting regime for private companies arising from the consultation was shareholders or the general public. This issue pervades the debate around the corporate governance consultation. It was noted that if the stated aim of the consultation is to rebuild trust, then unlike the Code, the explanations are not directed at shareholders but at a wider audience.

The Chairman noted that some large companies engage with a wider stakeholder group in any event. The Chairman also noted that measures such as the Modern Slavery Act reporting requirements had encouraged companies to disclose information even though technically they are able to comply with the regime by reporting that they have taken no action. The Chairman also noted the compliance with the Walker Guidelines by private equity portfolio companies as an example of a voluntary compliance regime. The Chairman noted, for example, that as many large companies follow good practice in any event, if they were asked to engage with customers (something which many do anyway) then that may not be too much of an imposition.

Vanessa Knapp expressed a concern that if further obligations are put on large private companies, it may add a layer of expense (and distract from other matters) and may not achieve what the Government wants.

Lucy Fergusson commented that the Government was looking to level the playing field between large private companies and listed companies. It was irrational that they were treated differently in some areas. Lucy thought that reporting would be simplified if the thresholds for reporting on matters such as the gender pay gap and modern slavery were set at the same level.

The Committee also considered how corporate governance obligations should apply in groups. There was a suggestion that the obligations should apply to the highest UK company that has employees rather than having several companies reporting separately. It was noted that there was no evidence that the Government had considered how obligations would apply to groups.

4.2 Limited partnerships – call for evidence. On 16 January 2017, BEIS published a call for evidence in relation to limited partnership law. The call for evidence is looking at Scottish limited partnerships and at the regulation of limited partnerships more broadly.

Stephen Mathews noted that the consultation came about because of the alleged use of Scottish limited partnerships for illegal activities. Many Scottish limited partnerships have only corporate members and these are usually not incorporated in the UK. The consultation also dealt with some more general points about limited partnership law.

4.3 CREST working party. Lucy Fergusson and Vanessa Knapp explained that the CREST working party was looking at the dematerialisation of shares and the proposals to eradicate share certificates for publicly traded companies. It was noted that the registrars were looking at the practical issues but that there were other legal issues which needed to be addressed.

Chris Pearson volunteered to sit on the CREST working group and the Chairman noted that he would find someone from Slaughter and May to join. Other firms were encouraged to do the same.

4.4 Brexit. The Chairman noted that the Government is collecting views on the impacts of Brexit but is not yet ready to engage on the detail of company law. The Chairman noted that this would be kept under close review and that the Committee would engage at the appropriate time.

5. Recent developments

5.1 Company Law

The Committee noted that on 8 December 2016, the Companies Act 2006 (Distributions of Insurance Companies) Regulations 2016/1194 were published. The Regulations amend Part 23 of the Companies Act 2006 to define the amount available for distribution by a long-term life insurance business, following implementation of the Solvency II Directive. The Regulations came into force on 30 December 2016.

The Committee noted that on 22 December 2016, the Informal Company Law Expert Group published a report on the recognition of the interest of company groups. It follows the European Commission's action plan on European company law and corporate governance. It sets out problems arising from the differing approaches within the EU, including a lack of clarity for directors in how they can act in a cross-border situation.

Vanessa Knapp commented that she thought the report was helpful as it described the position in different jurisdictions. The report also proposes that the EU should look at legislating so that there is a common understanding of how a company can take into account the interest of a group. Vanessa also noted that the difference between countries caused issues with some of the rules relating to financial institutions as there was an assumption in those rules that parent companies can control their subsidiaries.

The Chairman noted that the position set out in the paper that English law recognised the interest of the group per se was perhaps a simplification.

Vanessa Knapp noted that the EU, in its previous attempts at dealing with this issue, was trying to impose the German approach which involved parents taking on obligations in return for being able to direct the actions of subsidiaries. The paper was useful in trying to get away from that approach.

Vanessa Knapp also noted that revising the law in this area in may be beneficial even when the UK is no longer part of the EU as it may help international groups of companies.

5.2 Corporate Governance

The Committee noted that on 21 November 2016, the ISS published the updates to its UK benchmark proxy voting policies for 2017 which will apply to shareholder meetings taking place on or after 1 February 2017. The amendments relate to policies concerning

number of directorships, remuneration committees, pay structures and board and committee composition for UK smaller companies.

The Committee noted that on 8 December 2016, the Private Equity Reporting Group published its ninth annual report on disclosure and transparency in private equity.

The Committee noted that on 11 January 2017, the FRC published the Developments in Corporate Governance and Stewardship 2016 Report. The Chairman noted that this was an interesting report and that it looks at the quality of viability statements in some detail.

The Committee noted that on 13 January 2017, ICSA and the IA announced that they are proposing to publish joint guidance to assist boards in engaging with employees and other stakeholders. The guidance will be published in the second quarter of 2017. The Chairman remarked that the project is anticipating solutions to the Green Paper. The Chairman noted that the progress of this project was worth following as there may be useful examples of concrete measures for stakeholder engagement.

The Committee noted that on 18 January 2017, the Pension and Lifetime Savings Association published a revised version of its Corporate Governance Policy and Voting Guidelines.

5.3 Reporting and Disclosure

The Committee noted that on 2 December 2016, BEIS published the Government's response to its consultation paper seeking views on the duty to report on payment practices and performance. The response sets out the draft Regulations, which will require large companies and LLPs to report publicly twice yearly on their payment practices, rather than quarterly (as originally proposed).

The Committee noted that on 9 December 2016, the Government published its Response to the Consultation on the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (Regulations). The Regulations will come into force 6 April 2017.

The Committee noted that on 14 December 2016, the Task Force on Climate Related Financial Disclosures published its recommendations, which will be voluntary for businesses. They aim to help providers and users of such disclosures make more informed decisions about the climate risks that could affect their business and investments.

The Committee noted that on 15 December 2016, the FRC announced it will conduct a second thematic review into the use of APMs in annual reports and accounts. It will focus on matters in the earlier review and issues noted in the 'Annual Review of Corporate Reporting 2015/2016' published in October 2016.

The Committee noted that on 19 December 2016, the FRC's Financial Reporting Lab published an implementation study on how companies have responded to investor calls

for better disclosure of dividends. The Lab notes areas for further improvement, such as better disclosure of how dividend policies operate in practice and disclosure of risks and constraints.

The Committee noted that on 21 December 2016, the Regulations 2016/1245 and Explanatory Note were published. The regulations amend Part 15 of the Companies Act 2006 to implement article 1(1) and (3) of Directive 2014/95/EU (Non-Financial Reporting Directive) requiring EU listed companies with over 500 employees to prepare an annual statement relating to environmental, social and employee-related matters, human rights and anti-corruption matters. The amendments apply to the financial years of companies and qualifying partnerships beginning on or after 1 January 2017.

The Committee noted that on 21 December 2016, ESMA published a feedback statement on its consultation on draft regulatory technical standards on the ESEF. ESMA sets out the digital format which issuers in the EU must use to report company information from 1 January 2020.

5.4 Public M&A

The Committee noted that on 14 December 2016, the Takeover Panel Executive published Panel Statement 2016/9 which refers to a new set of content checklists and supplementary forms that must be completed and submitted together with any final form firm offer announcement, offer document, offeree board circular, scheme circular to Rule 15 offer/proposal.

The Committee noted that on 10 January 2017, the Takeover Panel published Panel Statement 17/1 cold-shouldering two individuals.

Chris Pearson noted that in the context of a takeover in the Dee Valley case, an employee had opposed a recommended scheme. The employee had bought over 400 shares before the scheme meeting and then split them between individual shareholders. The Chairman obtained an order from the court before the scheme meeting that he should report the result both including and excluding those shares. If the votes are accepted and the scheme fails on the basis of the majority in number test, the court will have no power to sanction the scheme.

It was noted that s.793 CA 2006 notices had been used to obtain evidence on interests in the shares.

The Committee discussed the majority in number test. The Chairman noted that as there was an element of expropriation in a scheme, an additional test could be justified. It was noted, however, that the additional test need not be one of majority in number.

It was also noted that the only case to have considered splitting of holdings was PCCW and that was a Hong Kong case where the bidder had split its shares, rather than opponents to the scheme. In these circumstances it is much easier for the court to discount the shares.

5.5 Equity Capital Markets

The Committee noted that on 12 December 2016, the AIM Regulation published an Inside AIM update on how social media interacts with disclosure obligations under the AIM Rules. These forms of communication are subject to the same rules regarding disclosure of regulatory information.

The Committee noted that on 20 December 2016, ESMA published version 26 of its questions and answers on prospectuses. Changes since the last version include a new question and answer on the application of ESMA's guidelines on alternative performance measures.

The Committee noted that on 20 January 2017, the Commission published a consultation on the Capital Markets Union action plan. The consultation ends on 17 March 2017.

5.6 Accounting

The Committee noted that on 13 December 2016, the FRC published amendments to FRS 101 (Reduced Disclosure Framework) and FRS 102 (The Financial Reporting Standard applicable in the UK and Republic of Ireland). The amendments remove the requirement for a qualifying entity to notify its shareholders that it intends to take advantage of the disclosure exemptions. The amendments apply for accounting periods beginning on or after 1 January 2016.

5.7 Cases

The Committee noted the following cases:

Gunewardena v Conran Holdings Ltd [2016] EWHC 2983 (Ch). The High Court considered which articles of association are binding on the company and its shareholders where an incorrect version of the articles is filed with the Registrar of Companies.

Re Portman Insurance plc [2016] EWHC 2994 (Ch). The High Court considered that a Part 8 claim form for certification under Article 25(2) of Council Regulation (EC) 2157/2001 on the Statute for a European Company (SE), should not be refused because one of the merging entities is a non-trading, dormant company and in effect a shell.

Granada Group Ltd v Law Debenture Pension Trust Corp plc [2016] EWCA Civ 1289. The Court of Appeal upheld the High Court's decision that directors' membership of a secured unfunded unapproved retirement benefits scheme did not amount to the acquisition by them of a non-cash asset for the purposes of section 320 of the Companies Act 1985 (now substantially re-enacted as section 190 of the Companies Act 2006).

Re Baltic Exchange Limited. In the context of a scheme of arrangement, shareholders who were to enter into contractual arrangements with the company after the completion of the scheme were held to be in the same class as other shareholders not benefiting from such arrangements. The court held that it is not confined to looking at the scheme document in the narrow sense, but, where the scheme is accompanied by other arrangements, the class question must be answered by reference to all those arrangements.

Chris Pearson noted that in the Baltic Exchange case a number of shareholders would be entering into new contractual arrangements on completion of the scheme. These arrangements were not worth a lot of money. Snowden LJ noted that that it was necessary to look at the wider arrangements not just the scheme.

5.8 Miscellaneous

The Committee noted that on 13 January 2017, the Ministry of Justice launched a call for evidence on corporate liability for economic crime including fraud, false accounting and money laundering when committed in the name of or on behalf of companies. The consultation closes on 24 March 2017. A working party would be set up to look at this. There was a concern at having more “failure to prevent” offences.

The Committee noted that on 23 January 2017, BEIS published a Green Paper, "Building our Industrial Strategy", in which it sets out the ten pillars underpinning the government's new approach to industrial strategy, together with its proposals in each area. It was noted that the FCA plans to review the structure of the UK’s listed market in the first quarter of 2017. It will also discuss whether changes to the listing regime are required.