THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 287th meeting
at 9:00 a.m. on 27 September 2017
at Clifford Chance LLP, 4 Coleman Street, London EC2R 5JJ

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1. **Welcome and apologies**

Attending: David Pudge (Chairman), Kath Roberts (Secretary), Stephanie Maguire, Antonia Kirby, Lucy Fergusson, Kevin Hart, Jeffrey Sultoon, Khasruz Zaman, Simon Jay, John Adebayi, Stephen Mathews, Murray Cox, Richard Ufland, Chris Pearson, Richard Spedding, Gary Green, Martin Webster, Victoria Younghusband.

Apologies: Mark Austin, Mark Bardell, Adam Bogdanor, Robert Boyle, Nicholas Holmes, Chris Horton, Vanessa Knapp, Andrew Pearson, Patrick Speller.

The Chairman welcomed John Adebiyi and Murray Cox as new members of the Committee attending their first meeting and also welcomed Kevin Hart of The City of London Law Society who expressed his intention to be a regular attendee going forward.

2. **Approval of minutes**

It was noted that the minutes for the July 2017 meeting were being finalised and would be circulated in due course.

3. **Matters arising**

3.1 Response to PCP 2017/1 (Takeover Panel Code Committee consultation paper on asset sales in competition with an offer and other matters). The Committee noted that the Takeovers joint working group (JWG) response to PCP 2017/1 had been submitted to the Panel on 22 September.

Chris Pearson reported that the view of the JWG is that, generally, parties should be free to structure a non-Code deal in the manner of their choosing unless there is a good reason to restrict them from doing so. In a non-competitive situation, where the target board is supportive of an asset sale, the JWG did not support Code regulation. To the extent the Panel were to proceed with its proposal then the JWG invited the Panel to re-consider setting the applicable materiality threshold at a higher level. However, in a competitive situation, given the need to put competing bidders on an equal footing, the JWG accepted that there was an argument that the proposed restriction should apply whereby an offeror or potential offeror would be restricted from circumventing the provisions of the Code by purchasing the company's assets following the offer or possible offer lapsing or being withdrawn.

The JWG's submission also questions the rationale for certain of the proposals in PCP 2017/1 relating to requiring a target to obtain separate independent financial advice and to publish a circular in relation to proposed actions under Rule 21.1, as proposed to be amended.

The Committee noted that the Panel had published PCP 2017/2 on statements of intention and related matters (see item 4.5 below). Chris Pearson confirmed that the JWG would review PCP 2017/2 and prepare a response.

3.2 Brexit: Repeal Bill:

(a) The Committee noted that on 30 August 2017, the Financial Markets Law Committee published a letter addressed to the Ministry of Justice that highlights issues of legal uncertainty arising out of clause 3 of the European Union (Withdrawal) Bill in relation to direct EU legislation forming part of domestic law on and after exit day provided that it is 'operative immediately before exit day'.

(b) The Committee noted that on 7 September 2017, the Law Society published a briefing that outlines its views on the EU (Withdrawal) Bill and its wider priorities for Brexit, calling for the Government to provide clarity around the use of delegated powers, to place greater emphasis on the devolved administrations and to seek transitional arrangements.

3.3 Response to CP 17/21 (FCA consultation paper on the proposal to create a new premium listing category for sovereign controlled companies). The Committee noted that a draft response to CP 17/21 has been prepared by Richard Ufland and is with the Joint Listing and Prospectus Rules Working Party for review.

3.4 MAR Q&A. The Committee noted that the CLLS/LSCLC MAR Q&A was updated on 21 July 2017 to include a note to state that Q&A7 is being revised in the light of updated Q&A7.7 in ESMA's Q&A on MAR published on 6 July 2017 as ESMA's views in Q&A7.7 were incompatible with the CLLS/LSCLC MAR Q&A. The revised version of the Q&A7 is still in draft.

3.5 Fourth Anti-Money Laundering Directive (MLD):

The Committee noted the following:

(a) The publication on 20 July 2017, by HM Treasury of a consultation on draft regulations which give powers and responsibilities to the Office for Professional Body Anti-Money Laundering Supervision (OPBAS, the proposed new money laundering and terrorist financing watchdog to be created within the FCA) to supervise professional body anti-money laundering supervisors.

(b) The publication on 24 July 2017, by the FCA of a consultation seeking views on OPBAS. The consultation proposes text for a specialist sourcebook for professional body anti-money laundering supervisors that will set out expectations in relation to anti-money laundering supervision. The FCA

anticipates that OPBAS will be up and running by the beginning of 2018. The consultation closes on 23 October 2017.

(c) The publication on 19 September 2017, by the Legal Sector Affinity Group (the anti-money laundering supervisory authority for the legal sector) of draft anti-money laundering guidance. It is subject to approval by HM Treasury, which is expected later this year, and so may be subject to change. Once it has been approved by HM Treasury, the guidance will be published in final form and will replace the Law Society's anti-money laundering practice note.

Stephen Mathews observed that, as a consequence of the MLD being a Directive, rather than Regulation, implementation of the PSC regime across different Member States varied, with an inconsistent approach being seen in different jurisdictions, for example, in relation to who should be entered as the controller of a company (and the applicable exemptions) and in relation to the treatment of aggregation of holdings.

3.6 Criminal Finances Act 2017 - Corporate offences of failure to prevent the criminal facilitation of tax evasion. The Committee noted that regulations have been made which bring the corporate offences of failure to prevent facilitation of tax evasion into force on 30 September 2017. HMRC has published guidance dated 1 September 2017 which contains the procedures that relevant bodies can put in place to prevent persons associated with them from committing tax evasion facilitation offences.

The Committee also noted the publication by the Law Society on 8 September 2017 of a practice note which provides guidance to solicitors on these new corporate offences.

4. **Discussions**

4.1 BEIS' response to the Green Paper on corporate governance reform. The Committee noted the publication by BEIS on 29 August 2017 of the Government's response to the Green Paper consultation on corporate governance reform.

The Chairman summarised the key proposal in the response paper. In particular, the Chairman reported that the Government intends, inter alia, to bring forward secondary legislation to require: (i) all large listed companies to disclose the pay ratio between their CEO and average UK worker; and (ii) all large companies (both public and private) to explain how their directors comply with their s.172 Companies Act 2006 duties. The FRC intends to consult on changes to the UK Corporate Governance Code in late Autumn and the Government intends to lay before Parliament draft secondary legislation before March 2018. Work on developing voluntary corporate governance principles for large private companies will commence in the Autumn. It was noted that the Government's current intention is to bring these changes into force by June 2018, and for them to apply to financial reporting years beginning on or after that date. The Government will also invite the GC100 to complete and publish new advice and guidance on the practical interpretation of the directors' duties in s.172 Companies Act 2006.

The Committee also discussed the ICSA/Investment Association paper entitled "The Stakeholder Voice in Board Decision Making" which was published on 26 September

2017 and provides advice to companies on how to identify their various stakeholder groups.

There were some concerns raised about the Government's proposals, built upon in the ICSA/Investment Association paper, that an independent director should be tasked with representing a particular group of stakeholders, or stakeholders generally, given that the role of any such director is to act independently. This independence may be compromised where he or she is expected to represent the interests of a particular stakeholder group.

The Committee also noted that companies and regulators should not lose sight of the fact that the directors' statutory and primary duty is to promote the success of the company for the benefit of its members. Any engagement with other stakeholder groups must take place within the wider framework of this duty and it may not be appropriate or necessary to engage with certain stakeholder groups about, for example, the company's M&A strategy.

The Committee will consider in due course both the changes to the Corporate Governance Code when the FRC publishes these and the work that the FRC intends to undertake in relation to share buy backs.

4.2 Meeting with the FCA. Victoria Younghusband summarised the discussions of a meeting held between the CLLS MAR Working Group and the FCA on 12 September 2017.

It was noted the FCA had raised an issue regarding (non-regulated) corporates that engage in own account trading and whether they are aware of their obligations under Article 16(2) MAR in regard to the prevention and detection of market abuse. The FCA highlighted Q6 of the ESMA Q&A which states that non-financial firms that, in addition to the production of goods and/or services, trade on own account in financial instruments as part of their business activities (e.g. industrial companies for hedging purposes) can be considered firms professionally arranging or executing transactions in financial instruments under Article 16(2) of MAR. The Chairman noted that this interpretation is very different from the interpretation that the FCA had applied under MAD. Murray Cox noted that ESMA's approach raises the question of whether ordinary course corporate treasury activities might be considered to be own account trading. Committee members agreed to consider this issue further and discuss it at the November meeting.

The Committee noted the FCA's change in its position on enforcement which was discussed at the meeting on 12 September and, in particular, the FCA's shift away from simply trying to secure successful prosecutions to referring more cases for open minded investigation. Committee members noted that they were seeing an increased number of requests for information being sent by the FCA to clients following the announcement of inside information (whether delayed or not).

The Committee discussed the question of whether, if an issuer announces inside information as soon as possible, is it still required to prepare an insider list? The conclusion was that it would be best practice to do so, given the obligation to prepare an insider list arises by reference to the existence of inside information and not by

reference to whether the issuer has delayed the announcement of any such information (Art 18, MAR).

Victoria Younghusband also reported that the FCA is keen to expand its engagement with the CLLS on MAR issues to encompass listing rules and Prospectus Directive/Regulation issues. The Chairman will discuss this suggestion with Jim Moran at the FCA and report back.

4.3 Brexit: Repeal Bill. The Committee noted that on 14 September 2017, the House of Lords Constitution Committee invited contributions to its inquiry on the European Union (Withdrawal) Bill. The Constitution Committee is seeking evidence on the detailed provisions of the Bill and their legal and policy effect. The inquiry will examine the constitutional implications of the Bill across the following three broad themes: (i) the relationship between Parliament and the executive; (ii) the rule of law and legal certainty; and (iii) the consequences for the UK's territorial constitution. The Committee agreed that it would not prepare a response to this call for evidence.

4.4 ICAEW consultation on prospective financial information. As reported at a previous Committee meeting, the ICAEW has put out a consultation paper on prospective financial information with a deadline of 31 October 2017. It was noted that William Underhill had kindly agreed to continue to lead on preparing a response and that any Members of the Committee interested in getting involved should let the Chairman know.

4.5 Takeover Panel consultation: Statements of intention and related matters. It was noted that on 19 September 2017, the Code Committee of the Takeover Panel published PCP 2017/2 setting out proposed amendments to the Takeover Code. These include: (a) requiring an offeror to make specific statements of intention with regard to research and development functions, the balance of the skills and functions of employees and management, and the location of the company's headquarters and headquarters functions; (b) bringing forward the requirement for an offeror to make statements of intention to the time of the announcement of its firm intention to make an offer; (c) introducing a requirement that an offeror must not publish an offer document for 14 days from the announcement of its firm intention to make an offer without the consent of the board of the offeree company; and (d) requiring offerors and offeree companies to publish reports on post-offer undertakings and post-offer intention statements given during the course of an offer. There was a brief discussion of some of the key points raised in the PCP. The Takeovers JWG will discuss the consultation and prepare a response in advance of the 31 October deadline.

4.6 Publication of draft text of Omnibus 3 Regulation amending the Prospectus Regulation. It was noted that the Commission has published draft text for the Omnibus 3 Regulation which contains proposed amendments to the Prospectus Regulation. In particular, the Commission has identified certain types of prospectuses which, due to the nature of the securities and issuers concerned, involve a level of technical complexity and potential risks of regulatory arbitrage which, in the Commission's view, means their centralised supervision and approval by ESMA would achieve more effective and efficient results than their supervision at national level.

The Committee noted that the proposed centralised categories for ESMA scrutiny and approval are: (A) prospectuses drawn up by EU entities for: (i) non-equity prospectuses on regulated market (or segments thereof) only accessible by qualified investors; and (ii) asset backed securities; (B) prospectuses drawn up by EU: (i) property companies; (ii) mineral companies; (iii) scientific research based companies; and (iv) shipping companies; and (C) prospectuses drawn up by third country issuers in accordance with Article 28 of the Prospectus Regulation. (Article 2(m)(iii) in the definition of Home Member State (HMS), which would have applied to third country issuers, is deleted; the HMS for third country issuers becomes, effectively, ESMA.).

The Chairman commented that the proposals had surprised many, coming out of the blue, and that it was thought likely that there might be opposition to them in the European Parliament.

4.7 Electronic AGMs: whether s.311(1)(b) Companies Act 2006 requires a physical location to be stated as the "place of the meeting"?

Stephen Mathews reported that an opinion had been obtained by Allen & Overy from leading counsel who, whilst acknowledging that the law is not clear on this point, was of the view that the better interpretation of s.311(1)(b) (which requires the notice of a general meeting of a company to state the place of the meeting) requires a physical location to be stated in the notice of meeting, failing which the notice is not valid and the meeting not properly convened (thereby invalidating proceedings carried on at the meeting). It would therefore follow that if a shareholder turned up at the physical meeting place then they must be able to participate in the meeting consistent with the decision in ***Byng v London Life Association Ltd*** [1990] Ch. 170. It was noted that this opinion contradicted the opinion from counsel that had supported the approach adopted by Jimmy Choo plc in holding an entirely virtual AGM.

Given that this point is untested by the Courts, the Committee was of the view that it would be necessary to advise clients of the risk involved in holding a wholly virtual meeting. The Committee noted that, in light of this advice, the costs and administrative burden of having to provide a physical location with the IT support to enable participation if shareholder(s) were to turn up at that physical location, may outweigh the benefits of trying to hold a meeting electronically for some companies.

5. Recent developments

5.1 Company Law

The Committee noted that on 12 August 2017 (and updated on 20 September 2017), Companies House issued a press release announcing that it will no longer issue certificates of incorporation for overseas companies, Societates Europaeae (SEs) or unregistered companies and that anyone who has bought these products for the above companies directly from Companies House is entitled to a refund.

5.2 Corporate Governance

The Committee noted that on 27 July 2017, the Pre-Emption Group issued a statement confirming that it does not intend to change the pre-emption thresholds set out in its 2015 Statement of Principles following changes made by the Prospectus Regulation

which increase the exemption from the obligation to publish a prospectus on admitting further securities to trading from 10% to 20%.

The Committee noted that on 3 August 2017, the FRC issued a press release stating that it has removed the Tier 3 categorisation for signatories to the UK Stewardship Code (i.e. those who required significant reporting improvements) on the basis that it was no longer required (the FRC had engaged with Tier 3 signatories and about 20 had improved their statements to Tier 1 or Tier 2 standard, whilst the other half had chosen to remove themselves from the list of signatories).

The Committee noted that on 13 September 2017, the FCA published amendments to the FCA Handbook Glossary and Listing Rules to ensure that the Listing Rules enable issuers to report against the correct version of the UK Corporate Governance Code in line with their annual reporting period and that such amendments came into force on 13 September 2017.

5.3 **Reporting and Disclosure**

The Committee noted that on 26 July 2017, the FRC published a factsheet on non-financial reporting which provides an overview of the regulations implementing the EU Directive on disclosure of non-financial and diversity information.

The Committee noted that on 15 August 2017, the FRC published a consultation paper setting out draft amendments to its Guidance on the Strategic Report aimed at updating the existing Guidance to: (i) reflect changes arising from the UK implementation of the EU Directive on disclosure of non-financial and diversity information; (ii) enhance the linkage between s.172 Companies Act 2006 and the purpose of the strategic report; and (iii) make targeted improvements to certain areas of the Guidance to reflect key developments in corporate reporting. Given that the FRC will amend this Guidance in light of the Government's response to the Green Paper, the Committee does not intend to submit a response to this consultation paper.

5.4 **Equity Capital Markets**

The Committee noted that on 31 July 2017, the LSE published a consultation on the amendments to the Rules of the LSE in preparation for MiFID II and following a general rulebook review. The proposed effective date for the new rules is 3 January 2018.

The Committee noted that on 23 August 2017, the QCA published a press release inviting comment on the first edition of its position paper setting out its vision for the future of the UK market structure for small and mid-sized quoted companies.

The Committee noted that on 31 August 2017, the FCA published Primary Market Bulletin (PMB) No. 18 to consult on changes to the UKLA Knowledge Base and, in particular, proposing new technical guidance on sponsor obligations. It was noted that the Joint Listing and Prospectus Rules Working Party chaired by Richard Ufland had organised a call to discuss PMB and the draft technical guidance notes in order to prepare a response which would be submitted to the FCA.

The Committee noted that on 1 September 2017, the FCA issued Quarterly Consultation Paper No. 18 (CP 17/32), which consults on various proposed amendments to the FCA Handbook. The consultation paper does not contain any proposed amendments to the Listing Rules, Prospectus Rules or Disclosure Guidance and Transparency Rules.

The Committee noted that on 18 September 2017, the FCA published Market Watch No. 53 which focuses on matters relating to the coming into effect of MiFID II on 3 January 2018, including the requirement that, from that date, all firms subject to MiFID II transaction reporting obligations and their eligible clients must have a Legal Entity Identifier or 'LEI'.

The Committee noted that on 22 September 2017, the LSE published its annual 2018 Dividend Procedure Timetable.

5.5 **MAR**

The Committee noted the publication on 1 September 2017 of an updated version of ESMA's Q&A on MAR. Changes include new detailed answers on: (i) the scope of the financial instruments subject to the market sounding regime under MAR; and (ii) the persons subject to the obligation to maintain insider lists.

The Committee noted the results of the poll, carried out among GC100 member and available via Practical Law, to find out how member companies have dealt with some of the requirements of MAR over the last year.

5.6 **Accounting**

The Committee noted that on 28 July 2017, the FRC published a report entitled "Developments in Audit 2016/17" and an accompanying summary report.

The Committee noted that on 25 August 2017, HM Treasury issued a consultation on draft regulations to increase, with effect from the tax year commencing on 6 April 2018, the thresholds below which co-operatives and community benefit societies are able to disapply the requirement to conduct an audit.

5.7 **Miscellaneous**

The Committee noted the speech by Andrew Bailey, Chief Executive of the FCA on 27 July 2017 indicating that LIBOR is likely to cease to exist by the end of 2021.

The Committee noted the publication by the Competition and Markets Authority on 5 September 2017 of the following updated guidance designed to further improve the merger process for businesses: (i) additional guidance on the CMA's use of initial enforcement orders; (ii) changes to the merger notice form; and (iii) minor amendments to the guidance on the CMA's mergers intelligence function.

The Committee noted that the Data Protection Bill 2017 had had its first reading in the House of Lords on 13 September 2017.

The Committee noted that BEIS had laid a draft of The Business Contract Terms (Assignment of Receivables) Regulations 2017 before Parliament and that the

Regulations would render ineffective terms in contracts which prohibit or restrict assignments of receivables. It was noted that certain contracts are excluded from the ambit of the Regulations, such as (a) contracts for prescribed financial services, (b) contracts concerning interests in land and (c) contracts where one or more of the parties is acting for purposes outside of a trade, business or profession and (d) contracts the law applicable to which is the law of England Wales or the law of Northern Ireland only by choice of the parties (and apart from that choice would be the law of Scotland or some country outside the UK). It was noted that a date for approval of the draft Regulations had not yet been scheduled.

The Chairman noted that although the draft Regulations reflected a number of drafting changes, the precise ambit of the Regulations remain unclear and potentially very broad. The Chairman commented that, although not expressly excluded from the ambit of the Regulations, the correct interpretation seemed to be that share sale and purchase agreements and asset purchase agreements are not contracts for the sale of goods, services or intangible assets and, as such, should not be caught by the Regulations. It seemed more open to question, however, whether transitional service agreements could be caught. There was broad agreement with these views but due to time constraints, the Chairman suggested that the Committee should discuss this topic in greater detail at the November meeting.

5.8 **Cases**

The Committee noted the following cases:

(a) *(1) Liontrust Investment Partners LLP (2) Liontrust Investment Services Limited (3) Liontrust Asset Management PLC and others v Eoghan Flanagan [2017] EWCA Civ 985.* The Court of Appeal held that a side letter to an LLP agreement that stated that "The notice period.... is six months.... such notice to expire no earlier than [4 October 2013]" meant that six months' notice was required, and not at least six months' notice. Therefore, the 14 months' notice which had been given was not valid and it was not open to Liontrust to operate the garden leave provisions more than six months before 4 October 2013. The Court of Appeal accepted that the meaning was dependent on the context, but there was nothing in the context in this case that required any departure from the literal meaning.

(b) *Richard Charles Fox-Davies v Burberry PLC [2017] EWCA Civ 1129.* The Court of Appeal had to decide whether the request for a copy of Burberry's register of members pursuant to s.116 Companies Act 2006 by Richard Fox-Davies, who ran a lost shareholder tracing business, was made for a proper purpose. It was held unanimously that the request in this case was not made for a proper purpose. The Court of Appeal reiterated its decision in *Burry & Knight Ltd v Knight [2014] EWCA Civ 604* that, when considering whether a purpose was improper for the purposes of s.116 Companies Act 2006, the manner in which the purpose was to be carried out was relevant. It was noted that the business of tracing lost shareholders itself is not regarded as an improper purpose, however, in this case, the fact that the requesting party had not disclosed to the court during the litigation the fee structure that would apply and did not, as a matter of business practice, disclose his fees to untraced members until they had signed up to his terms, was held to be

sufficient to make the otherwise proper purpose of reuniting missing shareholders with their shareholdings, an improper one.

(c) *Randhawa & Anor v Turpin & Anor [2017] EWCA Civ 1201.* The Court of Appeal held that the *Duomatic* principle simply could not apply in a situation where one of the registered shareholders was a company which did not exist because it had been dissolved. The *Duomatic* principle requires the consent of all the registered shareholders and the dissolved company was incapable of consenting. The court made no decision on whether the consent of a beneficial owner of shares is sufficient for *Duomatic* purposes if there is nobody entitled to agree on behalf of the registered shareholder. It was also held that the company did not become a single member company even though the company which was the other registered shareholder has been dissolved. It was held that: (i) the word 'member' in regulation 40 of Table A and the single member company provisions in the Companies Act 2006 includes "any member registered on the company's register, whether alive or dead, and, if corporate, whether subsisting, in an insolvency procedure or dissolved"; and (ii) the sole director did not have the right to appoint the joint administrators under paragraph 22(2) Schedule B1 Insolvency Act 1986 where the quorum provisions for board meetings in the company's articles was two.

(d) *M&G Broad European Loan Fund Limited v Hayfin Capital Luxco 2 SARL [2017] EWHC 1756 (Ch).* In an application for summary judgment, the High Court held that a pre-emption right in a shareholders' agreement that required the transfer notice to include the material terms on which the sale to the third party was to be effected did not mean that the terms of the proposed acquisition by the third party of the transferring shareholder's share of the debt owed by the company were "material terms" which had to be included in the transfer notice. The pre-emption right only concerned the shares, so it was only the terms relating to the sale of the shares that were material for the purposes of the shareholders' agreement. It was noted that it had not been argued that the price to be paid for the debt affected the price of the shares.

(e) *Garlsson Real Estate SA, in liquidation, and others v Commissione Nazionale per le Società e la Borsa (Consob) (Case C-537/16).* On 12 September 2017, Advocate General Campos Sánchez-Bordona delivered an opinion following a request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy). The opinion states that Article 50 of the Charter of Fundamental Rights of the European Union does not permit double administrative and criminal punishment of the same unlawful conduct consisting of market abuse, when the applicable administrative penalty is of a substantively criminal nature and the duplication of proceedings against the same person in respect of the same acts is provided for without establishing a procedural mechanism which prevents such duplication. Article 50 provides that no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the European Union in accordance with the law.

6. **Any other business**

Forthcoming CLLS events.

29 January 2018 - annual dinner for all members of the specialist committees of the CLLS

14 May 2018 - annual service for CLSC/CLLS at St Peter ad Vincula at the Tower of London, followed by a reception and dinner at Trinity House

11 June 2018 - CLLS AGM and annual reception.