THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 296th meeting
at 9:00 a.m. on 27th March 2019
at Clifford Chance LLP, 10 Upper Bank Street, London E14 5JJ

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1. **Welcome and apologies**

Attending: David Pudge (Chairman), John Adebiyi, Mark Austin, Sam Bagot, Jonathan Beastall (as alternate for Martin Webster), Adam Bogdanor, Lucy Fergusson, Nicholas Holmes, Chris Horton, Vanessa Knapp, Caroline Rae (as alternate for Mark Bardell), Patrick Sarch, Richard Spedding, Patrick Speller, Richard Ufland, Liz Wall, Victoria Younghusband and Kath Roberts (Secretary).

Apologies: Mark Bardell, Robert Boyle, Murray Cox, Kevin Hart, Stephen Mathews, Chris Pearson and Martin Webster.

2. **Approval of minutes**

The Chairman reported that final versions of the minutes of the meetings held on 28 November 2018 and 24 January 2019 were circulated to members on 25 February 2019 and 26 February 2019 respectively.

3. **Matters arising**

3.1 Post-legislative scrutiny of the Bribery Act 2010. The Committee noted that on 14 March 2019, the House of Lords Select Committee on the Bribery Act 2010 issued a press release announcing the publication of its post-legislative scrutiny report on the Bribery Act 2010, concluding that the Act is exemplary. It was further noted that, following 23 oral evidence sessions and 61 written submissions, the House of Lords Select Committee agreed with the view of the witnesses and other contributors that the Act is working well, and is an example to other countries, especially developing countries. However, the Committee noted the recommendations that the Government should improve the advice it provides to small and medium-sized companies on how best to export their products and services while remaining compliant with the Bribery Act and that the CPS and also that the SFO should make speeding up bribery prosecutions a priority action.

3.2 IA guidelines on the redemption or cancellation of irredeemable preference shares. The Committee noted that on 19 February 2019, the Investment Association published guidelines on the redemption or cancellation of irredeemable preference shares which provide a useful guide to shareholder expectations and good practice and are to be read as of general application to listed companies.

The Committee noted the background to the publication of these guidelines, namely the previous announcement by Aviva plc that it was contemplating the cancellation of certain irredeemable shares at or close to par value through a reduction of capital under the Companies Act 2006, which significantly and adversely affected the market for, and price of, those irredeemable shares. It was noted that the guidelines recommend that issuers follow a fair process when looking to redeem or cancel irredeemable preference shares, having regard to the fair market price for the shares and undertake consultation with both the preference shareholders and ordinary shareholders. However, the Committee noted that the guidelines do not address the reality that, in certain cases, shares which are stated to be irredeemable may not in fact be irredeemable and that, as such, it is important that issuers ensure that disclosures about the rights attaching to shares are clear and that investors obtain appropriate advice on the terms of the relevant investments. The guidelines also fail to address the conflict between ordinary and preference shareholders interests and the fact that there may be benefits to the ordinary shareholders of removing expensive preference shares. It was also noted that, for Solvency II purposes, irredeemable shares will not count towards an insurer's statutory capital requirements going forward and so there is likely to be a continued focus by insurers on how it may be possible to "remove" them.

3.3 Brydon review into UK audit standards. The Committee noted that on 14 February 2019, BEIS published the terms of reference for its independent review into the quality and effectiveness of audit that was announced on 18 December 2018. The meeting noted that the Brydon review intends to take a fresh look at the scope of audit practice in order to ensure that audits meet the needs of users of accounts. It was also noted that this review sits alongside a number of other reviews, including that of the CMA, into audit practices.

3.4 IOSCO consultation report on good practices to assist audit committees in supporting audit quality. The Committee noted that on 17 January 2019, the IOSCO issued a press release stating that it has published a report on good practices for audit committees in supporting audit quality following its consultation published on 24 April 2018. It was further noted that the report seeks to assist audit committees in promoting and supporting audit quality.

3.5 Gender pay gap reporting. The Committee noted that on 17 January 2019, the House of Commons' Business, Energy and Industrial Strategy Committee published the Government's response to the BEIS Committee's report on gender pay gap reporting published on 2 August 2018.

It was noted that the BEIS Committee's report made several recommendations for company boards, investors and regulators to drive change in tackling the gender pay gap. The Government's response addressed a number of the Committee's recommendations and, in particular, stated that it would not at this stage consider expanding the scope of the gender pay gap reporting regime by reducing the reporting threshold from businesses employing 250 persons to 50 persons. It was further noted that the Government response did not address the Committee's recommendation that boards introduce KPIs for reducing and/or eliminating gender pay gaps.

3.6 Letter to Companies House on electronic signatures. The Committee noted that, as discussed at the January Committee meeting, the Chairman, on behalf of the

Committee, wrote to Companies House concerning its policy to refuse to accept documents that have been executed using an electronic signature and urged Companies House to reconsider its policy to bring it into line with the Law Commission's views on electronic signatures set out in its August 2018 consultation paper. The Chair reported that he had received an acknowledgement from Companies House of receipt of his letter but no indication of whether Companies House would be likely to change its practice. Liz Wall (**LW**) reported that the Law Commission had recently been in touch with her regarding their work on electronic signatures and that it would be helpful if she could pass the Chair's letter and the response received from Companies House onto the Law Commission in advance of the publication of their final report. The Secretary agreed to send these documents to LW.

3.7 Letter to BEIS in relation to certain issues raised by the independent review of the FRC. The Committee noted that, as discussed at the January Committee meeting, the Chairman, on behalf of the Committee, wrote to BEIS to raise concerns about certain of the proposals raised in Sir John Kingman's final report of the independent review of the FRC which impact on directors' duties and other aspects of company law. The Chairman reported that he had not yet received any response to his letter from BEIS.

4. Discussions

4.1 FRC to be replaced with a new regulator following the review by Sir John Kingman. The Committee noted that on 11 March 2019, BEIS published a press release and an initial consultation on the recommendations set out in Sir John Kingman's final report of the independent review of the FRC. It was noted that, as per the recommendations, the FRC will be replaced with a new regulator, called the Audit, Reporting and Governance Authority, with stronger powers. The meeting further noted that BEIS is consulting on the detail of certain of the review's recommendations in this consultation (being those not requiring primary legislation) and will consult further on the detailed proposals for the new regulator once developed. The Chairman reported that the consultation closes on 11 June 2019.

The meeting discussed recommendation 28 (that the new regulator should introduce a pre-clearance procedure for the treatment of novel and contentious matters in accounts in advance of their publication). Whilst it was agreed this sounded like a helpful development, the Committee was of the view that it would even more useful if the regulator was required to publish details of what matters had been pre-cleared in order that a body of practice could be established in this area. The Committee discussed whether it wished to respond to the consultation. LW reported that the Law Society CLC was also considering whether to respond to some of the questions in the consultation and that members could feed comments through to her for inclusion in any such response.

It was noted that when the FSA was first established a significant amount of time was spent by litigators ensuring that there was a mechanism in place to enable decisions of the FSA to be appealed. It was thought that similar concerns would be raised in respect of the establishment of the ARGA and that any response to the consultation may wish to address this**.**

4.2 ICAEW consultation on prospective financial information. The Committee noted that the ICAEW had published its consultation on an Exposure Draft of guidance for

preparers of prospective financial information (PFI), which the ICAEW had presented to the Committee at the January Committee meeting. It was noted that the Exposure Draft (i) provides a revised framework of principles for preparing PFI and general guidance to support the preparation of any financial information that relates to a future period or has a future date; and (ii) includes specific guidance for preparing certain PFI in capital markets transactions. It was noted that the consultation closes on 30 April 2019, although the ICAEW had indicated that they had flexibility to receive comments after this date.

The Committee agreed that the draft guidance looked broadly fine and that it did not propose to submit a formal response to the consultation.

4.3 Government response to the consultation on protecting defined benefit pension schemes – A stronger Pensions Regulator. The Committee noted that on 11 February 2019, the Department for Work and Pensions published its response to the consultation on protecting defined benefit pension schemes – A stronger Pensions Regulator.

The Committee noted that the Government intends to introduce two new criminal offences to prevent and penalise mismanagement of pension schemes. In particular, it was noted that the first offence will target individuals who wilfully or recklessly mishandle pension schemes, endangering workers' pensions, with a new custodial sentence of up to seven years' imprisonment or an unlimited fine and the second offence, which will attract an unlimited fine, will target individuals who fail to comply with a contribution notice, which is issued by The Pensions Regulator requiring a specified amount of money to be paid into the pension scheme by that individual. It was noted that the Government also intends to introduce a new civil penalty of up to £1 million for these offences.

The Committee noted that the response confirms the introduction of a new requirement on those planning certain corporate transactions to issue a "declaration of intent" to the trustees and the Regulator covering (i) an explanation of the transaction; (ii) confirmation that the trustee board has been consulted; and (iii) how any detriment to the scheme is to be mitigated. It was noted that this requirement will be triggered in relation to (a) sale of controlling interest in a sponsoring employer (an existing notifiable event); (b) sale of a material proportion of the business or assets of a sponsoring employer which has funding responsibility for at least 20% of the scheme's liabilities (a new notifiable event); and (c) granting of security in priority to the scheme on a debt to give it priority over a debt to the scheme (a further new notifiable event).

The Committee discussed that, whilst it is unclear at this stage when the declaration must be made, the aim of the new regime is to involve the trustees and Regulator earlier than would previously have been the case which may raise practical difficulties for companies and their advisers on transactions. The Committee also noted the potential uncertainty as to whether a post offer undertaking on a takeover bid would be treated as a notifiable event.

Members reported that they had heard that a new pensions bill might be introduced as early as May 2019.

4.4 BEIS consultation on national security and investment. The Chairman provided a report to the Committee on the outcome of the meeting with BEIS on 7 February 2019 at which BEIS briefed the joint Committee/Law Society CLC working group on some of the "tweaks" and "refinements" being made to the Government's proposed new national security regime in light of responses to the recent consultation.

It was noted that the information was being shared subject to confidentiality restrictions given BEIS's revisions to the proposed regime remained very much "work in progress".

4.5 Brexit. The Committee noted that the items in the Brexit Annex appended to the meeting agenda had been published, along with those items listed referred to in paragraphs 5.1(a), 5.4(a), (b), (d), (e), (f), (g), (h) and (i), 5.6(a) and (b), 5.6(b) and 5.7(a).

With regard to the issue of cross border mergers (and noting that the UK Companies (Cross-Border Mergers) Regulations 2007 will be revoked on a hard Brexit), members reported that they were hearing that in some EU jurisdictions (most notably Germany and Austria) the authorities appear to be indicating that they will extend the period beyond the Brexit date for a company to effect its merger from the UK to that jurisdiction. It was unclear how this might work in practice given that once the merger is approved by the competent authority of the country where the merged entity will be registered, the UK merging company must then register the merger documents with the Registrar of Companies who would need to strike off the name of the UK transferor company and notify the registries in the jurisdictions where the other merging EEA companies are registered. However, as the UK regulations would have been revoked, there would no longer be a requirement on the Registrar to remove the company from the register of companies and notify the other relevant registries.

5. Recent developments

5.1 Company law

(a) Companies House no deal Brexit press releases. The Committee noted that on 14 February 2019, Companies House published two guidance notes relating to a no deal Brexit, one on changing company registration and the other on changes to Companies House forms.

5.2 Corporate governance

(a) FRC planned review of the UK Corporate Governance Code. The Committee noted that on 5 March 2019, Stephen Haddrill, CEO at the FRC, stated in a speech that the FRC plans to review how effectively the UK Corporate Governance Code is being implemented by companies at the end of 2019, with a more detailed review in 2020 when reporting under the revised code is fully effective. Members reported that they were not seeing any move by clients to report against the 2019 Code early in their 2018 financial year end annual reports.

(b) IA statement on director pensions and gender diversity. The Committee noted that on 21 February 2019, the Investment Association announced IVIS policy

changes in relation to pension contributions for directors and gender diversity on boards. It was noted that IVIS will: (i) 'red-top' companies who pay newly-appointed directors pension contributions which are not in line with the majority of their employees; (ii) 'red top' FTSE 350 companies that have no women or only one woman on their board; and (iii) 'amber-top' FTSE 350 companies not on course to meet the requirements of the Hampton-Alexander review, for 33% of women on their board, by 2020. The Committee further noted that following this announcement, on 15 March, the IA announced that the IA and the Hampton-Alexander Review had written to 69 of the FTSE 350 companies that have no women or just one woman on their board highlighting concerns about the lack of gender diversity on the relevant companies' board and asking the companies to outline what action they are taking to make progress and ensure they are on track to meet the Hampton-Alexander targets.

The Committee noted recent press coverage of investor concern's around large pension payments for board members at HSBC, Centrica, RSA and RBS which were out of step with pension contribution levels offered to the wider employees.

(c) FRC consultation on the UK Stewardship Code. The Committee noted that on 30 January 2019, the FRC published a press release announcing that it is consulting on a new UK Stewardship Code. It was noted that the FRC had published a consultation paper, a revised UK Stewardship Code and a summary of the changes from the 2012 UK Stewardship Code and that the consultation closes on 29 March 2019.

The Chairman reported that a Corporate Governance Working Group led by Ashurst held a call on 18 March 2019 to discuss areas of concern and was preparing a response to both this consultation and the FCA/FRC joint discussion paper (DP19/1) (see item 5.2(d)). Nicholas Holmes reported that whilst the response is largely supportive of the new Code, it sought to highlight concerns around the increasing influence of service providers and the need for their actions to be more closely monitored by the asset managers who engage them. It was noted by the Committee that proxy advisory agencies were becoming increasingly influential and concerns were raised about whether the asset managers that instruct them have the necessary resource to provide any meaningful monitoring of their activities and engagement with issuers.

Nicholas reported that the Working Group had secured an extension until 5 April 2019 to submit its response.

(d) New measures to encourage effective stewardship. The Committee noted that on 30 January 2019, the FCA published a press release announcing the publication of two papers that propose new measures on how to encourage effective stewardship in the interest of consumers: (i) FCA consultation paper on proposals to improve shareholder engagement (CP19/7) (which consultation closes on 27 March 2019); and (ii) FCA/FRC joint discussion paper on building a regulatory framework for effective stewardship (DP19/1) (comments on DP19/1 are requested by 30 April 2019).

It was noted that the Joint Listing and Prospectus Rules Working Group, led by Richard Ufland (**RU**), held a call on 6 March 2019 to discuss a response to CP19/7 and Primary Market Bulletin No. 20 (see item 5.4(f)) and that the FCA had requested a meeting with the Working Group to discuss CP19/7, which took place on 20 March 2019.

RU reported to the Committee that, by way of reminder, CP 19/7 sets out the FCA's proposals on how parts of the revised Shareholder Rights Directive (SRDII) will be implemented in the UK and that SRDII contains rules around board approval and public disclosure of material transactions between companies with shares admitted to trading on a regulated market in the EU and their related parties. It was noted that in the UK, extensive related party rules already exist for premium listed companies in Chp 11 of the Listing Rules but that implementation of the SRDII will mean the introduction of related party requirements for standard listed issuers, which are not currently subject to related party transaction rules. The new requirements are to be contained in DTR 7.3. It was noted too that SRDII uses the definition of related party for accounting purposes in IAS (IAS 24), which is wider than the premium listing definition and premium listed issuers will need to consider whether a transaction with a "related party" could be caught by the new DTR requirements even where it does not amount to a related party transaction under Chp 11.

RU reported that the FCA was interested to have feedback from the working group. The working group confirmed that it generally agreed with the proposed rules to implement the SDRII requirements and that applying a 25% ratio test to determine materiality in line with the class tests under Chp 10 made sense to the group.

The working group conveyed that it did have an issue with one aspect of the FCA's approach SRDII requires the FCA to make rules relating to all companies with their registered office in the UK and shares admitted to trading on a regulated market in the UK or elsewhere in the EU and that whilst companies with a registered office in an EU member state outside the UK with shares admitted to trading on a regulated market will be subject to the rules that transpose SRDII in that member state, SRDII does not prescribe rules for non-EU incorporated issuers which have shares admitted to trading on an EU regulated market. RU reported that in order to reconcile the scope of SRDII with the principle that all issuers in a given listing category should have to meet the same requirement, the FCA was proposing to amend the DTRs to require all premium listed issuers (except OEICS) and standard listed equity issuers (excluding GDR issuers) that are not required to comply with the requirements imposed by another EEA State that correspond with DTR 7.3 or related party measures imposed by a non-EEA state under equivalent legislation having similar effect to the requirements set out in DTR 7.3 to comply with those requirements as if they were an issuer to which DTR 7.3 applied.

The working group had explained to the FCA that it doubted whether many non-EU jurisdictions would have corresponding requirements with similar effect (aside from the question of who would be the arbiter of that) and that it

was opposed to the extension of these requirements to non-EU issuers as it was felt that it would seriously damage the attractiveness of the standard market, which was now increasingly seen as a viable option for many non-EU issuers who did not feel that the premium market would be appropriate for them. The FCA had seen the logic of treating sovereign controlled companies differently in terms of premium listing requirements and the working group did not see by the same token that non-EU issuers had to be made subject to the new related party requirements. It was surely a matter for investors to consider in the light of the disclosure of the corporate governance arrangements applied by a particular non-EU issuer whether to invest. The FCA was only making these changes to implement SDRII and the working group could not see that there was any real logic or rationale for gold-plating the requirements when the result might in many cases deter non-EU issuers from listing on the UK market. The working group also made the point that if other member states did not extend the scope of SRDII in the same manner, the UK risks putting itself in a disadvantageous position compared with other member states. The FCA said that they were interested to hear the working group's concerns and understood them. The working group has articulated these points in its formal response.

(e) PLSA Corporate Governance Policy and Voting Guidelines 2019. The Committee noted that on 29 January 2019, the Pensions and Lifetime Savings Association published a revised version of its Corporate Governance Policy and Voting Guidelines.

(f) DG JUST Online Platform on Corporate Governance. The Committee noted that the Directorate General Justice and Consumers of the European Commission (**DG JUST**), responsible for corporate governance policy, is launching an Online Platform on Corporate Governance. It was noted that this is a digital space for the exchange of best practices between companies, investors, private and public stakeholders and that the DG JUST is inviting people to join as members. Members were asked to let the Secretary know if they would like any further details.

5.3 **Reporting and disclosure**

(a) Consultation on draft guidelines on the standardised presentation of the remuneration report. The Committee noted that on 1 March 2019, the European Commission published for consultation draft guidelines on the standardised presentation of the remuneration report under the Shareholder Rights Directive. It was noted that the consultation closed on 21 March 2019.

(b) Financial Reporting Lab report on artificial intelligence and corporate reporting. The Committee noted that on 21 January 2019, the FRC's Financial Reporting Lab published a report on artificial intelligence and corporate reporting. It was noted that the report explains what artificial intelligence is, where its use might make sense in corporate reporting, and explores some of the possible and current use cases for the technology.

5.4 **Equity capital markets**

(a) Amendments to LSE rulebooks in the event of a no deal Brexit. The Committee noted that on 7 March 2019, the London Stock Exchange published Market Notice N04/19, AIM Notice 55 and proposed changes to certain of its rulebooks, including the Admission and Disclosure Standards, the AIM Rules for Companies and the AIM Rules for Nominated Advisers, that will apply in the event of a no deal Brexit.

(b) FCA Brexit Policy Statement. The Committee noted that on 28 February 2019, the FCA published its Brexit Policy Statement (PS19/5), which contains feedback on CP18/28, CP18/29, CP18/34, CP18/36 and CP19/2 and confirms the FCA's proposals in the event of a no deal Brexit. It was noted that PS19/5 contains near-final rules and guidance that will apply in the event the UK leaves the EU without an implementation period. It was further noted that the FCA will publish the final instruments on 28 March 2019 if a withdrawal agreement between the UK and the EU is not ratified (and the UK's exit date is not extended).

(c) ESMA publishes list of thresholds below which an EU prospectus is not required. The Committee noted that on 8 February 2019, ESMA issued a press release announcing the publication of a document listing the thresholds below which an offer of securities to the public does not need a prospectus in various EU member states. It was also noted that the document contains a short description of the national thresholds below which no prospectus is required, a summary of any national rules which apply to offers below that threshold and hyperlinks to the relevant national legislation and rules.

(d) Primary Market Bulletin No. 22. The Committee noted that on 20 March 2019, the FCA published the 22nd edition of the Primary Market Bulletin. It was noted that this edition advises issuers and other stakeholders of key changes to the Listing Rules, the DTRs and the Prospectus Rules that will be applicable in the event of a no deal Brexit. It was further noted that this Primary Market Bulletin summarises the relevant changes to the FCA Handbook which are set out in the FCA's Brexit Policy Statement PS19/5.

(e) Primary Market Bulletin No. 21. The Committee noted that on 22 February 2019, the FCA published the 21st edition of the Primary Market Bulletin which advises market makers and issuers of new regulatory obligations that they will need to implement for the Short Selling Regulation and Market Abuse Regulation in the event of a no deal Brexit.

(f) Primary Market Bulletin No. 20. The Committee noted that on 7 February 2019, the FCA published the 20th edition of the Primary Market Bulletin. It was noted that this edition covers the latest changes made, or proposed to be made, to the FCA's Knowledge Base. It was further noted that it also contains commentary on the retirement of the use of the UK Listing Authority name, a reminder that premium listed companies need to consider Listing Rule 11 (Related party transactions) when seeking shareholder approval to release any liabilities that may attach to the shareholders and any directors or former directors where dividends have not been paid in compliance with statutory

requirements, an overview of Brexit updates and updates on the Prospectus Regulation. The Committee also noted that, in relation to amended Technical Note FCA/TN/602.2 (Exemptions from the requirement to prepare a prospectus), PMB No. 20 states that the FCA has received feedback requesting further guidance about applying this technical note to the inclusion of a 'mix and match' in the scheme of arrangement context. It was noted that the FCA states that it intends to consider this request further as a separate piece of guidance.

Given it was unclear why the FCA was now raising the issuer of "mix and match" elections (or where the request for guidance has come from), the Committee proposed to put this issue on the agenda for discussion at the next FCA/CLLS Liaison Group meeting, scheduled for 2 May. Members were asked to send other suggestions for agenda items to VH.

(g) FCA temporary transitional power. The Committee noted that on 1 February 2019, the FCA issued a press release that outlines how it would use the temporary transitional power in the event of a no deal Brexit.

The Committee noted the helpful comments set out in the press release that, whilst the FCA expects firms and other regulated entities to undertake reasonable steps to comply with the necessary changes to their regulatory obligations by exit day, it intends to act proportionately in light of the scale, complexity and magnitude of the changes and would not, in a no-deal scenario, take a strict liability approach and take enforcement action against firms where there is evidence that they have taken reasonable steps to try and meet their obligations by exit day.

(h) No deal MOUs agreed between the FCA and ESMA and EU securities regulators. The Committee noted that on 1 February 2019, the FCA and ESMA separately published press releases announcing the agreement of memoranda of understanding (**MoUs**) between the FCA and ESMA and EU securities regulators. It was further noted that the MoUs cover cooperation and exchange of information in the event of a no deal Brexit.

(i) ESMA Q&As clarify prospectus and transparency rules in the event of a no deal Brexit. The Committee noted that on 31 January 2019, ESMA published an updated version of its Q&A on prospectuses and an updated version of its Q&A on the Transparency Directive. It was noted that the revised Q&As clarify the application of certain provisions in the Prospectus Directive and Transparency Directive in the event of a no deal Brexit.

(j) FCA consultation on changes to align the FCA Handbook with the Prospectus Regulation and European Commission delegated regulations supplementing the Prospectus Regulation. The Committee noted that on 28 January 2019, the FCA published consultation paper (CP19/6) on changes to align the FCA Handbook with the Prospectus Regulation, which was due to come into effect in July 2019. It was noted that the consultation would close on 28 March 2019 and the FCA aimed to issue a policy statement by the end of May. It was also noted that on 14 March 2019, the European Commission published the following draft texts of its delegated regulation supplementing the Prospectus

Regulation: (i) as regards the format, content, scrutiny and approval of prospectuses (and annexes); and (ii) with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal (and annexes).

5.5 **Accounting**

(a) FRC position paper on revisions to the 2016 Auditing and Ethical Standards. The Committee noted that on 5 March 2019, the FRC published a position paper that sets out its planned timetable to make revisions to the 2016 Auditing and Ethical Standards. It was further noted that the FRC will follow this paper with a public consultation on the revised text of the relevant standards in July 2019 and that the FRC's intention is that the revised standards will apply to the audit of financial periods commencing on or after 15 December 2019. In addition, the meeting noted that the paper sets out implications for auditors and audited entities in the event of a no deal Brexit.

(b) Letters on accounting/corporate reporting and audit if there's no Brexit deal. The Committee noted that on 21 February 2019, BEIS and the FRC published letters on accounting/corporate reporting and audit that set out how these areas will be impacted in the event of a no deal Brexit.

5.6 **Takeovers**

(a) Takeover Panel publishes Response Statement and Instrument on asset valuations under the Takeover Code. The Committee noted that on 6 March 2019, the Takeover Panel published Response Statement 2018/1 in relation to asset valuations under Rule 29, together with Instrument 2019/1 which sets out the amendments to the Takeover Code. It was noted that the Code Committee had adopted the amendments proposed in its consultation paper on asset valuations (PCP 2018/1), with some modifications, but that they were broadly in the form which was consulted upon. It was noted that the amendments to the Takeover Code take effect from 1 April 2019.

(b) Takeover Panel publishes Response Statement on the UK's withdrawal from the EU. The Committee noted that on 6 March 2019, the Takeover Panel published Response Statement 2018/2 in relation to the UK's withdrawal from the EU. It was noted that the Code Committee has adopted the amendments proposed in its consultation paper on the UK's withdrawal from the EU (PCP 2018/2) and that, in the event of a no deal Brexit, theses amendment to the Takeover Code take effect from 11.00 pm (UK time) on 29 March 2019.

It was noted that if the UK and EU enter into a withdrawal agreement or if the UK's exit date is extended, the amendments would take effect at a later date. The Committee noted that, as discussed at previous meetings, the key change was the loss of the shared jurisdiction regime. It was noted however that the Panel had engaged with all those companies that would, on a no deal Brexit, fall outside of its Code's remit. Members noted that in Rule 13, the Code continues to give special treatment to the EU competition regime over other non-EU regimes, enabling the offeror to revoke the bid if there a Phase 2

CMA reference or initiation of Phase 2 European Commission proceedings. It is thought that the Panel intends to review this position in due course.

5.7 **Miscellaneous**

(a) Guidance on the functions of the CMA after a no deal Brexit. The Committee noted that on 18 March 2019, the Competition and Markets Authority published guidance on the functions of the CMA after a no deal Brexit designed to explain how a no deal Brexit will affect the powers and processes of the CMA for antitrust and cartel enforcement, merger control and consumer protection law enforcement after exit day in the event of a no deal Brexit. Members also noted that the CMA has published a summary of responses to its consultation on the effects of a no deal Brexit on the functions of the CMA, which closed on 25 February 2019.

(b) Cyber security. The Committee noted that on 5 March 2019, the Government published a press release stating that UK boards of biggest firms must do more to be cyber aware and announcing the publication of its FTSE 350 Cyber Governance Health Check Report 2018 which assesses and reports on cyber security risk management in the FTSE 350. The Committee also noted that on 8 March 2019, the FCA published a report setting out industry insights into cyber security.

(c) CMA letter to BEIS on proposals for reform of the competition and consumer protection regimes. The Committee noted that on 25 February 2019, the Competition and Markets Authority published a letter from Andrew Tyrie, CMA Chair, to the Secretary of State for BEIS setting out its preliminary advice on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. It was noted that the CMA has also published a summary of the proposals.

(d) FCA issues its first decision under competition law. The Committee noted that on 21 February 2019, the FCA published a press release announcing that it had issued a decision which found that three asset management firms breached competition law. It was noted that the infringements consisted of the sharing of strategic information, on a bilateral basis, between competing asset management firms during one initial public offering and one placing, shortly before the share prices were set and that this was the FCA's first formal decision under its competition enforcement powers.

The meeting discussed the compliance challenges for financial services firms that may be active on both the buy and sell sides of a securities market. In particular, the sell side were becoming increasingly conscious of being clear as to when discussions about price can lawfully take place. It was noted that, in light of the current criminal action being pursued by the Australian competition authorities in relation to a share placement by ANZ in 2015, there is also concern about the treatment of the stick on a rights issue and that investment banks are increasing taking legal advice about this issue.

(e) Screening of foreign direct investment into the EU. The Committee noted that on 14 February 2019, the European Parliament issued a press release

confirming its adoption of proposals for a regulation establishing a framework for the screening of foreign direct investments into the European Union. It was noted that on 5 March 2019, the Council of the European Union issued a press release confirming its adoption of the regulation and that the regulation was published on 21 March 2019 and enters into force twenty days later and will apply 18 months later. It was also noted that the European Commission has published a press release, a factsheet setting out key aspects of the new framework and a report containing a detailed overview of the foreign direct investment situation in the EU.

5.8 **Cases**

(a) Stobart Group Limited v William Andrew Tinkler [2019] EWHC 258 (Comm). The Committee noted that the High Court had to consider a number of principles of corporate governance and directors' duties that arose from a confrontation between the majority of Stobart's directors on the one hand, and a dissenting director with significant shareholder support, Mr Tinkler, on the other. The Committees noted that the case raised a number of interesting points around the issue of directors' duties. In particular, it was noted that the High Court held that:

(i) the company's board had not acted in breach of their duties by exercising their powers under the company's articles of association to remove Mr Tinkler as a director, even though he had been re-elected by the shareholders at the AGM the previous day. In this regard, the Committee thought the decision was helpful as it makes clear that directors are not preventing from taking a decision which they believe in good faith to be in the best interests of the company as a whole, against the wishes of the company's major shareholders;

(ii) Mr Tinkler had acted in breach of his fiduciary and contractual duties by speaking to the company's significant shareholders and criticising the board's management and improperly sharing confidential information with a shareholder. The Committee noted here the Court's views about the collegiate nature of the board and the need to raise concerns about a board member with the board itself, rather than circumventing the board and raising concerns directly with a shareholder; and

(iii) the majority of the board had acted in breach of their duty to act for proper purposes by causing the transfer of shares from treasury to the company's employee benefit trust before an AGM in order to secure the trustee's favourable vote on the re-election of the company's chairman.

(b) BTI 2014 LLC v Sequana S.A. [2019] EWCA Civ 112. The Committee noted that the Court of Appeal only had to consider two principal issues on appeal of the High Court decision and, in particular, that there was no appeal against the High Court's dismissal of the claim that certain dividends were not lawfully paid in accordance with the provisions of Part 23 of the Companies Act 2006.

It was agreed the case provided a useful summary of when the directors must have regard to the views of creditors in a potential insolvency scenario. It was also noted that the Court of Appeal held that: (i) the payment of a lawful dividend is within the scope of section 423 of the Insolvency Act 1986 (transactions defrauding creditors); and (ii) the directors' duty to have regard to the interests of creditors arises when the directors know or should know that the company is or is likely to become insolvent – in this context, the Court held that "likely" means probable – and that this duty could arise when directors declare a dividend.

(c) Re Vernalis Plc [2018] EWHC 3898 (Ch). The Committee noted that the High Court considered whether to sanction a scheme of arrangement to implement a takeover by Ligand Holdings UK Limited of Vernalis Plc. It was noted that the takeover was supported by Vernalis' two largest shareholders who held over 60% of its issued shares.

The Committee noted that the single meeting of members was attended by 573 scheme shareholders, of whom 516 voted in favour, and that, whilst the statutory majorities were obtained, the meeting was not well attended in terms of turnout (only 3.88% in number of Vernalis' relevant shareholders, albeit they accounted for 85.95% in value). In addition, it was noted that the notice of court meeting was returned undelivered in respect of a large number of shareholders. It was noted that the court concluded that (i) although low in number, the turnout was higher than the numbers that had attended recent Vernalis shareholder meetings and the number of returned notices could be explained by the large number of shareholders holding very small numbers of shares whose addresses were not up to date; and (ii) while there was no blot on the scheme as such, the scheme did not contain any specific provisions dealing with payment by the bidder of the scheme consideration which is not claimed by outgoing scheme shareholders. The meeting noted that, following an adjournment of the sanction hearing to allow arrangements to be put in place to adequately protect the interests of such 'missing' shareholders, the court sanctioned the scheme.

(d) Triumph Controls – UK Limited and others v Primus International Holding Company and others [2019] EWHC 565 (TCC). The Committee noted this case involved warranty claims under a sale and purchase agreement pursuant to which Triumph purchased the share capital of three Primus companies. The Committee noted that most interesting aspect was the High Court's commentary on the principles that can be derived from case law and those that apply in relation to clauses in sale and purchase agreements that provide for a seller's liability under the warranties to be qualified by "fair" disclosure, in particular that: (i) the commercial purpose of such disclosure clauses is to exonerate the seller from its breach of warranty by fairly disclosing the matters giving rise to the breach; (ii) the disclosure requirements of the contract in question must be construed applying the usual rules of contractual interpretation, by reference to the express words used, the relevant factual matrix and the above commercial purpose; (iii) the adequacy of disclosure must be considered by careful analysis of the contents of the disclosure letter, including any references in the disclosure letter to other sources of

information, against the contractual requirements; (iv) a disclosure letter which purports to disclose specific matters merely by referring to other documents as a source of information will generally not be adequate to fairly disclose with sufficient detail the nature and scope of those matters. For that reason, disclosure by omission will rarely be adequate; (v) it is open to the parties to agree the form and extent of any disclosure that will be deemed to be adequate against the warranty. That could include an agreement that disclosure may be given by reference to documents other than the disclosure letter, such as by reference to a list or in a data room; and (vi) where disclosure is by reference to documents other than the disclosure letter, only matters that can be ascertained directly from such documents will be treated as disclosed.

(e) Michael Routledge v Richard Serritt and others [2019] EWHC 573 (Ch). The Committee noted that this case involves a petition for unfair prejudice, with a dispute revolving around the payment of dividends. It was noted that the company was owned by Mr and Mrs Skerritt who owned all the ordinary shares and who were also directors. The ordinary shares were re-designated into A ordinary shares and B ordinary shares and the B shares sold to Mr Routledge. The rights of the A shares and B shares were set out in a special resolution with the A shares having the right to receive dividends declared by the company before all other ordinary shareholders and in accordance with the policy in relation to dividends as made by the company's board of directors. It was noted that no dividend policy was ever put in place - dividends were paid to the A shareholders, but no dividends were ever paid to the B shareholder. Mr Routledge argued that this was unfairly prejudicial whilst Mr Skerritt argued that the dividend policy was to pay no dividends on the B shares.

The Committee noted the following points of interest: (i) that the court held that the effect of the special resolution was that, if no dividend policy was adopted by the board of directors, there was no basis for treating the A shares and the B shares differently in respect of dividends. Therefore, as no dividend policy had been adopted, the A shares and B shares ranked pari passu in respect of dividends; and (ii) that the directors had breached their directors' duties in a number of ways, including (a) by failing to adopt a valid dividend policy, the directors failed to take into account "the need to act fairly as between members of the company" - as required under s.172(1)(f) CA 2006; (b) by failing to address the question of board policy on dividends for the purpose of the special resolution the directors failed to exercise reasonable care, skill and diligence – as required by s.174 CA 2006; and (c) ultimately, the practice of not paying dividends on the B shares and not considering whether dividends should be paid on the B shares was unfairly prejudicial to Mr Routledge.

6. **Any other business**

The Committee noted that the Committee meeting scheduled for November 2019 will be the 300th Committee meeting. The meeting agreed to mark the occasion and, as such, the Secretary was asked to make arrangements for the meeting to be held at 5pm, followed by a dinner of the Committee. This would replace the annual Summer Committee dinner this year.

18 June 2019