

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 306th meeting
at 9:00 a.m. on 25th November 2020

1. **Welcome and apologies**

In attendance: John Adebisi, Mark Austin, Sam Bagot, Edward Baker, Adam Bogdanor, Robert Boyle, Tom Brassington, Lucy Fergusson, Nicholas Holmes, Chris Horton, Stephen Mathews, Jon Perry, Patrick Sarch, Patrick Speller, Richard Spedding, Liz Wall, Martin Webster, Victoria Younghusband, Vanessa Knapp, David Pudge (Chairman), Kath Roberts (Secretary), Juliet McKean, Michael Jacob (alternate for Caroline Rae).

Apologies: Caroline Rae, Murray Cox

2. **Update on Brexit from BEIS**

The Chairman welcomed Andrew Death (**AD**), Deputy Director at BEIS, to the meeting and invited Andrew to provide an update to the Committee on the Government's preparations for the end of the Brexit transition period.

The Chairman also invited AD to share with the Committee BEIS' intentions in relation to the progression of the respective recommendations of the Kingman review (into the FRC and its role), the Bryden review (into audit quality and the future of audit) and the CMA review (into competition in the audit market).

AD made the following observations:

- The three reports collectively made 170+ recommendations.
- BEIS had undertaken initial consultations on the recommendations of the CMA and Kingman reviews but had not yet shared its views. BEIS had not yet consulted on the Bryden review.
- A single White Paper addressing all 3 reviews is likely to be published soon (AD could not confirm if it would be before the year end). The White Paper would contain the government's proposals for action. However, in those areas where it had not yet consulted e.g. in relation to the introduction of a Sarbanes-Oxley type regime for the UK, the government would be seeking feedback.
- To date the message from government had been that it welcomes the findings of the reports (rather than that it supports all the recommendations). Government recognises this a complicated area.

- AD confirmed that the vast majority of the recommendations will require primary legislation – however, where this is not the case, AD noted that the FRC had already made a start on the implementation of many of the recommendations. The timing of any primary legislation is uncertain given the current pressures on Parliamentary time but this is a high priority for the Secretary of State for BEIS (himself a former auditor).
- On a separate note, AD stated BEIS' commitment to introducing TCFD reporting for companies as soon as possible. BEIS is also engaging with the International Financial Reporting Standards Foundation on the development of international standards for non financial reporting.
- A Committee member raised with AD whether BEIS were aware of the current EU consultation on sustainable corporate governance and, in particular, the EU's proposals to extend EU corporate governance requirements to non-EU entities that do business in the EU. AD was not aware of this consultation but agreed that it could potentially be a concerning development and that he would look into the issue.

The Chairman thanked AD for joining the meeting. AD left the call.

3. **Change of Committee Secretary**

The Chairman reported that Kath Roberts would be stepping down as Secretary to the Committee after this meeting and that she would be succeeded by Juliet McKean. The Chairman asked that the minutes reflect the Committee's thanks to Kath for her efforts in supporting the work of the Committee.

4. **Approval of minutes**

The Chairman reported that a draft of the minutes of the meeting held on 30 September 2020 was circulated to members on 25 October 2020. The Chairman asked members to send any comments that they had on the minutes to the Secretary by not later than 30 November.

5. **Matters arising**

- 5.1 *Law Commission scoping paper on intermediated securities.* The Committee noted that on 11 November 2020, the Law Commission issued a press release on the publication of its scoping paper on intermediated securities, along with a summary of the paper, which can be found on the project status webpage. It was noted that the paper analyses the law underlying intermediated securities, together with the concerns of market participants, and possible solutions to those concerns. The Chairman reported that it identifies problems surrounding the exercise of investor rights, such as the right to vote or be counted in a scheme of arrangement, and several areas where there is legal uncertainty, for example if an intermediary suffers financial difficulties and becomes insolvent. However, it was noted that the Law Commission suggests that the system of intermediation is retained but improved through reforms targeted at alleviating some of the problems caused by intermediation, for example by creating a new obligation on intermediaries to arrange for ultimate investors, upon request, to attend meetings, vote and receive information that the company sends to its members.

The Committee noted that the press release states that the Government now needs to decide whether there should be further work on the potential solutions.

- 5.2 *Delay to the implementation of the ESEF.* It was noted that on 5 November 2020, the FCA issued a press release announcing the publication of its Policy Statement on the delay to the implementation of the European Single Electronic Format (**ESEF**) and update on Coronavirus-related measures (PS20/14). There was insufficient time to discuss the Policy Statement but it was noted that the FCA is postponing ESEF requirements originally scheduled for financial years starting on or after 1 January 2020 by one year i.e. filing and publication of machine-readable financial statements and mandatory tagging of basic financial information. These requirements will commence for financial years starting on or after 1 January 2021, for publication from 1 January 2022. Issuers will however be able to publish and file their annual financial reports in ESEF voluntarily for financial years starting on or after 1 January 2020, from January 2021 if they choose to do so.

The ESEF requirements for tagging of notes to the financial statements continue to follow the original timetable, commencing for financial years starting on or after 1 January 2022, for publication from 1 January 2023. The FCA had confirmed in the Policy Statement that the temporary relief for delayed publication of financial statements will, at a minimum, continue to be available to listed companies with financial periods ending before April 2021 given that the disruption caused by coronavirus, in the FCA's view, has not abated sufficiently to justify removing this relief.

- 5.3 *BEIS Committee follow-up inquiry on audit reform – FRC written evidence.* The Chairman reported that on 27 October 2020, the FRC published its written evidence to the Business, Energy and Industrial Strategy Committee's (**BEIS Committee**) inquiry into delivering audit reform. It was noted that in March 2020, the BEIS Committee launched an inquiry on delivering audit reform to help map out a path for implementing meaningful reform of the UK's audit industry following a series of inquiries from the BEIS Committee, the CMA, Sir Donald Brydon and Sir John Kingman. The Committee noted AD's earlier comments that a White Paper on audit reform would likely be published by BEIS shortly.
- 5.4 *BEIS consultation on corporate transparency and register reform.* The Committee noted that the Chairman and Juliet McKean have joined an Expert Panel advising BEIS and Companies House on the Companies House reforms. The first meeting was held on 4 November 2020 to discuss the identity verification proposals. It was also noted that the next meeting would be held on 30 November 2020 and was to cover verification through third-party agents.
- 5.5 *FCA clean up of LRs/DTRs.* The Chairman reported that the FCA is considering a limited 'clean-up' of the Listing Rules and DTRs to modernise certain elements e.g. removing the requirement to submit two copies of documents or publish notices in newspapers given digital advances. It was noted that the Committee had been asked to contribute to this project by identifying areas that would benefit from changes and suggesting alternative approaches/drafting. The Chairman reported that a draft response to the FCA had been prepared by Jenny McCarthy and Mark Austin of Freshfields and had been circulated to Committee members for comment on 18

November 2020. The Chairman reported that various members of the Committee were scheduled to have a call with the FCA later that day to discuss the submission.

- 5.6 *Financial Services Bill.* The Committee noted that on 21 October 2020, the Financial Services Bill 2019-21 was published, together with explanatory notes, and had its first reading in the House of Commons. The Bill is intended to ensure the UK's financial services regulatory framework continues to function effectively after the UK leaves the EU. It was noted that alongside a host of provisions relating to prudential standards and benchmark indices, the Bill contained a number of measures relating to PDMR dealings, insider lists and market abuse. It was noted that of particular interest to issuers was the change to the timing of the notification requirement for an issuer to notify the market of any PDMR dealings.
- 5.7 *Pension Schemes Bill.* The Committee noted that on 23 October 2020, the Chairman submitted evidence in relation to the Pension Schemes Bill on behalf of the Committee. It was noted that the evidence raises the Committee's serious concerns over the proposed Bill, in particular the broad criminal offences set out in clause 107. The Chairman reported that his pension colleagues were not hopeful that any meaningful changes to the offences set out in clause 107 would be made to the Bill.

6. **Discussions**

- 6.1 *National Security and Investment Bill.* The Chairman reported that on 11 November 2020, BEIS issued a press release announcing the introduction of the National Security and Investment Bill— explanatory notes have also been published. It was also reported that this follows a consultation that took place in 2018, a response to which has been published on the consultation outcome webpage.

The Committee noted that the Bill will establish a new statutory regime for Government scrutiny of, and intervention in, investments for the purposes of protecting UK national security from potentially hostile foreign direct investment. It was also noted that the regime makes provision for: (i) a power to issue "call-in" notices that the Secretary of State may use to call in acquisitions of control over qualifying entities or assets to undertake a national security assessment whether or not they have been notified to the Government; (ii) a mandatory notification system requiring proposed acquirers of certain shares or voting rights in specified qualifying entities to obtain clearance from the Secretary of State for their acquisitions before they complete; and (iii) a voluntary notification system which is intended to encourage notifications from parties who consider that their trigger event may raise national security concerns.

The Chairman reported that BEIS has published a further consultation to seek views on secondary legislation to define the sectors subject to mandatory notification. It was also reported that this consultation closes on 6 January 2021.

The Chairman also noted that a statement of policy intent has been published, which describes how the Secretary of State expects to use the call-in power and the three risk factors that the Secretary of State expects to consider when deciding whether to use it. BEIS has also published: (i) a process for businesses factsheet; (ii) an overview of the Bill factsheet; and (iii) a guide on how the new regime functions with process flow diagrams.

The Chairman reported that a working group of the Committee, led by Sam Bagot, has been formed to submit written evidence to the Public Bill Committee that is considering the Bill and to respond to the consultation on the secondary legislation. The Chairman highlighted that the working group's main concerns with the Bill include that: (i) BEIS has underestimated the number of filings that it will receive under the mandatory clearance and voluntary filings regimes because of the breadth of sectors, entities and assets in scope – BEIS will potentially be inundated with filings and requests for guidance; (ii) where a transaction that is subject to mandatory clearance completes without obtaining clearance, it will be automatically "void" – this is likely to be unworkable in practice and leaves questions around how to unwind a deal when the sale proceeds have been distributed to shareholders or used to pay off debt. The working group will suggest that transactions should be "voidable" at the determination of the Secretary of State, rather than "void"; and (iii) the retrospective nature of the Bill gives rise to significant uncertainty for transactions that have not closed before 12 November 2020, especially transactions that signed before 12 November 2020 where the parties would not have contemplated the potential impact of the proposed regime and the deal terms will not cater for it. The Chairman also noted that the working group was considering the interplay between the Bill and the takeovers regime, particularly in light of the proposals set out in PCP 2020/1. Sam Bagot noted that another key concern is that this proposed regime should not be, or be seen to be, politicised. This is particularly because there has been a perception that the public interest powers under the Enterprise Act 2002 have, in recent years, been exercised in a manner which has increasingly moved towards industrial or electoral policy. Another Committee member noted that the response should not object to having a mandatory clearance regime as the Government appears to be pushing ahead with this policy. However, the response should focus on identifying ways to narrow the scope of the proposed regime, for example by including *de minimis* thresholds and clear safe harbours for certain common/non-controlling investments and reducing the breadth of the 17 sectors.

The Chairman further reported that on 11 November 2020, the Government announced its intention to bring forward a precautionary power to block listings on national security grounds – there will be a full consultation to inform the design of the power, which is expected to launch in early 2021.

- 6.2 *FCA/CLLS Liaison Committee call on 19 October 2020.* Victoria Younghusband (VY) provided an update of those matters discussed on the call.

VY reported that there had been both a FCA/CLLS Liaison Committee meeting and a separate meeting of the FCA and the Share Plan Lawyers Group.

- 6.3 *GC100 Position Paper on AGMs.* The Committee noted that the GC100 has prepared a discussion paper on the future of the AGM and its views on the construct of AGMs. It was also noted that the paper includes draft best practice guidance for holding virtual AGMs, with the intention of addressing concerns raised by shareholders during the 2020 AGM season and ensuring that the core purpose of the AGM – i.e. the passing of resolutions proposed as part of the business of the meeting – is achieved. A draft of the discussion paper was circulated to Committee members on 18 November 2020. The Committee has been asked to submit any comments to the GC100 by 30 November.

The Committee discussed this item and items 6.4 and 6.5 together.

- 6.4 *FRC review of 2020 AGMs.* The Chairman reported that on 6 October 2020, the FRC issued a press release on its review of the different ways companies held AGMs during the first half of 2020 and whether the approaches taken best served the interests of shareholders - Annex 1 includes best practice guidance that companies should consider when planning and conducting future AGMs. The FRC's review found that the best organised and executed virtual and hybrid meetings enabled increased participation from shareholders and that companies that held closed meetings with retail shareholders unable to participate or vote on the day of the AGM disenfranchised those shareholders. The Committee noted that the FRC will convene a Stakeholder Group to consider recommendations for legislative change and propose alternative means to achieve flexibility, whilst maintaining the integrity of the AGM – the Committee has been asked to join the Stakeholder Group. It was also noted that the FRC also asks the Government to consider as soon as possible what measures may need to be brought forward to ensure AGMs are able to take place either virtually or on a hybrid basis during 2021.
- 6.5 *2021 AGM season and virtual AGMs.* The Committee noted that the GC100 has sent a letter to BEIS requesting an extension of the temporary shareholder meeting provisions in the Corporate Insolvency and Governance Act 2020 until 5 April 2021 and the introduction of primary legislation to permit listed companies to hold virtual meetings in 2021 given the likelihood of continued social distancing and public health measures in relation to the Covid-19 pandemic.
- 6.6 *Takeover Panel consultation on conditions to offers and the offer timetable.* The Chairman reported that on 27 October 2020, the Takeover Panel published a public consultation paper (PCP 2020/1) setting out proposed amendments to the Takeover Code with regard to conditions to offers and the offer timetable. It was also reported that the consultation closes on 15 January 2021. The Committee noted that the Takeovers Joint Working Party were involved in the informal pre-consultation and will prepare a response to this consultation.
- 6.7 *FCA publicly censures Aviva plc.* The Committee noted that on 26 October 2020, the FCA issued a press release announcing that it has publicly censured Aviva plc for making an announcement that had the potential to mislead the market – the Final Notice is attached to the press release. The Chairman reported that the FCA's investigation into breaches of the Listing Rules and the DTRs found that Aviva's announcement on 8 March 2018 concerning its preliminary year-end results was reasonably capable of giving the impression that Aviva intended to take action to cancel at par value certain preference shares (which had been described at the time of issue in the early 1990s as 'irredeemable'). It was also reported that the FCA found that Aviva failed to consider properly its obligations under the rules to take reasonable care to ensure the announcement was not misleading. The Committee noted that the FCA considered that a public censure was appropriate (rather than a financial penalty) because, although Aviva's breach was serious, it was not intentional and the FCA also recognised that Aviva acted to clarify its announcement and provided a payment scheme for affected preference shareholders.

The Committee noted item 7.5(a) of the agenda - the FCA's announcement on 13 November 2020 that it had issued a warning notice to Carillion and certain unnamed

executive directors. The Committee agreed to put this item back on the agenda for discussion at the January 2021 Committee meeting.

- 6.8 *FRC discussion paper on the future of corporate reporting.* The Chairman reported that on 8 October 2020, the FRC issued a press release announcing the publication of a discussion paper on the future of corporate reporting, which is intended to start a discussion about potential changes to the current system of corporate reporting, with a view to making it more effective and engaging for those with an interest in a company. It was noted that, in particular, the FRC proposes moving towards a more objective-driven reporting framework (a so-called "reporting network"), supported by overarching principles intended to establish coherence across all company reporting. The Committee noted that comments to the discussion paper are invited by 5 February 2021¹.
- 6.9 *Impact of regulation 44 MLRs on corporate transaction documents.* The Committee noted that Regulation 44 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (**MLRs**) requires the trustees of a UK trust – even a trust that is exempt from the new HMRC registration requirements - to keep written records of the beneficial owners of the trust and to provide such records to law enforcement bodies on request. Time did not allow for further consideration of this item but members were asked to submit their views to the Chairman on whether this requirement needs to be addressed in corporate transaction documents that contain trust arrangements, for example asset purchase agreements. For further information, members were referred to the Chairman's email to Committee members dated 5 October 2020.
- 6.10 *PMB No. 31.* It was noted that on 11 November 2020, the FCA published Primary Market Bulletin No. 31 and that this edition, amongst other things, provided an update on the implementation of the ESEF (see item 5.2), coronavirus-related temporary policy measures on corporate reporting (see item 5.2) and recent changes to the Prospectus Regulation. The Chairman also reported that it includes a reminder for issuers and their advisers of their continuing obligations under MAR, the LRs and the DTRs and how enquiries from the FCA should be dealt with. It was noted that PMB No. 31 also presents two articles summarising the FCA's recent review work - one on listed companies' compliance with the FCA's rules relating to corporate governance disclosures and the other on delayed disclosure of inside information notifications. Members of the Committee raised concerns about some of the FCA's comments in the paper on delayed disclosure – in particular comments which appeared to indicate that there was a presumption that periodic financial results are inside information. It was agreed that, in the interests of time, this issue would be carried over for discussion at the next Committee meeting in January 2021. It was agreed that would also be helpful to discuss the paper with the FCA at the next FCA/CLLS Liaison Group meeting.
- 6.11 *Treasury review of the UK listing regime.* It was noted that the Treasury is seeking views on the following specific areas relating to the UK listing regime: free float requirements; dual class share structures; track record requirements; prospectuses; and dual and secondary listing and that, in addition to the above, broader

¹ NB. Nicholas Holmes has since offered to lead a working group of the Committee to respond to this discussion paper.

recommendations and/or comments are also encouraged. It was noted that the deadline for responses was 5 January 2021. The Chairman reported that the Joint Working Group on the Prospectus Rules and Listing Rules was responding to this paper.

- 6.12 *European Commission consultation on sustainable corporate governance.* The Chairman reported that on 26 October 2020, the European Commission launched a consultation on sustainable corporate governance that asks how the EU can best go about helping businesses in the way they operate, towards a transformation to a more sustainable economy and to ensure that environmental and social interests are embedded in business strategies. The Committee noted that the consultation closes on 8 February 2021.

Vanessa Knapp (**VK**) is the UK representative on the CCBE company law committee, which was scheduled to meet to discuss whether to respond to the consultation, in particular because there is a suggestion that it will apply to companies from outside the EU which do business in the EU. VK reported that the consultation paper is not clear how this requirement would operate in practice and, in particular, how it would apply where a company was already subject to similar corporate governance requirements under its home (or another) regime and whether there would be any proportionality test applied as to which requirements would need to be satisfied. VK also stated that it was not clear what the sanctions (if any) would be in the event of a failure to comply. The Committee was referred to the note that was circulated with the agenda to the meeting which had been prepared by the CCBE company law committee and which highlights some of the key questions raised by the consultation.

7. **Recent developments**

The Committee noted the following additional items in sections 7.1 to 7.8 and section 8 below which were set out in the agenda but which time did not allow them to consider.

7.1 **Company law**

- (a) *Companies House Direct closing.* On 29 October 2020, Companies House issued a press release announcing that it is closing its Companies House Direct (CHD) and WebCheck services by February 2021 and encouraging users to use its Companies House Service (CHS) instead.

7.2 **Corporate governance**

- (a) *IA principles of remuneration.* On 16 November 2020, the Investment Association (**IA**) published an update of its Principles of Remuneration for 2021. Minor amendments have been made to the principles this year to reflect market developments, including in relation to the use of non-financial performance measures, post employment shareholdings, bad leavers and bonus deferrals. The IA continues its focus on ensuring that pension contributions for executive directors are aligned with those available to the majority of the company's workforce. The approach for 2021 regarding pension contributions for new directors remains unchanged. Any new director (or director changing role) and any new directors remuneration policy should have pension

contributions in line with the majority of the workforce, or result in a Red Top from IVIS on the report or remuneration policy.

- (b) *IA updated guidance on the impact of Covid-19 on executive pay.* On 16 November 2020, the IA published an updated version of its April 2020 guidance on the impact of Covid-19 on executive pay.
- (c) *IA press release on executive pensions.* On 17 October 2020, the IA issued a press release on FTSE 100 executive pensions, which states that significant progress has been made on bringing executive pension contributions in line with those received by the majority of the workforce. This follows calls from shareholders for this alignment as an issue of fairness and to foster good employee relations. The press release also contains statistics on entries on the IA's public register, which tracks shareholder rebellions of more than 20% on individual resolutions.
- (d) *FRC Lab tips on section 172 statements.* On 14 October 2020, the FRC issued a press release announcing the publication by the FRC's Financial Reporting Lab (**FRC Lab**) of a 2-page tip sheet for section 172 statements, with guidance on how to make them more useful. The tip sheet contains guidance on how to build useful content into the section 172 statement, suggestions for how the statement can be presented and recommendations for how the process of the preparing the statement can be supported.
- (e) *Call for greater transparency on ethnic diversity on boards.* On 9 October 2020, the IA issued a press release that states that investment managers are calling for greater transparency on ethnic diversity on boards as almost three-quarters of FTSE 100 companies failed to report the ethnic make-up of their boards in this year's AGM season.
- (f) *FRC review of early reporting against the UK Stewardship Code 2020.* On 30 September 2020, the FRC issued a press release announcing the publication of its review of early reporting against the UK Stewardship Code 2020. The review seeks to help prospective signatories in their planning by reiterating the expectations for effective stewardship, explaining what the FRC expects to see from reports and highlighting good examples that it has found.
- (g) *Revised ICGN Global Stewardship Principles.* On 23 September 2020, the International Corporate Governance Network (**ICGN**) issued a press release announcing that it has approved revisions to the ICGN Global Stewardship Principles at its Annual General Meeting.

7.3 Reporting and disclosure

- (a) *FRC end of year CEO letter.* On 12 November 2020, the FRC issued a press release announcing the publication of its annual end of year letter to CEOs, CFOs and Audit Committee Chairs setting out its reporting expectations for preparers of reports and accounts for 2020/21. The letter highlights topics that the FRC expects to scrutinise over the coming year and sets out the FRC's expectations – such topics include Covid-19, Brexit, climate change and section 172 statements. The FRC is encouraging boards to carefully consider

whether they should lengthen their reporting timetables for 2021, making use of the extensions to reporting deadlines announced by the FCA which remain in place (see item 4.2).

- (b) *FCA announces changes to notification of major shareholdings.* On 12 November 2020, the FCA published an update to its Webpage: Submit an investor notification. The updated page confirms that the FCA is developing a new online portal for submission of notifications in major shareholdings. Under the new process, investors will need to complete an electronic TR-1 Form, to be made available via a new DTR 5 portal on the FCA's Electronic Submission System. The updated webpage confirms that, after the launch of the new portal in Q1 2021, it will no longer be possible for investors to submit TR-1 Forms to the FCA via email.
- (c) *IA position on climate change.* On 11 November 2020, the IA published its Position on Climate Change. The position paper outlines the UK investment management industry's commitment to climate action, including working with the UK Government to accelerate change and bolster the UK's position as a global leader in sustainable finance.
- (d) *FRC 'Climate Thematic' report.* On 10 November 2020, the FRC issued a press release announcing the publication of its report entitled 'Climate Thematic' that summarises the FRC's findings from its thematic review of climate-related considerations by boards, companies, auditors, professional bodies and investors. The FRC states that a reporting framework is needed and that it supports the introduction of global standards on non-financial reporting. In the meantime, the FRC encourages UK public interest entities to report against the Task Force on Climate-related Financial Disclosures' (TCFD) 11 recommended disclosures and, with reference to their sector, using the Sustainability Accounting Standards Board metrics. Alongside the summary report, the FRC has also published a suite of reports containing its more detailed findings – links to these can be found in the press release and the summary report.
- (e) *Mandatory climate-related financial disclosures.* On 9 November 2020, the Government announced its intention to introduce fully mandatory climate-related financial disclosure requirements, aligned with the TCFD's recommendations, across the UK economy by 2025, with a significant portion of mandatory requirements in place by 2023. The UK Taskforce's Interim Report, and accompanying roadmap, set out an indicative pathway to achieving that aim. The rules will apply to listed commercial companies, UK-registered large private companies, banks, building societies, insurance companies, UK-authorized asset managers, life insurers, FCA-regulated pension schemes and occupational pension schemes.
- (f) *TCFD 2020 Status Report.* On 29 October 2020, the Financial Stability Board issued a press release announcing that the TCFD has published its 2020 Status Report. The 2020 Status Report finds that disclosure of climate-related financial information aligned with the TCFD recommendations has steadily increased since the recommendations were published in 2017, however, the report highlights the continuing need for progress in improving levels of

TCFD-aligned disclosures given the urgent demand for consistency and comparability in reporting.

- (g) *FRC Annual Review of Corporate Reporting.* On 21 October 2020, the FRC issued a press release announcing the publication of its Annual Review of Corporate Reporting, which reveals the FRC's 'top ten' areas where improvements to reporting quality are needed so users of accounts have a clearer understanding of company performance and position. The press release states that: (i) the overall quality of corporate reporting remains consistent; (ii) of the 216 company accounts reviewed, the FRC wrote to 96 companies with substantive questions about their reporting; and (iii) looking ahead, Covid-19 disclosures should be sufficient for users to understand the impact on a company's performance, cash flow and financial position.
- (h) *FRC Lab guides on reporting in times of uncertainty.* On 15 October 2020, the FRC issued a press release announcing the publication by the FRC Lab of two short guides that cover some critical areas of focus for 2020 year-ends - COVID-19: Resources, action, the future - a look forward and COVID-19: Going concern, risk, and viability - a look forward. The guides look back at key elements highlighted in the FRC Lab's previous work (COVID-19 – Resources, action, the future and COVID-19 – Going concern, risk, and viability), consider current practice, including some more recent examples, and take a look forward at how investor information needs continue to develop.
- (i) *FRC Lab report on video in corporate reporting.* On 8 October 2020, the FRC Lab issued a press release announcing the publication of a new report on video in corporate reporting, which considers how companies currently use video for communication to investors and stakeholders. The report includes examples of current practice and concludes that companies are missing an opportunity to engage investors and other stakeholders more effectively through video. It also provides guidance on effective virtual AGMs following the FRC's review (see item 5.4).

7.4 **Equity capital markets**

- (a) *ISS benchmark policy changes for 2021.* On 12 November 2020, the Institutional Shareholder Services Inc. (**ISS**) issued a press release announcing the release of updates to its 2021 ISS benchmark proxy voting policies, which will generally be applied for shareholder meetings taking place on or after 1 February 2021. Full details of all ISS benchmark policy updates for 2021 can be found on the ISS Policy Gateway, including an executive summary of key updates and policy development process and Europe, Middle East & Africa proxy voting guidelines updates for 2021.
- (b) *Updated ESMA Q&A for prospectus and transparency rules.* On 9 November 2020, ESMA issued a press release announcing the publication of updates to its Q&A on the Prospectus Regulation and its Q&A on the Transparency Directive. These Q&As have been updated to include Brexit related Q&A concerning the choice of home member state in the PR and TD sphere and the use of prospectuses approved by the UK once the Brexit transition period is

concluded. ESMA has also updated its Q&A on the Prospectus Regulation as part of the ongoing Q&A revision exercise (see item 6.4(f)).

- (c) *Temporary changes to Dividend Procedure Timetable due to coronavirus withdrawn.* On 16 October 2020, the LSE issued Market Notice N16/20 that withdraws, with effect from 2 November 2020, the temporary measures that permitted the deferral of dividend payments set out in Market Notice N07/20 - after 2 November, issuers announcing cash dividends should revert to the standard 30 business day period from record date within which the dividend should be paid. The notice also announces the publication of the Dividend Procedure Timetable 2021.
- (d) *Brexit and FCA Handbook.* On 1 October 2020, the FCA issued a press release announcing that it has published an updated version of the FCA Handbook to show the rules that will apply at the end of the Brexit transition period. The FCA has also published details on how it intends to use the Temporary Transitional Power i.e. the power to make transitional provisions to financial services legislation for a temporary period.
- (e) *Prospectus Regulation.* On 30 September 2020, ESMA issued a press release announcing the publication of a statement concerning the applicability of level 3 guidance under the Prospectus Directive. The statement provides an update on the process of revising the guidance published under the Prospectus Directive, including on which Q&As will be revised or deleted, and the applicability of the CESR recommendations concerning specialist issuers.

7.5 MAR

- (a) *FCA issues warning notice to Carillion (in liquidation) and unnamed executive directors.* On 13 November 2020, the FCA announced that it has issued a warning notice to Carillion and certain unnamed executive directors. In the notice, the FCA states that it considers that Carillion breached: (i) Article 15 MAR (market manipulation) by disseminating information that gave false or misleading signals as to the value of its shares; (ii) Listing Rule 1.3.3R (prohibition on publication of misleading information) by failing to take reasonable care to ensure that its announcements were not misleading, false or deceptive and did not omit data likely to affect the import of the information; (iii) Listing Principle 1 (procedures, systems and controls) by failing to take reasonable steps to establish and maintain adequate procedures, systems and controls to enable the company to comply with its obligations under the Listing Rules; and (iv) Premium Listing Principle 2 (acting with integrity) by failing to act with integrity towards its holders and potential holders of its premium listed shares. The FCA states that it considers that the relevant unnamed executive directors were knowingly concerned in the above breaches. The warning notice is not a final decision of the FCA but indicates the FCA's intention to take action for the conduct referred to in the notice. In the case of Carillion, a public censure as opposed to a financial penalty is proposed.
- (b) *ESMA final report on amendments to MAR in respect of SME Growth Markets.* On 29 October 2020, ESMA issued a press release announcing the

publication of its final report on the amendments to MAR for the promotion of the use of SME Growth Markets. These amendments focus on liquidity contracts and insider lists for SME Growth Markets. The Annexes contain the draft regulatory technical standards on liquidity contracts and the draft implementing technical standards on insider lists. The new template for insider lists, to be used by SMEs in jurisdictions that opt for including in them all persons who have access to inside information, only contains the minimum fields that are necessary for supervisory purposes.

7.6 Accounting

- (a) No items to consider.

7.7 Takeovers

- (a) See item 6.6.
- (b) *Minor amendments to the Takeover Code.* On 12 November 2020, the Takeover Panel issued Panel Statement 2020/11 announcing the publication of Instrument 2020/1, which makes an amendment to document charges, and Instrument 2020/2, which makes various minor amendments to the Takeover Code e.g. reference to 'Prospectus Rules' has been changed to 'Prospectus Regulation Rules' and references to 'NEX Exchange Growth Market' have been changed to 'AQSE Growth Market'. The amendments, which take effect at 11 pm on 31 December 2020, do not materially alter the effect of the provisions in question and have therefore been made without formal consultation.

7.8 Miscellaneous

- (a) *CMA consultation on merger assessment guidelines.* On 17 November 2020, the CMA issued a press release announcing that it is consulting on updated guidelines about its approach to analysing mergers – a draft of the revised guidance has been published. The press release states that updated Merger Assessment Guidelines will help ensure that the CMA continues to protect consumers through its merger enforcement work as well as aiding companies and their advisers to assess whether competition concerns might be raised by the CMA before they enter into a deal or purchase. The consultation closes on 8 January 2021.
- (b) *Brexit and departure from retained EU case law by UK courts and tribunals.* On 15 October 2020, the Ministry of Justice published a response to its consultation on the departure from retained EU case law by UK courts and tribunals and a draft of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 was laid before Parliament, together with a draft explanatory memorandum.

7.9 Cases

- (a) (1) *Primus International Holding Company* (2) *Primus International Inc.* (3) *Primus International Cayman Co v (1) Triumph Controls – UK Limited* (2)

Triumph Group Acquisition Corporation [2020] EWCA Civ 1228. The Court of Appeal considered whether a claim brought by a buyer for breach of warranty in a share purchase agreement (SPA) was a claim 'in respect of lost goodwill' and, therefore, excluded pursuant to an exclusion clause in the SPA. Agreeing with the High Court, the Court of Appeal held that the buyer's claims did not fall within the definition of 'lost goodwill' and, therefore, the exclusion clause did not apply. It rejected the broad accounting definition of goodwill that was suggested by the seller and held that 'goodwill', for the purposes of the SPA, meant the good name, business reputation and business connections. The reasoning was based on the ordinary legal meaning of 'goodwill', the meaning of 'goodwill' derived from previous authorities, how the term 'goodwill' was used in other parts of the SPA and the fact that if the seller's interpretation of 'goodwill' was correct the buyer would have lost most of the protection of the warranties without any clear words to that effect.

- (b) *Travelport Limited and others v WEX Inc. [2020] EWHC 2670 (Comm).* The High Court had to determine certain preliminary issues in relation to whether a buyer was obliged to complete the purchase of shares under an SPA or whether the buyer could rely on a material adverse effect (MAE) clause to avoid completion. The MAE clause provided that the buyer need not complete the purchase if events occurred that had a material adverse effect on the target business. The MAE definition contained a carve-out relating to "*conditions resulting from ... pandemics*" and then contained an exception to the carve-out which provided that, where an adverse event otherwise falls within the carve-out, the buyer may still be able to invoke the MAE clause if the event has had "*a disproportionate effect on [eNett or Optal Groups], taken as a whole, as compared to other participants in the industries in which [they] operate*". The main issue at trial was the identification of the relevant industries for comparison purposes under the MAE definition. The High Court held that 'industry' is a wide word, and, in context, the MAE clause was referring to the B2B payments industry, as argued by the buyer, and not the narrower travel payments industry, as argued by the seller. The High Court applied usual principles of contractual construction. It also noted that the parties to the SPA could have, but did not, specify what industries they meant and that it may well be that one result of this case is that future drafters will do differently.

8. **Any other business**

Committee composition. The Chair has been asked to consider the composition of the Committee.

22 December 2020