

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 310th meeting
at 9:00 a.m. on 21st July 2021

1. **Welcome and apologies**

In attendance: John Adebisi; Mark Austin; Sam Bagot; Edward Baker; Robert Boyle; Tom Brassington; Lucy Fergusson; Nicholas Holmes; Chris Horton; Vanessa Knapp; Stephen Matthews; John Papanicola; Jon Perry; Caroline Rae; Richard Spedding; Patrick Speller; Allan Taylor; Liz Wall; Martin Webster; Victoria Younghusband; David Pudge (Chair); Juliet McKean (Secretary); Ariel White-Tsimikalis (alternate for Adam Bogdanor); and Chris Blairs (ISU); and Kat Stein (ISU) for item 2 only.

Apologies: Adam Bogdanor.

2. **National Security and Investment Act 2021**

- 2.1 The Chair noted that the Committee had agreed at its meeting that was held in May that BEIS and/or members of the Investment Security Unit (**ISU**) should be invited to a future Committee meeting to discuss the National Security and Investment Act 2021 (**NSI Act**) and the steps being taken to prepare for the implementation of the NSI Act. To that end, the Chair welcomed Chris Blairs (**CB**), Deputy Director at the ISU, and CB's colleague Kat Stein (**KS**) to the meeting.

CB thanked the Committee for inviting him and KS to the meeting and for the Committee's constructive engagement on the NSI Act at the Bill stage. CB informed the Committee that the Secretary of State for BEIS (**SoS**) had made a ministerial statement on 20 July 2021 announcing that the commencement date for the sections of the NSI Act that have not already commenced would be 4 January 2022. CB also informed the Committee that the SoS had published three sets of documents related to the NSI Act, being: (i) the first set of guidance documents on the NSI Act (i.e. an overview of the NSI Act; the extraterritorial application of the NSI Act; how the NSI Act works alongside other regulatory bodies and market practices; and guidance for Higher Education Institutions and other Research organisations); (ii) a draft of the notifiable acquisition statutory instrument, which sets out the proposed descriptions of the 17 sectors subject to the mandatory notification requirements; and (iii) a consultation on the draft statement of policy intent that describes how the SoS expects to use the call-in power in the NSI Act, which closes on 30 August 2021. CB encouraged the Committee to respond to the consultation to extent it had comments on the draft statement of policy intent.

The Chair thanked CB and KS for joining the meeting. CB and KS left the call.

2.2 *NSI Act commencement regulations.* The Chair noted that the National Security and Investment Act 2021 (Commencement No. 1 and Transitional Provision) Regulations 2021 were made on 30 June 2021, which brought into force on 1 July 2021 certain provisions of the NSI Act and made transitional provision.

3. **Approval of minutes**

A draft of the minutes of the meeting held on 26 May 2021 was circulated to members on 10 June 2021. The Chair asked members to send any comments on the minutes to the Secretary in the next couple of days, otherwise the minutes would be considered settled.

4. **Matters arising**

4.1 *Extension of duration of certain temporary measures under CIGA 2020.* The Committee noted that the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021 came into force on 22 June 2021, which further extend the duration of the temporary COVID-19 restrictions on the use of statutory demands and winding up petitions introduced by the Corporate Insolvency and Governance Act 2020 (**CIGA 2020**) from 30 June 2021 to 30 September 2021.

4.2 *Takeover Panel Response Statement on conditions to offers and the offer timetable.* The Chair reported that the changes to the Takeover Code to reflect revisions to the conditions to offers and the offer timetable took effect on 5 July 2021. The Chair also reported that, in advance of those changes taking effect, the Joint CLLS/Law Society Takeovers Working Group published on 28 June 2021 the following specimen documents to reflect those changes: (i) revised set of offer conditions; (ii) further terms of the offer; and (iii) wording for an acceleration statement. It was also reported that the Joint Working Group published a memorandum describing potential approaches for addressing cash confirmation exercises in light of the guidance from the Takeover Panel that financing arrangements for offers and schemes should continue beyond the stated contractual long-stop date of the offer/scheme. It was noted that the documents are intended as illustrative examples only and reflect the views and proposed approach to the relevant issues advocated by the Joint Working Group. Copies of the documents are available on the Committee and the Law Society Company Law Committee websites and the availability of these documents was publicised via FromCounsel, Practical Law and Lexis PSL. The Chair thanked all those that have been involved in the preparation of these documents.

It was also noted that the Takeover Panel has published revised checklists to reflect the changes to the Code and amended versions of some of its Practice Statements. It was noted that changes to the Practice Statements largely reflect the changes to the Takeover Code, however, Practice Statements Nos 5 and 29 have been updated to reflect current practice.

4.3 *FCA consultation paper on SPACs.* The Chair reported that on 28 May 2021 the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes, submitted a response to the FCA consultation paper (CP21/10) on proposed changes to aspects of the Listing Rules that apply to special purpose acquisition companies.

4.4 *BEIS consultation on UK audit and corporate governance reform.* The Chair reported that on 8 July 2021 a joint working group of the Committee and the Law Society Company Law Committee, led by Mark Austin, submitted a response to the BEIS consultation on UK audit and corporate governance reform. Mark Austin reported that, due to the inevitable length of the joint working group's response and in order to ensure that the key concerns in the response were sufficiently highlighted, a short letter was sent by the Committee (and others, including TheCityUK and the Quoted Companies Alliance) to No. 10 and HM Treasury (**HMT**) that raises some of the significant concerns that the Committee has with certain of the proposals in the consultation. At the suggestion of No. 10, the letter was also sent to the Secretary of State for BEIS.

5. **Discussions**

5.1 *FCA/CLLS CLC Liaison Committee call on 20 July 2021.* Victoria Younghusband and other members of the Committee that attended the call provided an update of those matters discussed on the call.

5.2 *Better Business Act campaign.* The Chair reported that a working group of the Committee, led by Lucy Fergusson, has prepared a note that contains some thoughts for discussion on the Better Business Act campaign. Lucy Fergusson led a discussion on the note prepared by the working group.

5.3 *HMT consultation on a power to block listings on national security grounds.* The Chair reported that on 7 June 2021 HMT published a consultation on a power to block listings on national security grounds. It was noted that the consultation states that this precautionary power would ensure the Government has the ability and flexibility it needs to intervene in the small number of cases in which a listing or new admission to trading raises national security risks. The Chair noted that the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes, is preparing a response to this consultation, which will be submitted by 27 August 2021 (being the consultation closing date).

5.4 *FCA consultation on enhancing climate-related disclosures by standard listed companies.* The Chair reported that on 22 June 2021 the FCA published a consultation on enhancing climate-related disclosures by standard listed companies and seeking views on ESG topics in capital markets (CP21/18). It was noted that the FCA is proposing to extend the application of its TCFD-aligned Listing Rule for premium-listed commercial companies to issuers of standard listed equity shares. It was also noted that the FCA intends to confirm its final policy on climate-related disclosures before the end of 2021. The Chair noted that Chris Horton is leading the working group that is preparing a joint response to this consultation of the Committee, the CLLS Planning and Environmental Law Committee and the Law Society Company Law Committee, which will be submitted by 10 September 2021 (being the consultation closing date).

5.5 *HMT consultations on review of the UK prospectus regime and the wholesale capital markets.* The Chair reported that on 1 July 2021 HMT published two related consultations in respect of a review of: (i) the UK prospectus regime - this follows Lord Hill's recommendations in the UK Listings Review; and (ii) the wholesale capital markets – this consultation considers how the UK's regime for wholesale

capital markets can be reformed to deliver a framework that is fair, outcomes-based and supports openness and competitiveness, whilst maintaining the highest regulatory standards. The Chair noted that the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes, is preparing a response to the consultation on the review of the UK prospectus regime, which will be submitted by 24 September 2021 (being the consultation closing date).

- 5.6 *FCA consultation on reforms to improve the effectiveness of UK primary markets.* Noting that this consultation had been discussed with the FCA on the call referred to in minute 5.1 above, the Chair reported that on 5 July 2021 the FCA published a consultation (Consultation Paper CP21/21 - Primary Markets Effectiveness Review) on a series of proposed reforms to improve the effectiveness of UK primary markets, alongside a discussion of how the FCA might continue to develop the regime to ensure the UK remains a competitive and dynamic market. It was noted that the proposed changes aim to reduce barriers to listing for companies and, as a consequence, increase the range of investment opportunities for consumers on UK public markets. It was also noted that the FCA is proposing measures to ensure the listing regime continues to have high standards of market integrity and clarity for users. It was further noted that, subject to consultation feedback and FCA Board approval, the FCA will seek to make relevant rules before the end of 2021 and, with regard to the discussion areas, the FCA will provide feedback and potentially consult further on wider listing regime changes in due course, if appropriate. The Chair noted that the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes, is preparing a response to this consultation, which will be submitted by 14 September 2021 (being the consultation closing date).

6. **Recent developments**

The Committee noted the following additional items in sections 6.1 to 6.9 which were set out in the agenda but which time did not allow it to consider, other than the Committee discussed whether it should respond to the Law Commission's discussion paper on corporate criminal liability (see item 6.8(d)). The Committee agreed that the views of corporate lawyers on certain aspects of the discussion paper would be important. The Chair, therefore, agreed to contact the chair of the CLLS Corporate Crime & Corruption Committee to see if that committee is preparing a response to the discussion paper and, if so, whether members of the Committee could feed into that committee's response.

6.1 **Company law**

- (a) No items to consider.

6.2 **Corporate governance**

- (a) *Research on workforce engagement published by the FRC.* On 24 May 2021, the FRC announced the publication of research (by Royal Holloway, University of London and the Involvement and Participation Association) on workforce engagement under the UK Corporate Governance Code that provides a useful summary of how companies are engaging with their workforce in order to satisfy the Code requirements.

6.3 Reporting and disclosure

- (a) *FRC statement of intent on ESG challenges.* On 7 July 2021, the FRC announced the publication of a statement of intent on ESG challenges. This paper identifies areas where there are issues with ESG information if companies are to report in a way that meets the demands of stakeholders. The paper also sets out how companies can address these demands and the FRC's planned activities in this area.

6.4 Equity capital markets

- (a) *PMB No. 35.* On 2 July 2021, the FCA published Primary Market Bulletin No. 35. In this edition, the FCA is consulting on a new technical note, Primary Market/TN/104.1 - Listing applicants with cannabis-related businesses, which contains the FCA's proposed approach to assessing eligibility and listing applications for companies with cannabis-related activities.
- (b) *PMB No. 34.* On 24 June 2021, the FCA published Primary Market Bulletin No. 34. In this edition, the FCA consults on changes it proposes to make to its Knowledge Base in relation to the prospectus regime. The consultation closes on 4 August 2021. The FCA intends to create a new Primary Market Technical Note to adapt, as FCA guidance, the ESMA guidelines on disclosure requirements under the Prospectus Regulation. The FCA also intends to incorporate certain explanations contained in the ESMA Prospectus Directive Q&As (**PD Q&As**) published in April 2019 into the Technical Notes. The proposed changes mean that the FCA Handbook will no longer refer to the CESR Recommendations or the PD Q&As and the relevant substantive content will be consolidated into the Technical Notes. The FCA is also proposing to update a Procedural Note and several other Technical Notes.

6.5 MAR

- (a) No items to consider.

6.6 Accounting

- (a) *FRC revised auditing standard for auditor's responsibilities relating to fraud.* On 27 May 2021, the FRC announced that it has issued a revision of its UK auditing standard on the responsibilities of auditors relating to fraud - ISA (UK) 240. The revisions to the standard are designed to provide increased clarity as to the auditor's obligations, addressing the concern raised by Sir Donald Brydon in his review of the quality and effectiveness of audit. The revisions include enhancements to the requirements for the identification and assessment of risk of material misstatement due to fraud and the procedures to respond to those risks. The revised standard is effective for audits of periods beginning on or after 15 December 2021, however, early adoption is permitted
- (b) *UK Endorsement Board.* On 26 May 2021, the FRC announced that BEIS has delegated statutory powers in relation to the adoption of international accounting standards for use within the United Kingdom to the newly

established UK Endorsement Board (**UKEB**) pursuant to The International Accounting Standards (Delegation of Functions) (EU Exit) Regulations 2021. These regulations were made on 21 May 2021 – an explanatory memorandum has also been published.

6.7 Takeovers

- (a) See item 4.2.

6.8 Miscellaneous

- (a) *Pension Schemes Act 2021*. On 29 June 2021, the Department for Work and Pensions published its response to its consultation on strengthening The Pensions Regulator's powers in respect of contribution notices and information gathering following its consultation that was published in March 2021. The following statutory instruments, which will come into force on 1 October 2021, have also been published: (i) The Pensions Regulator (Employer Resources Test) Regulations 2021 (draft); and (ii) The Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021 (made on 23 June 2021). On 24 May 2021, The Pension Schemes Act 2021 (Commencement No. 1) Regulations 2021 were made. These are the first commencement regulations made under the Pension Schemes Act 2021 and, amongst other things, brought into force certain provisions of the Act on 31 May 2021 for the purpose only of making regulations.
- (b) *HMT response to consultation on regulatory framework for financial promotion approvals*. On 22 June 2021, HMT published the response to its consultation on the regulatory framework for approval of financial promotions.
- (c) *HMRC decommissions the stamp presses*. On 18 June 2021, HMRC published formal Gazette notices and an accompanying press release confirming the withdrawal of the physical stamp presses with effect from 19 July 2021. The Gazette notices confirm that from 19 July 2021 stock transfer forms (and other instruments affected by the notices) will only be duly stamped by a lawful die where stamp duty has been paid and notified to HMRC in accordance with the electronic procedure that was introduced in March 2020 due to the COVID-19 pandemic. Pursuant to the electronic procedure, HMRC confirms by letter that the relevant instrument has been duly stamped. On 9 July 2021, Companies House updated its guidance to confirm that the temporary measures put in place during the COVID-19 pandemic for stamping SH03 forms with stamp duty paid have been made permanent.
- (d) *Law Commission discussion paper on corporate criminal liability*. On 9 June 2021, the Law Commission announced the publication of a discussion paper on corporate criminal liability and that it is seeking views on whether, and how, the laws relating to corporate criminal liability can be improved so that they appropriately capture and punish criminal offences committed by corporations, and their directors or senior management. The consultation closes on 31 August 2021.

6.9 Cases

- (a) *Zavarco UK plc v Ranjeet Singh Sidhu [2021] EWHC 1526 (Ch)*. The High Court had to consider whether the exemption in section 594 CA 2006 to the restriction in section 593 CA 2006 that a public limited company must not allot shares for non-cash consideration unless it obtains an independent valuation report applied where a plc had allotted shares to an allottee that had not paid any cash for the shares. The allottee argued that the shares had been allotted pursuant to a share sale arrangement that fell within the exception in section 594, which exempts allotments where the consideration for the allotment consists of an arrangement for the transfer of shares in another company to the plc. The High Court held that section 593 had been breached because at the time the shares in the plc were allotted there was no "arrangement" that satisfied the provisions of section 594. The allottee was therefore liable under section 593(3) CA 2006 to pay the plc a sum equal to the entire nominal value of the allotted shares (the shares were not issued at a premium). The High Court also ruled that it was not able to grant relief under section 606 CA 2006 – being the first decision in respect of this provision of the CA 2006.
- (b) *Alan Burnell v (1) Trans-Tag Limited (2) Robert Aird [2021] EWHC 1457 (Ch)*. The High Court had to consider, amongst other things, whether a former de facto director was in breach of section 175 CA 2006 by virtue of section 170(2)(a) CA 2006 as a result of post-resignation acts. Although the general principle is that a director (including a de facto director) ceases to be subject to directors' duties when he/she ceases to be a director, section 170(2)(a) extends the application of the duty to avoid conflicts of interest in section 175 to former directors as regards the exploitation of any property, information or opportunity of which he/she became aware at the time when he/she was a director. Section 170(4) CA 2006 provides that the directors' duties codified in sections 171 to 177 CA 2006 must be interpreted and applied having regard to the corresponding common law rules and equitable principles. Pre-existing case law indicates that a director's fiduciary duties terminate once he/she has ceased to be a director. However, under previous decisions, former directors have been held liable for breach of duty where the former director's resignation was prompted or influenced by his/her wish to exploit a business opportunity for his/her own benefit – although case law provides that a claim for breach of duty must be based on actions of the director before or at the time of resignation (and not on solely post-resignation acts). Having considered section 170(4) and the previous case law, the court noted that section 170(2)(a) expressly provides that the duty in section 175 "continues" after the relevant person ceases to be a director in certain circumstances and held that it is not permissible as a matter of construction to ignore the plain words of the statute. Therefore, the court held that a breach of the continuing duty to avoid conflicts of interest under section 175 as extended by section 170(2)(a) could be founded solely on post-resignation acts and without a requirement to show that the director's resignation was prompted or influenced by the director's desire to exploit a business opportunity for his/her own benefit. In this respect, the codified duty in section 175 extends beyond the

scope of the duty imposed by common law rules and equitable principles on which the section 175 duty is based.

- (c) *Hurstwood Properties (A) Ltd and others v Rossendale Borough Council and another [2021] UKSC 16*. The Supreme Court declined to invoke the "evasion principle", which is one of the two distinct principles that underlie the cases concerned with piercing the corporate veil (see *Prest v Petrodel Resources Ltd [2013] UKSC 34*). Accordingly, this decision reaffirms the position that the corporate veil will only be pierced in very rare circumstances. Although the Supreme Court considered that this was not the occasion for reaching any final view, it noted that it was inclined to share Lord Walker of Gestingthorpe's doubts on the doctrine of piercing the corporate veil – in *Prest*, Lord Walker questioned whether piercing the corporate veil is a coherent principle or rule of law at all, as opposed to simply a label used to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a corporate body (see paragraph 106 of *Prest*).

11 September 2021