

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 315th meeting
at 9:00 a.m. on 27th May 2022

1. **Welcome and apologies**

In attendance: John Adebisi; Mark Austin; Sam Bagot; Edward Baker; Adam Bogdanor; Robert Boyle; Tom Brassington; Lucy Fergusson; Sarah Hawes (alternate for Caroline Rae); Nicholas Holmes; James Inness (alternate for Chris Horton); Vanessa Knapp; Gerard Lee (Acting Secretary); Stephen Matthews; John Papanicola; Jon Perry; David Pudge (Chair); Patrick Speller; Allan Taylor; Liz Wall; Martin Webster; and Victoria Younghusband.

Apologies: Kevin Hart; Chris Horton; Juliet McKean; Caroline Rae; Matthew Rous; and Richard Spedding.

2. **Approval of minutes**

A draft of the minutes of the meeting held on 30 March 2022 had been circulated to members on 20 May 2022. An updated draft of the minutes incorporating comments received by the Acting Secretary was circulated to members on 25 May 2022. The Chair asked members to send any final comments on the minutes to the Acting Secretary by the end of the following week, otherwise the minutes would be considered settled.

3. **Matters arising**

3.1 *Ending of temporary insolvency measures.* The Chair reported that on 28 March 2022, the Insolvency Service issued a press release confirming that the remaining restrictions on winding up companies under the Corporate Insolvency and Governance Act 2020 would not be extended further following their expiry on 31 March 2022, allowing the insolvency regime to return to its pre-pandemic operation.

3.2 *National Security and Investment Act 2021 (Prescribed Form and Content of Notices and Validation Applications) (Amendment) Regulations 2022.* The Chair reported that The National Security and Investment Act 2021 (Prescribed Form and Content of Notices and Validation Applications) (Amendment) Regulations 2022 were made on 28 March 2022 and came into force on 20 April 2022. The explanatory memorandum to the Regulations explains that they make minor corrections to the existing 2021 regulations, which set out the content of the notification forms under the National Security and Investment Act 2021 (**NSI Act**).

3.3 *National Security and Investment Act 2021: guidance on compliance and enforcement.* The Chair reported that on 11 April 2022, BEIS published new guidance explaining (amongst other things) what can be expected if parties to a transaction become subject to orders and/or notices under the NSI Act. The guidance notes that an interim order

may be issued at any time during the assessment period to prevent parties to an acquisition taking any steps which might undermine any conditions the Secretary of State may seek to put in place at the end of the assessment period through a final order. Such interim orders could include (but are not limited to) preventing the exchange of confidential information and access to sensitive sites or assets, and may include compliance monitoring requirements. Final orders may include both ‘structural’ and ‘behavioural’ conditions. Structural conditions would apply to the corporate structure of an organisation, including decision-making structures and ownership structures; an example might be excluding certain parts of an entity or certain assets from an acquisition, or requiring Government approval of proposed business locations. An example of a behavioural condition might be a regular on-site security inspection or interviews with staff.

- 3.4 *Update on the 14th Programme of Law Reform.* The Chair reported that on 25 April 2022, the Law Commission announced its decision to extend the timetable for finalising its 14th Programme of Law Reform, on which it had consulted during 2021 and which had been expected to be finalised during the first half of 2022. The Committee noted that the Law Commission has not given details of the new timetable but merely states that it remains committed to taking forward as many law reform proposals as possible, whether as part of the future 14th Programme or in the meantime as ministerial references or as 13th Programme projects. In April 2021, the Chair had sent a letter to the Law Commission registering the Committee's support for the Law Commission's proposal to review the law of deeds and variation of contracts as part of the 14th Programme.
- 3.5 *Register of Overseas Entities.* The Chair reported that on 27 April 2022, Companies House issued an update on its progress on the new Register of Overseas Entities to be implemented under the Economic Crime (Transparency and Enforcement) Act 2022. In the update, Companies House confirms that: (i) it will soon be writing to all overseas entities captured by the Act that are registered as owning land in England, Wales and Scotland to ensure that they are aware of their new responsibilities; and (ii) it will publish detailed guidance on the new regime on GOV.UK after secondary legislation is laid. The Committee noted that the update followed a written statement made by Lord Callanan (Minister for Business, Energy and Corporate Responsibility) to the House of Lords on 26 April 2022, in which he confirmed that drafting of the secondary legislation and accompanying guidance would begin imminently and be laid for Parliamentary scrutiny as soon as possible, such regulations to include: (i) technical details of verification requirements; (ii) the protection regime for beneficial owners and managing officers who wish to have their details protected from public disclosure due to a risk of serious harm or violence; and (iii) the mandating of the digital delivery of information to Companies House.
- 3.6 *The Queen's Speech 2022.* The Chair reported that on 10 May 2022, the Queen's Speech was delivered, setting out the Government's proposed legislation for the current session of Parliament. The Committee noted that the lobby pack on the Speech includes reference to: (i) a Brexit Freedoms Bill, which will create new powers to strengthen the ability to amend, repeal or replace retained EU law by reducing the need to use primary legislation to do so, remove the supremacy of retained EU law as it still applies in the UK, and clarify the status of retained EU law in UK domestic law; (ii) a Financial Services and Markets Bill, which will (amongst other things) revoke retained EU law

on financial services and replace it with a UK-designed approach, update the objectives of the financial services regulators to ensure a greater focus on growth and international competitiveness, and reform the rules that regulate the UK's capital markets to promote investment; (iii) an Economic Crime and Corporate Transparency Bill, which will enact the reforms to Companies House set out in the BEIS White Paper on corporate transparency and register reform published in February 2022; and (iv) a Modern Slavery Bill, which will (amongst other things) mandate the reporting areas to be covered in modern slavery statements, require organisations to publish their statements on a government-run registry, and introduce civil penalties for organisations that do not comply with the requirements. It was further noted that the pack also includes reference to a "draft" audit reform bill that was not referred to in the Speech itself, but which will include proposed reforms set out in the BEIS consultation on restoring trust in audit and corporate governance launched in March 2021.

3.7 *Amendments to the Takeover Code.* See items 5.7(a), 5.7(b) and 5.7(c).

4. **Discussions**

4.1 *Updates to note on the execution of a document using an electronic signature.* The Chair reported that in July 2016, a joint working party of the Committee, the Law Society Company Law Committee and the CLLS Financial Law Committee issued a note on the execution of a document using an electronic signature. Draft updates to the note prepared by the CLLS Financial Law Committee reflecting developments since publication of the note were circulated to members on 13 May 2022 with a view to obtaining the Committee's approval to issue an updated version of the note.

4.2 *Law Society guidance on the TRS regime.* The Chair reported that on 6 April 2022, the Law Society announced the publication of guidance to help members to comply with the expanded Trust Registration Service (**TRS**) regime. The Committee noted that the Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 (**2020 Regulations**) provided for the expansion of the TRS by amending the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (**MLRs**). It was also noted that the Law Society's corporate guidance is intended to help corporate lawyers who advise on trusts that arise in a commercial context to understand when those trusts will need to be registered with HMRC, and sets out in table form common corporate and commercial arrangements alongside its generic analysis as to whether it considers that there is any TRS registration requirement or if an exclusion applies. It was further noted that Regulation 44 of the MLRs (**Regulation 44**) also requires trustees of relevant trusts to maintain accurate and up-to-date written records of all beneficial owners of the trust. UK trusts are caught by Regulation 44 regardless of whether they are exempt from the TRS registration requirements, meaning that trustees are still required to keep written records of the beneficial owners of a trust under Regulation 44 even if it is exempt from the TRS registration requirements.

4.3 *FCA Policy Statement on diversity and inclusion on company boards and executive management.* The Chair reported that on 20 April 2022, the FCA issued a press release announcing the publication of Policy Statement 22/3 setting out new rules requiring listed companies to report information and disclose against targets on the representation of women and ethnic minorities on their boards and executive management. This follows consultation CP 21/24 in July 2021 (to which a working party of the Committee led by Nicholas Holmes submitted a response in October 2021). The Committee noted

that new Listing Rules have been introduced to require issuers that are in scope to include a statement in their annual financial report setting out whether they have met specific board diversity targets on a 'comply or explain' basis as at a chosen reference date within their accounting period and, if they have not met the targets, why not. The targets are: (i) at least 40% of the board are women; (ii) at least one of the senior board positions is a woman; and (iii) at least one member of the board is from a minority ethnic background. In-scope companies are also required to: (i) publish numerical data on the sex or gender identity and ethnic diversity of their board, senior board positions and executive management in a standardised table format; and (ii) explain their approach to collecting the data used for the purposes of the new reporting requirements. It was further noted that new guidance on disclosures relating to the diversity of boards and executive management has also been included in the Listing Rules and the Disclosure and Transparency Rules. The new rules apply to accounting periods starting on or after 1 April 2022, but the FCA has encouraged companies whose financial years began on or after 1 January 2022 to consider reporting on the targets and making numerical disclosures in relation to their current accounting period on a voluntary basis. This topic was also discussed on the FCA/CLLS Liaison Committee call this month – see item 4.10 below.

- 4.4 *Call for evidence: the venture capital market.* The Chair reported that on 28 April 2022, the House of Commons Treasury Committee issued a press release announcing its Call for Evidence for the purposes of a short inquiry into the venture capital market. The Treasury Committee welcomes written evidence on (amongst other things) the operation and effectiveness of the current tax incentives in the venture capital market (including any options for change) and the operation and effectiveness of the regulatory regime(s) concerning venture capital. The Committee noted that the Call for Evidence closes on 7 June 2022.
- 4.5 *Re Fore Fitness Investments Holdings Ltd, Hashmi v Lorimer-Wing [2022] EWHC 191.* The Chair reported that he had received a request for further discussion by the Committee of this case, which relates to the interpretation of articles of association in respect of quorum provisions and sole directors. Members were directed to item 5.9(d) of the draft version of the minutes of the meeting held on 30 March 2022 for a summary of the case and the Committee's previous discussion in relation to it.
- 4.6 *Share security and the NSI Act.* The Chair reported that Lord Callanan has approved the publication by the CLLS on its website of a statement setting out the Government's view that whilst the grant of security over shares could create an equitable interest in such shares, such an interest would not appear to grant any control over such shares (as referred to in section 8(1) of the NSI Act) until the happening of an event that would provide control, leading to the Government's conclusion that the grant of security of this type does not fall within the scope of mandatory notification under the NSI Act until such an event that would grant control. The Chair noted that although the statement referred to the grant not falling within scope of the mandatory notification, he understood that this was also intended to convey that it was not a notifiable event under the regime. The Committee also noted that the CLLS has been advised that this issue is under consideration to be included in the next bulletin of guidance on the NSI Act to be issued by BEIS within six months of the Act coming into force.

- 4.7 *NSI Act – practical issues.* The Chair noted that at the previous meeting, he had proposed keeping the NSI Act as a standing item on the agenda for meetings of the Committee so that issues arising in practice can be collated and relayed to BEIS.
- 4.8 *NSI Act – ECM issues.* The Chair reported that he had received a request for discussion by the Committee of issues arising under the NSI Act specifically in relation to equity capital markets (ECM). The Chair proposed a separate meeting for ECM practitioners to discuss these issues.
- 4.9 *Sanctions.* The Chair proposed discussion of the evolving practice of members of the Committee in relation to sanctions, including in respect of voting shares and the payment of dividends.
- 4.10 *FCA/CLLS CLC Liaison Committee call.* Victoria Younghusband updated the Committee in respect of the call that was held on 6 May 2022.
- 4.11 *Takeover Panel Executive meeting.* The Chair updated the Committee in respect of an informal meeting to discuss issues of interest in relation to takeovers, the Code and the Panel requested by the Takeover Panel Executive and held on 13 May 2022 with the Chair (in his capacity as chair of the Committee) and the chair of the Joint CLLS/Law Society Takeovers Working Group.
- 4.12 *Corporate re-domiciliation.* The Chair and Jon Perry updated the Committee on further discussions with BEIS in relation to its consultation on the proposed UK corporate re-domiciliation regime.
- 4.13 *FCA discussion paper on further reform of the listing regime.* The Chair reported that on 26 May 2022, the FCA published Discussion Paper 22/2: Primary Markets Effectiveness Review: Feedback to the discussion of the purpose of the listing regime and further discussion. It was noted that DP 22/2 summarises feedback that the FCA has received on its discussion of the purpose of the listing regime in CP 21/21, and sets out further proposals to (amongst other things) establish one listing segment for equity shares of commercial companies, which would feature: (i) a single set of eligibility criteria; and (ii) a robust, minimum set of 'mandatory' continuing obligations, with issuers having a choice to adopt further additional 'supplementary' obligations. The Committee noted that the FCA welcomes feedback on the topics discussed by 28 July 2022, following which it will provide feedback and consider whether to issue a consultation paper in due course or whether a further discussion paper is appropriate.

5. **Recent developments**

The Committee noted the following additional items in sections 5.1 to 5.9 which time did not allow them to consider, other than the Chair briefly commenting on items 5.5(b), 5.7(a) and 5.7(d).

5.1 **Company law**

- (a) No items to consider.

5.2 Corporate governance

- (a) *FRC 3-Year Plan.* On 5 April 2022, the FRC announced the publication of its 3-Year Plan 2022-25 setting out its progress towards establishing the new Audit, Reporting and Governance Authority (**ARGA**) following the publication of the BEIS White Paper on restoring trust in audit and corporate governance in March 2021. The Plan considers how and when the FRC will need to increase its capacity to adapt to its new powers and responsibilities when it becomes ARGA (assuming that the proposals set out in the White Paper are implemented during the three-year period covered by the Plan).
- (b) *UK Transition Plan Taskforce.* On 25 April 2022, HM Treasury launched the UK Transition Plan Taskforce (**TPT**) to develop a 'gold standard' for climate transition plans. In November 2021, the Chancellor of the Exchequer committed at COP26 to making it a requirement for certain financial sector firms and listed companies to publish their climate transition plans by 2023. The outputs set out in the TPT's terms of reference include the creation of guidance on the role of governance and assurance, third-party verification and the implications of organisational transition plans for reporting. On 10 May 2022, the TPT published a call for evidence seeking views on (amongst other things) where companies should disclose information on their climate transition plans.
- (c) *Call for Evidence: Update to Green Finance Strategy.* On 12 May 2022, BEIS published a Call for Evidence to obtain evidence and views from stakeholders to support the development of an update to the UK's Green Finance Strategy, which was published in July 2019 and first set out the Government's expectation for all listed companies and large asset owners to disclose in line with the 2017 recommendations of the Taskforce on Climate-related Financial Disclosures (**TCFD**) by 2022. The Call for Evidence includes questions relating to the provision of data to the market and refers to the work of the Taskforce on Nature-related Financial Disclosures to design a risk management and disclosure framework for organisations to report on nature-related risks. The Call for Evidence closes on 22 June 2022 and the resulting update to the Green Finance Strategy is planned for publication in late 2022.

5.3 Reporting and disclosure

- (a) *ISSB drafts of IFRS Sustainability Disclosure Standards.* On 31 March 2022, the International Sustainability Standards Board (**ISSB**) announced the publication of exposure drafts of the first two proposed IFRS Sustainability Disclosure Standards on climate and general sustainability disclosure requirements. The draft standards are: (i) IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information, which would require a company to disclose material information about all significant sustainability-related risks and opportunities to which it is exposed as a part of the company's general purpose financial reporting, meaning that the sustainability-related financial disclosures would be published at the same time as the financial statements; and (ii) IFRS S2 Climate-related Disclosures, which would require a company to provide material information about its significant climate-related risks and opportunities, incorporating and adding to the recommendations of the

TCFD. The Government has previously stated that its intention is for listed companies to report climate impacts under the ISSB climate standards and environmental impacts using the proposed UK green taxonomy. The consultation closes on 29 July 2022 and the ISSB aims to issue the new standards by the end of 2022.

- (b) *FRC report on modern slavery reporting practices in the UK.* On 25 April 2022, the FRC announced the publication of its report summarising evidence of how a sample of 100 companies comprising FTSE 100, FTSE 250 and Small Caps companies have reported on modern slavery. The research, which was undertaken in conjunction with the UK Anti-Slavery Commissioner and Lancaster University, found (amongst other things) that one in ten companies did not provide a modern slavery statement despite it being mandated under section 54 of the Modern Slavery Act 2015, and identified significant shortcomings even where companies did comply with the requirement.
- (c) *Updated ICAEW guidance on disclosure of auditor remuneration.* On 29 April 2022, the Institute of Chartered Accountants in England and Wales (ICAEW) announced the publication of Technical Release TECH 01/22 FRF, its updated guidance on the disclosure of auditor remuneration for the audit of accounts and other services. The updated guidance supersedes the previous version of the guidance set out in TECH 14/13 FRF published in 2013, but remains substantively unchanged other than to reflect changes during the intervening period to the Companies (Disclosure of Auditor Remuneration and Liability limitation Agreements) Regulations 2008 to remove the requirement for small companies to disclose details of audit fees and to narrow the scope of the disclosure exemption available to subsidiaries included in group accounts. The updated guidance also reflects changes to a number of related laws, regulations, financial reporting standards and other guidance, including the FRC's Revised Ethical Standard, the Companies Act 2006, UK Financial Reporting Standards and the UK Corporate Governance Code.
- (d) *Handbook Notice No 98.* On 29 April 2022, the FCA published Handbook Notice No 98, which sets out changes to the FCA Handbook, including: (i) the new rules and guidance relating to diversity and inclusion on company boards and executive management (see item 4.3); and (ii) following consultation CP 22/5 in March 2022, minor changes to allow companies to use a more up-to-date electronic format for their annual financial reports.
- (e) *Supply chain disclosure: FRC Lab insight.* On 29 April 2022, the FRC published the first of the FRC Lab's insights into current market issues. The first edition in the series focuses on supply chain disclosure and sets out questions and resources that may be useful for companies to consider in preparing their supply chain reporting, including in relation to: (i) access to raw materials and goods; (ii) digital security, outsourcing and weaknesses in infrastructure; and (iii) legal, ethical and reputational considerations.
- (f) *ESMA public statement on implications of Russia's invasion of Ukraine on half-yearly financial reports.* On 13 May 2022, ESMA issued a press release announcing the publication of a Public Statement in relation to the preparation of interim financial statements according to IFRS Accounting Standards and

interim management reports for the 2022 half-yearly reporting periods in light of Russia's invasion of Ukraine, setting out (amongst other things): (i) a reminder of the main IFRS requirements which may be applicable in the context of Russia's invasion of Ukraine (e.g. impairment of non-financial and financial assets, and loss of control); (ii) ESMA's expectations regarding disclosures in financial statements (e.g. judgements made, significant uncertainties, and going concern risks); (iii) ESMA's expectations regarding disclosures in interim management reports (e.g. direct and indirect impact of Russia's invasion of Ukraine and imposed sanctions on issuers' strategic orientation and targets, operations, financial performance, financial position and cash-flows, measures taken to mitigate the impacts, and cybersecurity risks); and (iv) a reminder of issuers' obligations vis-à-vis MAR.

5.4 **Equity capital markets**

- (a) *New Q&As on ESMA Guidelines on Alternative Performance Measures.* On 1 April 2022, ESMA issued a press release announcing the publication of updated Q&As on the application of the ESMA Guidelines on Alternative Performance Measures (**APM Guidelines**). In the new Q&A, ESMA states that when financial measures using ESG labels (such as green turnover, sustainable CAPEX) are included in regulated information and prospectuses, those measures are covered by the APM Guidelines unless such measures are determined in accordance with, for example, the EU Taxonomy Regulation (**TR**) or the EU Sustainable Finance Disclosures Regulation (**SFDR**). ESMA also calls on issuers to use caution when they present APMs using ESG labels, as these may be misperceived by users as being compliant with TR or SFDR. Issuers should be clear about whether a specific ESG financial measure is determined in accordance with TR or SFDR by displaying so in the label and/or including the information together with the APM used (e.g. in a footnote).
- (b) *Market Notice N12/22.* On 11 May 2022, the London Stock Exchange published Market Notice N12/22, which includes a consultation on proposed amendments to the Admission and Disclosure Standards to: (i) create the Voluntary Carbon Market; and (ii) effect other minor changes to the Admission and Disclosure Standards, including to provide that all communications between the Exchange and an issuer are confidential to the Exchange and should not be disclosed without the prior written consent of the Exchange (except as required by any other regulatory or statutory body). The Voluntary Carbon Market will be a designation open to funds admitted to trading on the Main Market or AIM that have an investing policy focused on carbon reduction and/or removal projects. The consultation closes on 11 July 2022 and the Exchange expects to confirm the final rules around the end of September 2022.

5.5 **MAR**

- (a) *Market Watch 69.* On 17 May 2022, the FCA published Market Watch 69, which discusses the FCA's observations from its engagement with small and medium-sized firms in relation to: (i) firms' arrangements for market abuse surveillance; (ii) obligations involving policies and procedures to counter the risk a firm is used to further financial crime, specifically criminal market abuse

(as per SYSC 6.1.1R); and (iii) investigations into potential market abuse by firms' employees and when firms should submit a STOR.

- (b) *BaFin Issuer Guidelines*. It has been noted that Module C of the Issuer Guidelines published by the Federal Financial Supervisory Authority in Germany (**BaFin**) includes helpful guidance on (amongst other things) rebuttal of the statutory presumption under Article 9 of MAR that a person who possesses information 'uses' that information if they deal in the price-affected securities. Such guidelines may be useful when advising on this and other issues in the UK (for as long as UK MAR continues to apply without significant amendment) given that there are relatively few official publications that discuss these (or other) issues arising under MAR or UK MAR in detail.

5.6 Accounting

- (a) No items to consider.

5.7 Takeovers

- (a) *Takeover Code: miscellaneous Code amendments*. On 5 May 2022, the Takeover Panel issued Panel Statement 2022/9. The Panel Statement announces (amongst other things) the publication by the Code Committee of Response Statement 2021/1 following consultation PCP 2021/1 in December 2021 on miscellaneous Code amendments (to which the Joint CLLS/Law Society Takeovers Working Group submitted its response in February 2022) and Instrument 2022/2, which makes the amendments to the Code adopted in the Response Statement. PCP 2021/1 included proposals in relation to: (i) a new requirement for a potential offeror to disclose an obligation to offer a minimum level, or particular form, of consideration; (ii) a new restriction on acquisitions of interests in shares by a mandatory offeror at the end of the offer timetable; (iii) clarification of the application of the 'look-back period' for determining the price of a mandatory offer; (iv) the chain principle; (v) the restrictions following the lapsing of an offer or a statement of no intention to bid; and (vi) other minor issues. The Code Committee has adopted the amendments proposed in PCP 2021/1 with certain modifications, including the introduction of a new Note 4 on Rule 2.4, which provides that where it may not be practicable for a potential offeror to make enquiries of all persons acting in concert with it in order to confirm whether any details are required to be disclosed in respect of (i) above, this should be stated in its announcement and any relevant details should be announced as soon as practicable (and in any event by no later than the deadline for the potential offeror's opening position disclosure). The amendments will take effect on 13 June 2022 and the Code, as amended, will be applied from this date to all companies and transactions to which it relates, including those ongoing transactions which straddle that date, except where to do so would give the amendments retroactive effect.
- (b) *Takeover Code: document charges*. On 5 May 2022, the Takeover Panel published Instrument 2022/3, which amends the Documents Charges section of the Code so as to: (i) refer to a "*Rule 9 waiver*" rather than a "*whitewash*" (consistent with other amendments made by Instrument 2022/2); and (ii) explain that the calculation of the value of an offer should include only shares in the

offeree company already in issue and should exclude any shares in the offeree company held by the offeror.

- (c) *Takeover Code: removal of restriction on anonymous order book dealings.* On 5 May 2022, the Code Committee published Response Statement 2022/1 following consultation PCP 2022/1 in February 2022 on the removal of the restriction on an offeror purchasing shares in the offeree company through an anonymous order book (to which the Joint CLLS/Law Society Takeovers Working Group submitted its response in March 2022) and Instrument 2022/4, which makes the amendments to the Code adopted in the Response Statement. PCP 2022/1 proposed: (i) the deletion of Rule 4.2(b), which provides that, during an offer period, an offeror and persons acting in concert with it must not acquire an interest in any securities of the offeree company through any anonymous order book system, or through any other means, unless, in either case, it can be established that the seller, or other party to the transaction in question, is not an exempt principal trader connected with the offeror; and (ii) consequential amendments to Rule 38.2 and minor and clarificatory amendments to Rule 4.2(a). The Code Committee has adopted the amendments proposed in PCP 2022/1 without modification. The amendments will take effect on 13 June 2022 and the Code, as amended, will be applied from this date to all companies and transactions to which it relates, including those ongoing transactions which straddle that date, except where to do so would give the amendments retroactive effect. The Panel Executive intends to publish a Practice Statement in relation to purchases of shares in the offeree company by an offeror during an offer period when the amendments come into effect.
- (d) *Takeover Code: consultation on amendments to the Code in relation to the presumptions of the definition of "acting in concert" and related matters:* On 26 May 2022, the Takeover Panel issued Panel Statement 2022/11 announcing the publication of Public Consultation Paper 2022/2 (PCP 2022/2), which sets out a number of proposed amendments to the Code with regard to the presumptions of the definition of "acting in concert" and related matters. The Committee noted that PCP 2022/2 proposes (amongst other things) to raise the threshold in what is currently presumption (1) of the definition of "acting in concert" (which relates to companies) from 20% to 30%, so as to align it with the threshold in the Code's definition of "control" and explains that the new 30% threshold is proposed to apply differently to interests in voting share capital and (voting or non-voting) equity share capital. It was noted that a webinar will be held on the proposed amendments in late June or early July and that the Code Committee has requested comments by 23 September 2022. The Code Committee expects to publish a Response Statement setting out the final amendments to the Code in late 2022 and expects that the amendments to the Code would come into effect approximately two months after the publication of that Response Statement.

5.8 Miscellaneous

- (a) *Government response to BEIS consultation on reforming competition and consumer policy.* On 20 April 2022, BEIS issued a press release announcing the publication of the Government's response to its consultation on reforming competition and consumer policy launched in July 2021. The response confirms

(amongst other things) that the Government will implement proposals to adjust the thresholds for the Competition and Markets Authority's jurisdiction by: (i) raising the target turnover test threshold in line with inflation from £70 million to £100 million; and (ii) creating an additional basis for establishing jurisdiction where an acquirer has both: (a) an existing share of supply of goods or services of 33% in the UK or a substantial part of the UK; and (b) a UK turnover of £350 million. The Government will also introduce a small merger safe harbour, exempting mergers from review where each party's UK turnover is less than £10 million.

5.9 Cases

- (a) *MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm)*. The High Court held that a force majeure clause (**Clause**) in a contract of affreightment (**Contract**) which provided that a force majeure event was (amongst other things) one that cannot be overcome by reasonable endeavours by the affected party did not require the affected party to vary the terms of the contract or to accept non-contractual performance in order to circumvent the effect of the clause. The Contract required payments to be made by the counterparty to the affected party in US dollars. Following the imposition of US sanctions on the counterparty's parent company, the affected party sought to rely on the Clause. The counterparty argued that the imposition of the sanctions could have been overcome by reasonable endeavours from the affected party if it accepted payments in euros instead of US dollars, notwithstanding that this was not provided for by the Contract. By reference to existing case law, the High Court rejected the counterparty's submission that when a question arises to the exercise of reasonable endeavours, the significance of any contractual obligation is simply one factor to be weighed in the balance in deciding the overall question of reasonableness. The High Court also rejected the counterparty's argument to the effect that a claim for force majeure is impermissible if it involves as one aspect of causation a decision by the party relying upon the clause (in this case the affected party's decision to suspend its performance of the Contract notwithstanding that such performance remained physically possible), provided that such decision does not break the chain of causation from the original force majeure event which, in the context of breach of contract, will usually require unreasonable conduct by the affected party.
- (b) *The Financial Conduct Authority v Ferreira [2022] EWCA Civ 397*. The Court of Appeal allowed an appeal in relation to the application of section 382 (**section 382**) of the Financial Services and Markets Act 2000 (**FSMA**), which provides that the court may make an order for compensation to be paid by persons who have been knowingly concerned in the contravention of a relevant requirement under FSMA. An order made by the High Court under section 382 related to a contravention of section 21(1) of FSMA (**section 21**), which (as in force at the relevant time) provides that a person must not in the course of business communicate an invitation or inducement to engage in investment activity. However, by section 21(2) of FSMA, the prohibition under section 21 does not apply if the person making the communication is an authorised person or if the content of the communication is approved by an authorised person. The High Court had held that, provided that a defendant knew that a relevant

communication was being made, it was not necessary for the making of an order under section 382 that the defendant should also have known that it had not been approved by an authorised person. The Court of Appeal disagreed and considered that knowledge of the facts which made the act complained of a contravention of the statute must include knowledge of the factual circumstance that prevented a potentially relevant disapplication from operating.

- (c) *Soteria Insurance Ltd (formerly CIS General Insurance Limited) v IBM United Kingdom Ltd [2022] EWCA Civ 440*. The Court of Appeal held that an exclusion clause (**Exclusion Clause**) in a master services agreement that excluded liability for indirect or consequential losses or loss of profit, revenue or savings did not exclude claims for wasted expenditure. The Court of Appeal observed that that on the natural and ordinary meaning of the words, claims for wasted expenditure were not included in "*loss of profit, revenue [or] savings*", and that in light of the specificity of the Exclusion Clause the parties' decision not to expressly exclude claims for wasted expenditure was telling. The Court of Appeal also found that on the basis of established principles relating to the construction of exclusion clauses, the more valuable the right, the clearer the language of any exclusion clause will need to be; that is, the more extreme the consequences, the more stringent the court must be before construing the clause in a way which allows the contract-breaker to avoid liability for what may be his catastrophic non-performance. Finally the Exclusion Clause did not exclude all claims for loss of bargain; it was simply a question of identifying those losses which were excluded (loss of profit, revenue or savings), and those which were not (most obviously, claims for re-procurement and wasted expenditure).
- (d) *Asher & Ors v Jaywing Plc [2022] EWHC 893 (Ch)*. The High Court found that the buyer breached the terms of a sale and purchase agreement (**SPA**), which required an earn-out statement to be prepared by "*the buyer's auditors*", by delivering to the sellers an earn-out statement prepared by its Chief Financial Officer (**CFO**), its statutory auditors having declined to prepare the statement due to independence concerns. The High Court rejected the buyer's submission that the word 'auditors' can be read as meaning any firm of accountants appointed by the buyer, given that the immediately preceding sub-paragraph referred to "*audited*" financial statements. However, the High Court agreed that a term needed to be implied into the SPA on the grounds of business necessity and/or business efficacy in order to deal with the preparation of an earn-out statement should the buyer's statutory auditors for some reason be unable to undertake this task. The term to be implied would be that the buyer was free to appoint a suitably qualified independent firm to prepare the earn-out statement, but the buyer also breached this implied term by having its CFO prepare the statement.
- (e) *Re Smile Telecoms Holdings Ltd (Part 26a of the Companies Act 2006) [2022] EWHC 740 (Ch)*. The High Court sanctioned a restructuring plan under Part 26A of the Companies Act 2006 in respect of a company incorporated in Mauritius and registered as an overseas company in England under Part 34 of the Companies Act 2006. The application raised questions, in particular, about: (i) the concept of a "*compromise or arrangement*" in Part 26A; (ii) the effect of an order made at the convening stage under section 901C(4) of the Act that

classes of creditors who have no genuine economic interest in a plan company need not be summoned to meetings to consider a plan; and (iii) questions as to the approach of the court to the exercise of its jurisdiction to sanction a restructuring plan for a foreign company that applies to its members as well as its creditors. The High Court was satisfied that the provisions of the plan as regards alteration to the company's constitution and share capital were likely to be capable of being implemented in Mauritius by the use of the power of attorney granted under the plan, under which the company was to exercise the voting rights necessary to pass the relevant resolutions.

6. **Any other business**

- 6.1 *CLLS and CLSC AGM.* Details of the AGM of the CLLS and the City of London Solicitors' Company (**CLSC**) and summer drinks reception to be held on 22 June 2022 were circulated to members on 28 April 2022. All members of the CLLS are welcome to attend.
- 6.2 *CLLS drinks reception and dinner.* The next meeting of the Committee in July will be held as an in-person meeting, to be followed by a drinks reception and dinner.
- 6.3 *AGMs.* The Chair proposed including as an item on the agenda for the next meeting of the Committee issues that arose during the 2022 AGM season, particularly in light of recent high-profile disruptions to meetings.