

THE CITY OF LONDON LAW SOCIETY  
COMPANY LAW COMMITTEE

Minutes

for the 316<sup>th</sup> meeting  
at 5:00 p.m. on 19<sup>th</sup> July 2022

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1. **Welcome and apologies**

*In attendance:* Mark Austin; Sam Bagot; Edward Baker; Adam Bogdanor; Tom Brassington; Lucy Fergusson; Kevin Hart; Sharon Jenman (alternate for John Adebisi); Marianna Kennedy (alternate for Nicholas Holmes); Vanessa Knapp; Gerard Lee (Acting Secretary); Stephen Mathews; Juliet McKean (Secretary); John Papanicola; Jon Perry; David Pudge (Chair); Caroline Rae; Matthew Rous (Chief Executive of the CLLS); Richard Spedding; Patrick Speller; Liz Wall; Martin Webster; Peter Wilson (alternate for Allan Taylor); and Victoria Younghusband.

*Apologies:* John Adebisi; Robert Boyle; Nicholas Holmes; Chris Horton; and Allan Taylor.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 27 May 2022 was circulated to members on 12 July 2022. 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.

3. **Matters arising**

- 3.1 *Register of Overseas Entities.* The Chair reported that a draft of The Register of Overseas Entities (Delivery, Protection and Trust Services) Regulations 2022 was laid in Parliament on 22 June 2022 (along with an explanatory memorandum). The draft regulations contain provisions relating to the electronic delivery of documents, the protection of information and the definition of registrable beneficial owners. In addition, the Committee noted that The Register of Overseas Entities (Verification and Provision of Information) Regulations 2022 were made on 29 June 2022 (an explanatory memorandum has also been published). These regulations make provision in respect of the verification by a "relevant person" of certain information pertaining to a person who is or was a registered beneficial owner or managing officer of an overseas entity as well as the provision and processing of information coming within section 42(1)(c) of the Economic Crime (Transparency and Enforcement) Act 2022. It was noted that both sets of regulations will come into force on the same date as the relevant provisions of the Economic Crime (Transparency and Enforcement) Act 2022 that create the new register. It was further noted that a commencement order confirming the start date for the new register is expected to be published shortly. Furthermore, the Committee noted that Companies House has published two updates (one on 23 June and one on 30 June) on the progress of the Register of Overseas Entities.

The Committee noted that BEIS's target date for the launch of the Register of Overseas Entities was 1 August 2022. The Chair reported that BEIS was working at speed to produce non-statutory technical guidance on the analysis of beneficial ownership (intended to mirror the equivalent guidance issued when the PSC regime was introduced) and the verification requirements under the new regime.

The Committee further noted that a working group was being coordinated by the Law Society Company Law Committee to produce practical guidance for the legal profession on how to approach the verification requirements under the new regime.

- 3.2 *NSI Act Annual Report 2022.* The Chair reported that on 16 June 2022, BEIS announced the publication of its first Annual Report on the National Security and Investment Act 2021 (**NSI Act**), which covers the first three months of the new regime's operation. Supplementary background information with volume and timing statistics has also been published. The Committee noted that key findings of the first Annual Report include: (i) the average time to inform parties that a notification has been accepted as complete is three working days; (ii) where the Government has called-in a deal, on average this has been decided in 24 working days and all have been decided within the deadline of 30 days; (iii) the Government has received 222 deal notifications in the reporting period, of which 17 were called-in for further assessment, and of the 17 called-in, three were cleared with the other 14 cases still being assessed at the end of the reporting period; and (iv) acquisitions called-in for further assessment included businesses from areas of the economy such as artificial intelligence, advanced materials and satellite and space technologies. See also the discussion items at 4.7 and 4.8 and item 5.8(a).
- 3.3 *Law Commission options paper on corporate criminal liability.* The Chair reported that on 10 June 2022, the Law Commission announced the publication of an options paper on corporate criminal liability which sets out its options for how the Government can improve the law to ensure that corporations are effectively held to account for committing serious crimes. The Law Commission has also published a summary of the options paper and updated the current project status page.
- 3.4 *Economic Crime (Transparency and Enforcement) Act 2022 commencement regulations.* The Chair reported that The Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No. 2 and Saving Provision) Regulations 2022 were made on 9 June 2022 and brought into force on 15 June 2022 three provisions in Chapter 1 of Part 3 of the Economic Crime (Transparency and Enforcement) Act 2022 which relate to financial sanctions. As noted at the Committee meeting held in March 2022, Part 3 of that Act introduces a strict liability test for civil monetary penalties imposed for breaches of financial sanctions legislation by amending section 146 of the Policing and Crime Act 2017.
- 3.5 *Dormant Assets Act 2022.* The Chair reported that The Dormant Assets Act 2022 (Commencement) Regulations 2022 were made on 24 May 2022 and brought into force on 6 June 2022 those provisions of the Dormant Assets Act 2022 that were not already in force.

## 4. Discussions

- 4.1 *Audit and corporate governance reform.* The Chair reported that on 31 May 2022, the Government announced the publication of its response to BEIS's consultation on audit and corporate governance reform. In the announcement the Government states that it will revamp the UK's corporate reporting and audit regime through the establishment of ARGAs as a new regulator, greater accountability for big businesses and by addressing the dominance of the Big Four audit firms. The Committee noted that, broadly, the Government has scaled back the obligations on companies/directors (by way of example, there will be no mandatory SOX-style requirement for a directors' statement on the effectiveness of internal controls, rather there will be a comply or explain requirement in the UK Corporate Governance Code, and the new regime will only be extended to cover the largest private companies (i.e., those having more than 750 global employees and turnover of more than £750 million)). However, the Government is largely following through on the consultation proposals to set up a new regulator ARGAs with stronger enforcement powers in relation to breaches of the corporate reporting and audit-related responsibilities by directors and to introduce managed shared audits as a way of ensuring more competition, and encouraging better quality, in the audit market. It was noted that the reforms will be implemented through a combination of primary legislation (i.e., the Audit Reform Bill), secondary legislation, changes to the UK Corporate Governance Code, codes of practice and guidance and changes to the Listing Rules.

The Chair also reported that on 12 July 2022, the FRC announced the publication of a position paper that sets out the next steps to reform the UK's audit and corporate governance framework. The position paper builds on the areas of the Government's response that fall within the FRC's remit to provide clarity for stakeholders on how the work of reform will be delivered ahead of legislation. The Committee observed that, more specifically, the position paper sets out proposed changes to the UK Corporate Governance Code and states that the FRC will consult on changes to the Code and supporting material from Q1 of 2023 with a view to the revised Code applying to periods commencing on or after 1 January 2024.

The Chair reported that, in addition, on 5 July 2022, the FRC announced that it will be holding two webinars on audit and corporate governance reform (one on 14 July and one on 20 July).

- 4.2 *FCA discussion paper on further reform of the listing regime.* The Committee was updated in respect of calls held on 20 June 2022 and 1 July 2022 with members of the Committee on FCA Discussion Paper 22/2: Primary Markets Effectiveness Review (DP 22/2) and the roundtable discussions on DP 22/2 between the Committee and the FCA held on 21 June 2022.
- 4.3 *Consultation on amendments to the Takeover Code in relation to the presumptions of the definition of "acting in concert" and related matters.* The Chair updated the Committee in respect of the call held on 14 June 2022 with members of the Committee on Public Consultation Paper 2022/2 (PCP 2022/2) and the call on PCP 2022/2 between the Chair, Chris Pearson of Norton Rose Fulbright and the Takeover Panel held on 22 June 2022.

- 4.4 *New rules on diversity and inclusion on company boards and executive management.* The Chair noted that at the previous meeting, he had proposed discussion of the new LRs and DTRs on diversity and inclusion on company boards and executive management with members sharing their insights and evolving thinking, including on how the relevant data should be presented.
- 4.5 *AGMs.* The Chair noted that at the previous meeting, he had proposed discussion of the issues that arose during the 2022 AGM season, particularly in light of high-profile disruptions to meetings during the season, and the advice that can be given to clients to minimise the disruption caused at future AGMs. The Chair updated the Committee on the status of proposed guidance in relation to general meetings and shareholder engagement guidance being developed by the FRC-led industry working group.
- 4.6 *Sanctions.* The Chair noted that at the previous meeting, he had proposed discussion of any issues arising in practice in relation to sanctions since the last Committee meeting.
- 4.7 *NSI Act – practical issues.* The Chair noted that he had previously proposed as a standing item on the agenda for meetings of the Committee discussion of on any issues arising in practice in relation to the NSI Act since the last Committee meeting.
- 4.8 *NSI Act – ECM issues.* The Chair updated the Committee in respect of the call held on 13 June 2022 for ECM practitioners from member firms to discuss issues arising under the NSI Act specifically in relation to ECM matters.
- 4.9 *UK re-domiciliation regime.* Jon Perry provided an update on discussions with BEIS in relation to the proposals previously published by BEIS for consultation .

## 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 in the meeting, other than the Chair briefly commenting on item 5.9(b).

### 5.1 **Company law**

- (a) No items to consider.

### 5.2 **Corporate governance**

- (a) *FRC research on revised Stewardship Code.* On 5 July 2022, the FRC announced the publication of new research that has identified the positive impact the revised UK Stewardship Code has had on the practice and reporting of asset managers and owners.
- (b) *FRC consultation on publishing audit quality indicators.* On 22 June 2022, the FRC announced the publication of a consultation on publishing audit quality indicators (**AQIs**) for the largest UK audit firms, which would provide users of audited information with greater detail on audit firms' efforts to deliver high quality audit. The 11 proposed AQIs would provide stakeholders with a range of comparable indicators on perceived culture within an audit firm, audit quality inspection results, staff workloads and the level of partners' involvement in

individual audits. The FRC believes that setting out AQIs to enable discussions between Audit Committee Chairs (ACCs) and audit firms on the drivers of audit quality will help ACCs to make more informed comparisons between firms when appointing external auditors. The consultation closes on 18 August 2022.

- (c) *QCA 2022 Non-Executive Directors Survey.* On 1 June 2022, the QCA published the findings from its fifth survey of small and mid-sized quoted companies. The survey gathers insights into various aspects of the role of non-executive directors and includes information on NEDs' salaries, working hours and independence.
- (d) *Updated FRC Guidance on the Strategic Report.* On 16 June 2022, the FRC announced the publication of an updated edition of its Guidance on the Strategic Report. The press release states that the updated edition incorporates the new climate-related financial disclosures and a number of other amendments made to maintain alignment with legislation.
- (e) *FRC reports from 2020/21 audit quality inspections.* On 27 May 2022, the FRC published two reports: (i) Key Findings Reported in 2020/21 Inspection Cycle; and (ii) Good Practices Reported in 2020/21 Inspection Cycle, which set out the key findings / good practice points reported in the 2020/21 inspection cycle which relate to the private sector audits inspected at the seven largest firms.
- (f) *30% Club guidance on reporting on diversity.* On 24 May 2022, the 30% Club UK Investor Group published guidance for companies reporting on diversity. The purpose of the guidance is to: (i) establish a shared understanding of what constitutes useful reporting on diversity, so investors can more confidently use that information in their decision-making processes and engagements; and (ii) help companies better understand what investors value most in disclosure on diversity and provide insights on how company reporting can be made more effective and comprehensive.

### 5.3 Reporting and disclosure

- (a) *FCA instrument on electronic format of annual financial reports.* On 24 June 2022, the FCA published Handbook Administration (No. 60) Instrument 2022 (FCA 2022/26) which, amongst other things, corrects a drafting error in Article 4(5)(b) of the UK Transparency Directive European Single Electronic Format Regulation by clarifying that both the UKSEF 2022 taxonomy and the ESEF 2021 taxonomy are permitted taxonomies for financial years beginning on or after 1 January 2022 (and not just the UKSEF 2022 taxonomy). This change came into force on 24 June 2022.

### 5.4 Equity capital markets

- (a) *ESMA public statement on EU sanctions.* On 8 July 2022, ESMA announced the publication of a public statement on prospectus supervision in the context of EU sanctions over Russia's invasion of Ukraine. The purpose of the public statement is to alert stakeholders to the European Commission's view that infringements of EU sanctions can constitute sufficient legal basis for a national competent authority (NCA) to refuse the approval of a prospectus and that

issuers submitting a prospectus to an NCA should note that they may receive questions and requests for additional documentation from NCAs concerning the areas and parties identified by EU sanctions.

- (b) *Market Notice N14/22.* On 8 July 2022, the London Stock Exchange published Market Notice N14/22 to announce that it is extending the closing date for its consultation on amendments to the Admission and Disclosure Standards (previously announced in Stock Exchange Notice N12/22) to 1 August 2022. This is to enable the LSE to pose further questions and make further changes on the proposed launch of the Voluntary Carbon Market designation and to accommodate changes to the Standards in respect of Stock Connect, following rule changes by the China Securities Regulatory Commission and consideration of this in relation to the listing of global depositary receipts from issuers in China. The notice states that the LSE still expects to confirm the final rules at or around the end of September 2022.
- (c) *FCA consultation on improving equity secondary markets.* On 5 July 2022, the FCA published a consultation paper on improving equity secondary markets (CP22/12) as part of the review of UK wholesale financial markets it has been conducting with the Treasury. The FCA is consulting on rule changes to improve trade execution and post-trade transparency for investors and is seeking views on future guidance on outages and the structure of UK markets for retail orders. The consultation closes on 16 September 2022.
- (d) *ESG integration in UK capital markets.* On 29 June 2022, the FCA published its Feedback Statement on ESG integration in UK capital markets (FS22/4) and Primary Market Bulletin No. 41. FS22/4 summarises feedback to the FCA discussion chapter in CP21/18 on ESG integration in UK capital markets and the FCA's response to that feedback and sets out the FCA's potential next steps. PMB No. 41 elaborates on the FCA's response to the feedback and clarifies the FCA's expectations of issuers of ESG-labelled debt instruments.
- (e) *PMB No. 40.* On 27 May 2022, the FCA published Primary Market Bulletin No. 40. In this edition, the FCA explains the changes it is making to the Knowledge Base on the prospectus regime following its consultation in PMB No. 34. The changes to the Knowledge Base include an update to one existing procedural note, an update to 10 existing technical notes and the addition of four new technical notes.
- (f) *FCA Handbook Notice No. 99.* On 27 May 2022, the FCA published Handbook Notice No. 99 which, amongst other things, summarises changes made to the FCA Handbook including changes made to the: (i) LRs and PRRs pursuant to the Listing Rules and Prospectus Regulation Rules (Prospectus Guidance and Guidelines) Instrument 2022. This instrument makes changes to the LRs and PRRs consequential to the changes to the FCA's Knowledge Base (see PMB No. 40 at item 5.4(e)); and (ii) LRs pursuant to the Listing Rules (Open-ended Investment Companies) (Amendment) Instrument 2022. This instrument adds a new limb to LR 14.1.1R. Both instruments came into force on 27 May 2022.

## 5.5 **MAR**

- (a) No items to consider.

## 5.6 **Accounting**

- (a) *The Statutory Auditors and Third Country Auditors (Amendment) Regulations 2022.* The Statutory Auditors and Third Country Auditors (Amendment) Regulations 2022 were made on 4 July 2022 and come into force on 27 July 2022. An explanatory memorandum has also been published. These regulations make amendments to the UK's audit regime by amending the Statutory Auditors and Third Country Auditors (Amendment) (EU Exit) Regulations 2019, including to make indefinite the approval of the United States of America as a fully equivalent third country, and the approval of its audit regulatory authorities as "approved third country competent authorities" on account of the full adequacy of their arrangements for the transfer of audit working papers and investigation reports.

## 5.7 **Takeovers**

- (a) *New Practice Statement No. 33 and Panel Bulletin 4.* On 13 June 2022, the Takeover Panel published Panel Statement 2022/12 which announced the publication of: (i) the revised Takeover Code reflecting amendments made by Instrument 2022/1 (Limitation on length of service of Panel members), Instrument 2022/2 (Miscellaneous Code amendments), Instrument 2022/3 (Document charges) and Instrument 2022/4 (Removal of restriction on anonymous order book dealings) and consequential amendments made to Practice Statements Nos 19, 20, 24, 28 and 29 (see published blackline showing the amendments made to the Practice Statements); (ii) a new Practice Statement No. 33 (Purchases of shares in the offeree company by an offeror during an offer period); and (iii) Panel Bulletin 4 (Calculation of the value of an offer).

## 5.8 **Miscellaneous**

- (a) *MoU between BEIS and the CMA on the operation of the NSI Act.* On 16 June 2022, BEIS published a memorandum of understanding between BEIS and the Competition and Markets Authority on the operation of the NSI Act that sets out the legal framework and broad principles for collaboration on the timing of investigations, interim measures, remedies and the sharing of relevant information.
- (b) *European Scrutiny Committee's post-Brexit regulatory divergence inquiry.* On 14 June 2022, the House of Commons European Scrutiny Committee announced the launch of an inquiry into regulating after Brexit which will look at the opportunities for, and the challenges of, policy and law-making after the UK's withdrawal from the EU. The call for evidence closes on 22 July 2022. Priority areas for deregulation include data and financial services.

## 5.9 Cases

- (a) *Ivy Technology Ltd v Martin [2022] EWHC 1218 (Comm)*. The High Court held that the beneficial owner of 50% of the shares purchased pursuant to an SPA was not liable for any claims for breach of warranty under the SPA, on the basis that he was not a party to the SPA and the contracting seller did not conclude the SPA as agent for him. Henshaw J observed that had the SPA simply failed to mention the beneficial owner, it would have been possible to conclude that he was nonetheless a disclosed and identified principal whose rights and obligations were not excluded by the terms of the contract. However, the recitals to the SPA set out as an agreed basis of contracting that the contracting seller was selling as 100% beneficial owner of the sale shares and that no other person had any rights in or to them, which was further reinforced by a customary provision in the SPA excluding third party rights and obligations. The High Court found that the admissible factual matrix indicated that the parties to the SPA knew that the statements in the recitals did not reflect the actual position and that this was an example of parties agreeing to contract on a particular basis whether it be true or not.

The High Court also held that, in its claim for breach of restrictive covenant, the purchaser had not discharged the burden of showing that the relevant non-compete covenant was reasonable. Henshaw J observed that certain objections made by the sellers to the non-compete covenant did raise serious concerns, namely: (i) the absence of any limitation on the seniority of employees or consultants to which the prohibition on solicitation or hiring applied; (ii) the application of the prohibition to any employee or consultant of the target companies or the purchaser at any date during the currency of the covenant (so that such individual could have been recruited after the date of the SPA); and (iii) that the two-year period of the restraint ran from the end of a third earn-out period (i.e., five years from completion). The High Court found that each of these aspects of the covenant was a serious imposition that would require specific justification, and that whilst it was possible that the covenant could have been saved by radical blue-pencilling (subject to potential issues about whether such changes would involve a major change to the effect of the covenant), it was not the function of the courts to seek to rescue a covenant (or parts of it) in ways which have not been put forward by the party relying on the clause, the purchaser having failed to address any of these issues either in evidence or in terms of potential narrowing of the covenant pursuant to the blue-pencil principle (or the contractual equivalent incorporated into the covenant itself).

- (b) *Autonomy Systems Limited & Ors v (1) Michael Richard Lynch (2) Sushovan Tareque Hussain [2022] EWHC 1178 (Ch)* (the judgment is in three parts: Part A contents; Part B contents; and schedule of impugned VAR transactions). This decision of the High Court is in respect of the first claim to be considered at full trial brought under section 90A and Schedule 10A of the Financial Services and Markets Act 2000. Section 90A/Schedule 10A impose liability on an issuer of securities in respect of statements or omissions in certain published information relating to the securities on which the investor relied in making its investment decision. The section 90A/Schedule 10A claim arose following the acquisition of Autonomy by Hewlett Packard (**HP**). HP alleged that Autonomy was liable



in respect of statements or omissions in Autonomy's published information on which the investor (a bidco incorporated by HP to acquire Autonomy) had relied when making its investment decision. An interesting feature of this case is that the Court allowed an unusual "dog-leg" structure to HP's FSMA claim, which allowed HP to claim against two directors of Autonomy rather than against Autonomy itself. This meant that HP had to satisfy two limbs in respect of each alleged wrongdoing: (i) that Autonomy was liable (as issuer) to bidco; and (ii) that the defendants were liable to Autonomy as PDMRs. The Court also permitted reliance by HP on information that Autonomy had provided to bidco.

Other interesting points from the lengthy judgment include: (1) *Reliance*: In respect of the nature of the reliance required to establish a successful section 90A/Schedule 10A claim, Hildyard J, at paragraph 445, notes that the courts "should not interpret and apply the section [*meaning section 90A/Schedule 10A*] in a way which exposes public companies and their shareholders to unreasonably wide liability". This suggests the courts may apply a narrow interpretation of this statutory framework. In the specific situation, HP had conducted the pre-acquisition due diligence and was the controlling mind of bidco, therefore "HP's reliance was bidco's reliance" (see paragraph 500). (2) *Misrepresentation and deceit*: The representations relied upon included confirmations of the accuracy of statements in Autonomy's "published information" (the financial statements) made during the negotiation of the acquisition of Autonomy.

The judgment is limited to the issue of liability and a separate judgment on the quantum of damages will follow. Dr Lynch intends to seek permission to appeal.

- (c) (1) *Gama Aviation (UK) Limited* (2) *International Jet Club Limited v MWWMMWM Limited* [2022] EWHC 1191 (Comm) and its addendum (case transcript and addendum on Westlaw). The High Court held that a clause giving either party a unilateral termination right on three months' notice did not prevent an implied novation of the contract i.e., the clause did not impact mutual termination. The High Court also concluded that, based on the facts and applying Lord Sumption's estoppel reasoning in the Supreme Court decision of *Rock Advertising*, the defendant was estopped by its conduct from denying that the novation was effective. The case also contains a brief summary of the law on the principles of the unreasonable withholding of consent.

## 6. Any other business

Kevin Hart reported that the work of the specialist committees of the CLLS were highly commended at the recent AGM of the CLLS and the City of London Solicitors' Company.

7 September 2022