

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 318th meeting
at 9:00 a.m. on 30th November 2022

1. **Welcome and apologies**

In attendance: Danette Antao (alternate for Tom Brassington); Mark Austin; Sam Bagot; Edward Baker; Adam Bogdanor; Robert Boyle; Lucy Fergusson; Kevin Hart; Sharon Jenman (alternate for John Adebisi); Vanessa Knapp; Stephen Mathews; Juliet McKean (Secretary); John Papanicola; Jon Perry; David Pudge (Chair); Caroline Rae; Lucy Reeve (Chair of the Law Society Company Law Committee (LSCLC)); Matthew Rous; Richard Spedding; Patrick Speller; Liz Wall; Martin Webster; Peter Wilson (alternate for Allan Taylor); and Victoria Younghusband.

Apologies: John Adebisi; Tom Brassington; Nicholas Holmes; Chris Horton; and Allan Taylor.

The Chair informed the Committee that Martin Webster would be retiring as a member of the Committee at the end of the meeting. The Chair thanked Martin for his fantastic contribution to the Committee over the course of many years. The Chair also informed the Committee that he would initiate a recruitment process with a view to recruiting one or possibly two new members.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 6 October 2022 was circulated to members on 22 November 2022. The Chair asked members to send any comments on the minutes to the Secretary by 9 December, otherwise the minutes would be considered settled.

3. **Matters arising**

3.1 *LSCLC / CLLS note on the execution of a document using an electronic signature.* The Chair noted that on 26 October 2022 the updated version of the LSCLC / CLLS note on the execution of a document using an electronic signature, prepared by the CLLS Financial Law Committee to reflect developments since the publication of the note in July 2016, was published on the CLLS website.

3.2 *Retained EU Law (Revocation and Reform) Bill.* The Chair reported that on 26 October 2022 the House of Commons Public Bill Committee issued a call for written evidence on the Retained EU Law (Revocation and Reform) Bill. The Chair noted that this Bill was discussed at the meeting of the Committee held on 6 October 2022 and that a small working group of members of the Committee had concluded that the Committee would not submit written evidence on the Bill.

- 3.3 *NSI Act – ECM issues.* The Chair reported that the briefing paper prepared on behalf of AFME on issues arising under the NSI Act in relation to ECM, which was discussed at the meeting of the Committee held on 6 October 2022, was endorsed by the LSCLC and submitted to BEIS on 2 November 2022.
- 3.4 *Economic Crime and Corporate Transparency Bill.* The Chair reported that on 7 October 2022 a joint working group of the Committee and the LSCLC submitted comments to BEIS on the Economic Crime and Corporate Transparency Bill. The Chair also reported that a call for written evidence on this Bill was issued on 17 October 2022.
- 3.5 *Digital assets consultation responses.* The Chair reported that on 31 October 2022 a joint working group of the Committee, the CLLS Financial Law Committee and the CLLS Regulatory Law Committee submitted a response to the UK Jurisdiction Taskforce (**UKJT**) consultation on questions that its proposed Legal Statement on Digital Securities can most usefully answer and that the Committee also submitted an additional short response to the UKJT consultation. The Chair also reported that on 4 November 2022 the CLLS Financial Law Committee submitted a response to the Law Commission's consultation paper on digital assets and that the Committee submitted a short response endorsing the concerns in the CLLS Financial Law Committee's response regarding the potential problems that could arise from linking shares in UK companies to crypto assets.

4. **Discussions**

- 4.1 *Revised PEG Statement of Principles.* The Chair reported that on 4 November 2022 the Pre-Emption Group (**PEG**) announced that the revised pre-emption regime described in the Secondary Capital Raising Review (**SCRR**) is now in effect i.e., allowing premium listed companies the flexibility to raise up to 20% of their issued share capital, in placings for cash, on a non pre-emptive basis (up from the previous 10%), with the size criteria increased so as to allow for a 10% pre-emption disapplication for general corporate purposes and a 10% pre-emption disapplication with respect to an acquisition or a specified capital investment, plus a 2% additional follow-on offer, with respect to each disapplication resolution (so an additional 4% follow-on offer, in total). The Chair noted that follow-on offers are subject to a number of specific conditions set out in the PEG Statement of Principles, including that only shareholders who did not participate in the non pre-emptive placing made pursuant to the relevant disapplication resolution are eligible to participate in a follow-on offering. The Chair also reported that PEG has published a revised Statement of Principles and template resolutions. The Chair noted that this restores permanently the ability, that had been introduced as a temporary measure during the COVID-19 pandemic (then withdrawn), to undertake larger non pre-emptive cash placings and that premium listed companies are expected to obtain authorities under the new PEG Statement at their next AGM. However, the Chair noted that this is subject to reform of the prospectus regime, which currently restricts the size of the placing and any follow-on offer that may be undertaken without the publication of a prospectus. It was further noted that for urgent exceptional circumstances before a company's next AGM, PEG recommends that issuers follow the transition arrangements in the SCRR (on page 56).
- 4.2 *Takeover Panel consultations.* The Chair reported that on 19 October 2022 the UK Takeover Panel published Panel Statement 2022/19 announcing the publication of two

public consultation papers - one on improving the offer timetable in a competitive situation (PCP 2022/3) and the other on miscellaneous amendments to the Takeover Code (PCP 2022/4). The Chair noted that both consultations close on 13 January 2023 and that the Panel expects to publish response statements in Spring 2023 with the changes coming into effect approximately one month later. The Chair also reported that the Joint CLLS/Law Society Takeovers Working Group is preparing a response to each of these consultations.

- 4.3 *FRC consultation on audit committees standard.* The Chair reported that on 8 November 2022 the FRC announced the publication of a consultation on its draft proposal for a minimum standard for audit committees, which follows the Government's response to its consultation on Restoring Trust in Audit and Corporate Governance. The Chair noted that the Government's response sets out its intention to give ARGA statutory powers to mandate minimum standards for audit committees in their role on the external audit. It was noted that the purpose of the standard will be to increase performance across audit committees in the FTSE 350, ensuring a consistent approach and supporting a well-functioning audit market. The Chair also noted that the consultation closes on 8 February 2023 and Patrick Speller is leading a working group of the Committee that has been formed to respond to this consultation.
- 4.4 *BTI 2014 LLC v Sequana SA and others [2022] UKSC 25.* The Chair reported that the Supreme Court had held that, in certain circumstances, the section 172(1) directors' duty (to promote the success of the company for the benefit of its members) is modified by the common law rule that the company's interests are taken to include the interests of the company's creditors as a whole (known as the "**creditor duty**"). The Committee noted that it is clear from the decision that the creditor duty is owed to the company itself and is not a duty owed by directors directly to creditors or other stakeholders. The Committee noted that the Supreme Court held that the creditor duty is engaged when the company is insolvent or bordering on insolvency, or where an insolvent liquidation or administration is probable. The Committee also noted that where the company is insolvent, or bordering on insolvency, but is not faced with an inevitable insolvent liquidation or administration, the directors should consider the interests of creditors and balance them against the interests of shareholders where they may conflict, however, the greater the company's financial difficulties, the more the directors should prioritise the interests of creditors. The Committee further noted that where an insolvent liquidation or administration is inevitable, the creditors' interests become paramount as the shareholders cease to retain any valuable interest in the company and would not be able to ratify actions taken by the directors in breach of their common law and/or statutory duties.
- 4.5 *EU Foreign Subsidies Regulation.* The Chair reported that on 10 November 2022 the European Parliament announced that it has adopted the Regulation on foreign subsidies distorting the internal market that is expected to apply from mid-2023 and will enable the European Commission to take measures against market-distorting subsidies from non-EU countries by giving the European Commission the power to intervene in takeovers of EU companies or public procurement bids where the buyer or bidder (as applicable) is supported by subsidies from non-EU countries. The Chair noted that where the Commission concludes that subsidies are distortive, it can apply measures to address this to prevent companies benefitting, for example, from zero-interest loans, below-cost financing, preferential tax treatment or direct state grants outbidding EU

competitors in M&A or public procurement procedures. The Chair noted that under the new rules, companies will need to let the Commission know about planned mergers and acquisitions if: (i) the target is established in the EU and generates an aggregate EU-wide turnover of at least EUR 500 million (for joint venture transactions, the JV must meet this threshold and for legal mergers it can be either of the merging parties); and (ii) the parties to the transaction received from third countries combined aggregate "financial contributions" of more than EUR 50 million in the preceding three financial years. The Chair also noted that the Commission will be able to investigate tenders in public procurements if the value of a procurement is at least EUR 250 million and the undertakings participating in the tender have been granted aggregate "financial contributions" of at least EUR 4 million per third country in the preceding three financial years.

- 4.6 *Tech related developments (digital assets / DAOs)*. The Chair reported that on 16 November 2022 the Law Commission announced the publication of a call for evidence about how decentralised autonomous organisations (**DAOs**) can be characterised and how the law of England and Wales might accommodate them now and in the future. The Committee discussed how these tech-related consultations that have a cross over with areas in the Committee's remit should be dealt with going forward.

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 5.2(g) and noting that the cases set out in item 5.9, although fact specific, contain helpful conclusions.

5.1 **Company law**

- (a) No items to consider.

5.2 **Corporate governance**

- (a) *FRC Review of Stewardship Reporting 2022*. On 24 November 2022, the FRC announced the publication of its 'Review of Stewardship Reporting 2022'. The FRC's review has found improvements across multiple areas of stewardship reporting compared to 2021. The review sets out key messages from the stewardship reports assessed in Spring 2022 and expectations for reporting in 2023.
- (b) *Glass Lewis 2023 proxy voting policy guidelines*. On 17 November 2022, Glass Lewis announced the publication of its 2023 proxy voting policy guidelines for the United States, Canada, Continental Europe and the United Kingdom. The press release states that the 2023 market guideline updates reflect the trending topics at the top of mind for investors and issuers, including cyber risk, oversight of climate and other E&S risks and board diversity and composition. In addition, Glass Lewis has released its 2023 ESG Initiatives Policy Guidelines.
- (c) *EU Corporate Sustainability Reporting Directive*. On 10 November 2022, the European Parliament announced that it has adopted, with amendments, the Commission's proposal for a Corporate Sustainability Reporting Directive. The

Council is expected to adopt the proposal on 28 November, after which it will be signed and published in the EU Official Journal. The Directive will enter into force 20 days after publication.

- (d) *IA 2023 Principles of Remuneration.* On 10 November 2022, the Investment Association announced the publication of its Principles of Remuneration for 2023 and letter to the Chairs of the Remuneration Committees of FTSE 350 companies. The press release states that investment managers are calling for the remuneration of senior leaders of FTSE companies to be kept in check during the ongoing cost-of-living crisis.
- (e) *ISS 2023 benchmark policy consultation.* On 4 November 2022, Institutional Shareholder Services Inc. announced the launch of its open comment period on proposed changes to its benchmark voting policies for 2023. The comment period closed on 16 November 2022.
- (f) *FRC Annual Review of Corporate Governance Reporting.* On 3 November 2022, the FRC announced the publication of its Annual Review of Corporate Governance Reporting which found an improvement in the quality of reporting against the UK Corporate Governance Code. The press release states that the FRC has seen year-on-year improvements in reporting, and importantly more companies are disclosing the areas within the UK Corporate Governance Code that they have chosen to explain rather than comply. However, the press release states that the review also found that too few companies are providing meaningful explanations.
- (g) *EU law to improve gender balance on company boards.* On 17 October 2022, the Council of the European Union announced that it has adopted the final text of a directive on improving the gender balance among directors of listed companies and related measures. The European Parliament resolved to adopt the directive on 22 November 2022. The directive lays down that at least 40% of non-executive director positions in listed companies should be held by members of the underrepresented sex by 2026. Although if member states choose to apply the new rules to both executive and non-executive directors, the target would be 33% of all director positions by 2026. The core of the directive stipulates that listed companies which do not achieve the objectives will need to adjust their selection process. The application of the new directive will be triggered by admission to trading of shares (debt securities alone will be insufficient) on an EU regulated market – "listed company" is defined as "a company which has its registered office in a Member State and whose shares are admitted to trading on a regulated market within the meaning of Article 4(1) ... of Directive 2014/65/EU, in one or more Member States". Member states have two years following the entry into force of the directive to adopt the required national measures.
- (h) *FRC report on board diversity.* On 4 October 2022, the FRC announced the publication of a report entitled 'Navigating barriers to senior leadership for people from minority ethnic groups in FTSE 100 and FTSE 250 companies'. The report shows that, while there are still significant challenges to be addressed, the need for change has been taken seriously across the spectrum,

including senior managers, executive leaders, board chairs and executive search consultants.

- (i) *ICGN viewpoint on board effectiveness in relation to sustainability factors.* On 30 September 2022, the International Corporate Governance Network (**ICGN**) published a viewpoint that considers the investor view of the board's role in the creation and oversight of the company's sustainability journey in meeting rising global investor expectations.

5.3 Reporting and disclosure

- (a) *IOSCO Statement on Financial Reporting and Disclosure during Economic Uncertainty.* On 14 November 2022, the International Organization of Securities Commissions (**IOSCO**) announced the publication of a Statement on Financial Reporting and Disclosure during Economic Uncertainty. The IOSCO is encouraging issuers, external auditors and audit committees to be particularly vigilant in times of economic uncertainty in their consideration of how risks and uncertainties that could affect or have affected an issuer's operations, financial condition, cash flows and prospects can be transparently communicated to investors.
- (b) *FRC Annual Review of Corporate Reporting.* On 27 October 2022, the FRC announced the publication of its Annual Review of Corporate Reporting (along with its Corporate Reporting Highlights and Key matters for 2022/23 reports and accounts).
- (c) *TCFD 2022 Status Report.* On 13 October 2022, the Task Force on Climate-related Financial Disclosures (**TCFD**) announced the publication of its 2022 Status Report.
- (d) *FRC Lab report on disclosing net zero commitments.* On 11 October 2022, the FRC announced the publication of a report on disclosing net zero commitments. The report is designed to be of use to reporting teams as they prepare disclosures on net zero and other GHG emission reduction commitments. It is supported by a separate detailed example bank which provides a number of practical examples of current good practice to help companies improve their disclosures. A summary of the findings has also been published.
- (e) *FRC review of the accounting and reporting for business combinations.* On 29 September 2022, the FRC announced the publication of its thematic review of the accounting and reporting for business combinations. The review looks at annual reports of a number of companies which have recently completed a business combination and draws out some of the features of better reporting and disclosures, whilst also highlighting areas for improvement.

5.4 Equity capital markets

- (a) *FCA notice of decision to cancel UHS's shares.* On 28 October 2022, the FCA announced that on 4 July 2022 it had issued Umuthi Healthcare Solutions PLC (**UHS**) with a First Supervisory Notice confirming its decision to unilaterally discontinue the listing of UHS's standard shares from the Official List with

immediate effect. UHS has referred the decision to the Upper Tribunal. On 18 October 2022, the Upper Tribunal handed down judgment in two interim applications, first, allowing UHS to make its reference to the Upper Tribunal outside the standard 28-day time limit and, second, refusing to suspend the FCA's decision to cancel UHS's listing.

- (b) *FCA Decision Notices against Barclays.* On 21 October 2022, the FCA announced that it has decided to fine Barclays a total of £50 million in relation to its failure to disclose certain arrangements agreed with Qatari entities as part of its capital raisings announced in 2008. The FCA has published a Decision Notice to Barclays plc and a Decision Notice to Barclays Bank plc. Barclays has referred the Decision Notices to the Upper Tribunal, therefore, any findings in the Decision Notices are provisional.
- (c) *Updated ESMA Q&As on the EU Prospectus Regulation.* On 12 October 2022, ESMA published an updated version of its Q&As on the Prospectus Regulation to include new Q&A 15.9 concerning the prospectus exemption in connection with a takeover by means of an exchange offer. The Q&A confirms that the reference to 'approval' in Article 1(6a), point (b), of Regulation (EU) 2017/1129 means the approval process applied by the relevant supervisory authorities designated in accordance with Directive 2004/25/EC and that have the competence, where applicable, to review the offer document under that directive.
- (d) *ESMA call for evidence on implementation of SRD2.* On 11 October 2022, ESMA announced the publication of a call for evidence on the implementation of the revised Shareholders Rights Directive (**SRD2**). The call for evidence seeks to collect information from market participants and map the state of play with regards to the implementation of the SRD2 provisions on the identification of shareholders, transmission of information, facilitation of the exercise of shareholder rights and transparency of proxy advisors. The call for evidence closes on 28 November 2022. ESMA will consider the feedback received when preparing its input for the SRD2 review that will be delivered to the European Commission by July 2023.
- (e) *Revised LSE Admission and Disclosure Standards.* On 10 October 2022, the London Stock Exchange published Market Notice N19/22 which contains feedback on its consultation on amendments to the Admission and Disclosure Standards, along with a revised version of the standards and a marked up version highlighting the changes made. The revised standards took effect immediately, other than the changes to the early notification period (as set out in Rule 2.16 of Section 2) which took effect 30 days from the date of the Market Notice.

5.5 MAR

- (a) *FCA fines brokerage firm for market abuse reporting failures.* On 6 October 2022, the FCA announced that it had fined a brokerage firm, Sigma Broking Ltd (**Sigma**), £531,600 (which included a 10% discount) for failing to make reports crucial in fighting potential market abuse and three directors over £200,000 in total, two of whom have also been prohibited from holding

significant management functions in firms regulated by the FCA. The FCA has issued Final Notices to Sigma and the three individuals.

5.6 Auditing and accounting

- (a) See FRC consultation at minute 4.3.
- (b) *The FRC and the Regulators' Code*. On 23 November 2022, the FRC published a report on the FRC's approach to regulation that explains how the FRC complies with the Regulators' Code (which sets out a clear and principles-based framework for how regulators should engage with those they regulate). This report provides an explanation of the FRC's regulatory role and approach and funding and also considers the impact of its planned transition to ARGA.
- (c) *FRC principles for public interest test*. On 14 November 2022, the FRC announced the publication of a set of principles that it will use to assess whether the public interest is best served by carrying out regulatory, supervisory and enforcement work that is outside of its primary regulatory perimeter as it transitions to ARGA. The Government has committed to expanding the definition of a public interest entity to also include companies with over 750 employees and a turnover of over £750m. Much of the scope of ARGA's work is expected to be determined by this new definition, however, the Government also recognised there will be exceptional circumstances where ARGA should take regulatory action in areas of public interest that are not within this regulatory focus.

5.7 Takeovers

- (a) See Takeover Panel consultations at minute 4.2.
- (b) *Takeover Panel Ruling*. On 16 November 2022, the Panel's Hearings Committee imposed a time limit of approximately four and a half months, from the date of its Ruling (set out in Panel Statement 2022/20), within which the 43% shareholder of an unlisted public company should announce, and then make, a Rule 9 bid (by 17:00 GMT on 31 March 2023). The Panel wanted a long-stop date to be placed on the commitment to announce a Rule 9 bid, rejecting the suggestion that an undertaking to do so could be open-ended. The shareholder has been given seven months to publish his offer document (by 15 June 2023) and two weeks to update shareholders of the position via the company's website, each deadline calculated from the date of the Ruling.

5.8 Miscellaneous

- (a) *TPT consultation on disclosure framework and implementation guidance*. On 8 November 2022, the UK Transition Plan Taskforce (TPT) announced the publication of its proposed disclosure framework for private sector climate transition plans and accompanying implementation guidance, which are open for public consultation until 28 February 2023. The TPT will use the consultation to finalise the disclosure framework and implementation guidance. The FCA plans to draw on the TPT's final outputs to strengthen its transition plan disclosure expectations of listed companies, asset managers and regulated

asset owners. A one page summary of recommendations has also been published.

- (b) *ROE further commencement regulations.* The Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No. 4) Regulations 2022 were made on 12 October 2022 and bring into force the remaining provisions of Part 1 of the Economic Crime (Transparency and Enforcement) Act 2022 relating to the registration of overseas entities.
- (c) *Government to categorise more businesses as small businesses.* On 2 October 2022, the Government announced plans to widen the exemptions for small businesses from certain regulations and reporting requirements to capture businesses with fewer than 500 employees. The Government's starting assumption when developing policy has been that businesses with less than 50 employees should be exempt from certain regulations, but this threshold has been amended to businesses with less than 500 employees and applies from 3 October 2022 to all new regulations under development as well as those under current and future review, including retained EU laws. The Government also plans to consult in the future on potentially extending the threshold to businesses with 1,000 employees, once the impact of the current extension is known.

5.9 Cases

- (a) *Re Compound Photonics Group Limited [2022] EWCA Civ 1371.* In the context of minority shareholder petitioners claiming unfair prejudice under section 994 of the Companies Act 2006 in relation to the majority shareholders 'removing' two directors (**Directors**) who the petitioners alleged were entrenched in office as directors, the Court of Appeal clarified the interpretation of a clause in a shareholders' agreement (**SHA**) pursuant to which the shareholders undertook to each other and the company that they would act in good faith to each other in relation to matters contained in the SHA (**good faith clause**). The High Court judge held that the good faith clause entailed that the Directors, originally appointed by the petitioners, could not be removed, despite the absence of any express term of the SHA to that effect. The Court of Appeal, overturning the High Court decision, held that the conduct of the majority shareholders was not unfairly prejudicial to the minority shareholders and determined that the High Court judge had interpreted the good faith clause too widely. It held that the good faith clause required the parties to act honestly towards each other and the company but that it is not appropriate to import all the minimum standards of good faith identified in *Unwin v Bond [2020] EWHC 1768 (Comm)* in a formulaic way to every contractual duty to act in good faith – any further requirements of an express duty of good faith must be capable of being derived as a matter of interpretation or implication from the other terms of the contract in issue in the particular case.
- (b) *MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406.* The Court of Appeal overturned the High Court's decision (discussed at the May 2022 Committee meeting) that a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause. The Court of Appeal found that the issue did not concern reasonable endeavours or force majeure clauses in general; rather

each such clause must be considered on its own terms. In this case, the force majeure clause provided that a force majeure event was (amongst other things) one that could not be "overcome" by reasonable endeavours by the affected party. The Court of Appeal held that, on the facts, the counterparty's proposed non-contractual performance would have overcome the event (that is, completely avoided its adverse consequences) without any exertion or detriment on the part of the affected party; the word "overcome" did not necessarily mean that the contract had to be performed in strict accordance with its terms.

6. **Any other business**

The Committee noted that the next FCA / CLLS CLC Liaison Committee meeting would be held in early 2023.

12 January 2023