

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 317th meeting
at 9:00 a.m. on 6th October 2022

1. **Welcome and apologies**

In attendance: John Adebisi; Mark Austin; Sam Bagot; Edward Baker; Adam Bogdanor; Tom Brassington; Lucy Fergusson; Nicholas Holmes; James Inness (alternate for Chris Horton); Vanessa Knapp; Juliet McKean (Secretary); John Papanichola; Jon Perry; David Pudge (Chair); Caroline Rae; Lucy Reeve (Chair of the Law Society Company Law Committee (**LSCLC**)); Richard Spedding; Patrick Speller; Liz Wall; Martin Webster; Peter Wilson (alternate for Allan Taylor); and Victoria Younghusband.

Apologies: Robert Boyle; Kevin Hart; Chris Horton; Stephen Mathews; Matthew Rous; and Allan Taylor.

The Chair welcomed Lucy Reeve to the meeting in her capacity as the new chair of the LSCLC.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 19 July 2022 was circulated to members on 7 September 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 on 1 August 2022 Companies House announced that the new Register of Overseas Entities (**ROE**) had gone live. The Chair also reported that The Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No. 3) Regulations 2022 were made on 27 July 2022, which brought into force on 1 August 2022 most of the provisions of Part 1 of the Economic Crime (Transparency and Enforcement) Act 2022 relating to the registration of overseas entities, and the Register of Overseas Entities (Delivery, Protection and Trust Services) Regulations 2022 were made on 25 July 2022, which came into force on 1 August 2022.

The Chair further noted that the following guidance has been published: (i) Companies House guidance on the ROE and on agent assurance codes for registering an overseas entity (published on 25 July 2022); (ii) BEIS technical guidance for registration and verification in respect of the ROE (published on 1 August 2022); and (iii) Law Society guidance for solicitors concerning verification in respect of the ROE (published on 29 July 2022), which sets out areas to be considered by solicitors when undertaking verification responsibilities in respect of the ROE, including highlighting the risks that should be considered. Lastly, the Chair reported that on 25 August 2022 the CLLS and

the Law Society sent a joint letter to Lord Callanan regarding the issues for solicitors surrounding ROE verification and that BEIS has responded to this letter.

- 3.2 *FRC Good Practice Guidance for Company Meetings.* The Chair reported that on 21 July 2022 the FRC published its 'Good Practice Guidance for Company Meetings', which has been developed by an FRC-led industry working group, and that the Committee is named as a contributor to, but not an author of, the guidance.
- 3.3 *NSI Act guidance.* The Chair noted that on 19 July 2022 BEIS published NSI Market Guidance Notes July 2022 that complement guidance already published on the NSI Act by answering questions and providing advice based on the first six months of the NSI Act's operation. The Chair also noted that the guidance notes state that the topics covered are based on analysis of the notifications received under the NSI Act and feedback from stakeholders on their experience of the system and have a particular focus on whether commonly raised scenarios require mandatory notification. The Chair further noted that BEIS has also published: (i) updated guidance on the details of the 17 types of notifiable acquisitions under the NSI Act; (ii) guidance on the applicability of the NSI Act to new build downstream gas and electricity assets to help developers of new build downstream gas and electricity infrastructure to understand the scope of the NSI Act; and (iii) a Notice of Final Orders made under the NSI Act.
- 3.4 *Consultation on amendments to the Takeover Code in relation to the presumptions of the definition of "acting in concert" and related matters.* The Chair reported that on 22 September 2022 the Joint CLLS/Law Society Takeovers Working Group submitted its response to the Takeover Panel consultation on amendments to the Takeover Code in relation to presumptions of the definition of "acting in concert" and related matters (PCP 2022/2).
- 3.5 *FCA discussion paper on further reform of the listing regime.* The Chair reported that on 27 July 2022 the Joint Prospectus and Listing Rules Working Group submitted its response to the FCA Discussion Paper 22/2: Primary Markets Effectiveness Review (DP 22/2).

4. **Discussions**

- 4.1 *Economic Crime and Corporate Transparency Bill.* The Chair reported that the Economic Crime and Corporate Transparency Bill was introduced to Parliament on 22 September 2022 that includes (amongst other things) the Companies House reforms and reforms to prevent abuse of limited partnerships. The Chair noted that explanatory notes to the Bill and a series of factsheets which contain helpful information on the measures within the Bill have been published. The Chair also reported that a joint working group of the Committee and the LSCLC had been formed in order to submit comments on the Bill.
- 4.2 *Digital assets consultation papers.* The Chair reported that on 28 July 2022 the Law Commission published a consultation paper on digital assets that contains new proposals to reform the law relating to digital assets (including crypto-tokens and cryptoassets) to ensure that the law recognises and protects digital assets. The Chair noted that this consultation follows the Government's previous request that the Law Commission reviews the law on digital assets to ensure that the law can accommodate them as they continue to evolve and expand, and closes on 4 November 2022. The

Chair also reported that the UK Jurisdiction Taskforce (**UKJT**) has announced that it intends to publish a Legal Statement on Digital Securities and, to that end, has published a consultation to ensure that experts and members of the public can provide their input into the questions that the proposed legal statement can most usefully answer. The Chair noted that this consultation was due to close on 23 September 2022, but the closing date was extended to 31 October 2022. The Chair also noted that the CLLS (Financial Law, Company Law, Regulatory Law and Insolvency Law Committees) is preparing a joint response to both of these consultations and the Committee is also preparing an additional side letter to the UKJT consultation by way of response.

- 4.3 *UK Secondary Capital Raising Review.* The Chair reported that on 19 July 2022 HM Treasury published the outcome of the UK Secondary Capital Raising Review. The Committee noted that the report contains a series of recommendations to the Government, the FCA and the Pre-Emption Group (**PEG**), including: (i) protecting the rights of existing shareholders by maintaining and enhancing the UK pre-emption regime; (ii) reducing regulatory involvement in fundraisings, including by raising the threshold at which a prospectus should be required for a further issuance, removing the requirement for a sponsor to be appointed by an issuer and reconsidering the FCA’s approach to working capital statements; (iii) making existing fundraising structures quicker and cheaper by making changes to the Companies Act 2006 (**CA 2006**); (iv) increasing the range of choice of fundraising structures for companies, including by replicating the key principles and structure of Australian offer processes for smaller fundraisings; and (v) establishing the Digitisation Taskforce to drive forward the modernisation of the UK’s shareholding framework – noting that Sir Douglas Flint has been appointed to chair the new Taskforce to consider the digitisation of shareholdings and terms of reference were published on 20 July 2022. It was also noted that the FCA and PEG have both published statements welcoming the report.
- 4.4 *Financial Services and Markets Bill.* The Chair reported that the Government is legislating for the Financial Services Future Regulatory Framework (**FRF**) Review reforms (see item 5.8(c)) through the Financial Services and Markets Bill, which was introduced to Parliament on 20 July 2022 and that, once enacted, the Bill will revoke the UK Market Abuse Regulation and the UK Prospectus Regulation. The Chair also reported that on 8 September 2022 the UK Parliament published a call for evidence inviting written submissions on the Bill to the House of Commons Public Bill Committee, which is scheduled to report on the Bill by 25 October 2022.
- 4.5 *FCA fines former chairman for disclosing inside information.* The Chair reported that on 5 August 2022 the FCA announced that it has fined Sir Christopher Gent, the former non-executive Chairman of ConvaTec Group Plc, £80,000 for unlawfully disclosing inside information in breach of Article 14(c) of EU MAR.
- 4.6 *Prospectus requirements on a scheme with a mix and match facility.* The Committee noted that in contrast to the generally held market view that a prospectus is not required even where a statutory scheme includes a mix and match facility, in August 2020, the FCA published draft guidance set out in Primary Market/TN/606.1 that states that the FCA considers that such a scheme involves an element of investor choice and, therefore, requires the publication of a prospectus (absent an exemption). The Committee also noted that in Primary Market Bulletin No 33 (published in March 2021) the FCA stated that it continues to consider responses to draft Primary Market/TN/606.1, noting that respondents felt that a prospectus is not required even

where a scheme includes a mix and match facility. The Committee further noted that: (i) there was a mix and match facility on a scheme without a prospectus in May 2022 in respect of GXO Logistics' offer for Clipper Logistics; (ii) a prospectus was published by the special purpose acquisition company AdvancedAdvT on its offer for M&C Saatchi which included a mix and match facility; and (iii) a prospectus will be published with respect to the mix and match element of the consideration for Vistry Group PLC's offer for Countrywide Partnership PLC announced in September 2022.

- 4.7 *Sanctions.* The Chair led discussions on issues arising in practice in relation to sanctions since the last Committee meeting.
- 4.8 *NSI Act – ECM issues.* Members of the Committee discussed the revised draft briefing paper prepared on behalf of AFME on issues arising under the NSI Act in relation to ECM, which proposes that BEIS considers an expedited approval process and/or adopting a formal waiver (or in one case, a statutory exemption) to ensure that NSI Act processes do not disrupt the efficient operation of the capital markets.
- 4.9 *NSI Act – practical issues.* Members of the Committee did not raise any new issues arising in practice in relation to the NSI Act since the last Committee meeting.
- 4.10 *New rules on diversity and inclusion on company boards and executive management.* Members of the Committee did not raise any new insights on the new LRs and DTRs on diversity and inclusion on company boards and executive management.

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 items 5.5(a) and 5.5(c) and the cases at 5.9(a) and 5.9(c).

Members of the Committee also discussed the Retained EU Law (Revocation and Reform) Bill at item 5.8(a).

5.1 **Company law**

- (a) *Companies House permanent closures.* On 29 July 2022, Companies House announced the permanent closure of its London office and its public counters in Cardiff, Belfast and Edinburgh.

5.2 **Corporate governance**

- (a) *Consultation on the G20/OECD Principles of Corporate Governance.* On 19 September 2022, the OECD Corporate Governance Committee announced a public consultation on revisions to the G20/OECD Principles of Corporate Governance. The overall objective of the review is to update the Principles in light of recent evolutions in capital markets and corporate governance policies and practices. The consultation closes on 21 October 2022.
- (b) *FRC Lab report on improving ESG data production.* On 30 August 2022, the FRC announced the publication of the FRC Lab's report on ESG data production, which is designed to help companies consider how to collect and

use ESG data more effectively to support better decision-making. A summary of the findings has also been published.

- (c) *PIE Auditor Register.* On 18 August 2022, the FRC announced the publication of the regulations for the new PIE Auditor Register, following the Government's response to the consultation on restoring trust in audit and corporate governance. From 5 December 2022 all audit firms and responsible individuals who undertake statutory audit work for Public Interest Entities (PIEs) will need to be registered by the FRC. Audit firms currently auditing PIEs will need to apply and be approved to be included on the PIE Audit Register to prevent any disruption to their work. There will be a transition period from 5 September to 4 December 2022 for existing audit firms of PIEs to submit transitional applications. Guidance on transitional applications and the feedback statement on the FRC consultation on proposed PIE Auditor Registration Regulations have also been published.

5.3 Reporting and disclosure

- (a) *FRC Lab report on structured digital reporting.* On 23 September 2022, the FRC announced the publication of a report on structured digital reporting that identifies lessons learnt from the first year of mandatory structured digital reporting under the TD ESEF regulation. A summary of the findings has also been published.
- (b) *FRC thematic review of earnings per share.* On 8 September 2022, the FRC announced the publication of its thematic review of earnings per share (IAS 33). The review highlights that some of the main principles of IAS 33 are not always well understood or applied correctly and also identifies more common errors found in EPS calculations. The review further identifies how companies can improve their disclosure of EPS and includes a summary of the main requirements of the standard and examples of calculations.
- (c) *FRC research into the state of auditor reporting in the UK.* On 16 August 2022, the FRC announced the publication of research into the state of auditor reporting in the UK in the form of a series of six infographic 'snapshots' that provide an in-depth look at the length and readability of auditors' reports, as well as how auditors communicate how the audit was performed, the risks they identified, and the responses to those risks. A document containing an introduction to the snapshots, along with a description of how the study was conducted and the sample used, has also been published.
- (d) *FRC Lab report on Digital Security Risk Disclosure.* On 3 August 2022, the FRC announced the publication of a report on digital security risk disclosure to help companies improve the disclosure of digital security strategies, risks and governance. The report is supported by a separate detailed example bank that provides a number of practical examples to help companies improve their disclosures.
- (e) *Review of TCFD-aligned disclosures by premium listed commercial companies.* On 29 July 2022, the FRC announced that the FRC (CRR Thematic review of TCFD disclosures and climate in the financial statements) and the FCA (Review

of TCFD-aligned disclosures by premium listed commercial companies) have published two separate reports which found that premium listed companies have made significant steps forward in the quality of climate-related information provided in their financial reports, but further improvements are needed. The FRC's report contains better practice examples to help companies improve their disclosures.

- (f) *FRC thematic review of judgements and estimates update.* On 26 July 2022, the FRC announced the publication of its thematic review of judgements and estimates update. The review includes examples of good practice to encourage improvement in the general quality of these disclosures, including: quantified assumptions and amounts at risk of material adjustment; detailed explanations of management's judgements and the nature of the uncertainties relating to significant estimates; and discussion of the effects of climate change on estimates.

5.4 **Equity capital markets**

- (a) *LSE Dividend Procedure Timetable 2023.* On 16 August 2022, the LSE published its 2023 Dividend Procedure Timetable.
- (b) *New UK Capital Markets Industry Taskforce.* On 19 July 2022, the London Stock Exchange announced the launch of a new UK Capital Markets Industry Taskforce, which aims to maximise the impact of the current programme of regulatory reforms to UK capital markets following the publication of the recommendations of the UK Secondary Capital Markets Review (see minute 4.3). The Taskforce's objectives will be to stimulate industry engagement to ensure that the UK's capital markets serve both issuers and investors, as well as support the economy and strengthen the UK's role as a global financial centre. The Taskforce is chaired by Julia Hoggett, CEO of London Stock Exchange plc, and comprises CEOs, Chairs and industry leaders representing private and publicly listed companies, asset owners and managers and the advisory services that support their access to capital and investments.

5.5 **MAR**

- (a) *ESMA Q&A on MAR.* On 20 September 2022, ESMA added two new Q&As on disclosure of inside information to its Questions and Answers on MAR; one on financial guidance (see new Q&A 5.11) and one on market analysts' expectations and the identification of inside information (see new Q&A 5.12).
- (b) *FCA fines Citigroup's international broker-dealer for failures relating to the detection of market abuse.* On 19 August 2022, the FCA announced that it has fined Citigroup Global Markets Limited £12,553,800 for failing to properly implement the MAR trade surveillance requirements relating to the detection of market abuse. The FCA found that these failures meant Citigroup Global Markets could not effectively monitor its trading activities for certain types of insider dealing and market manipulation. Citigroup Global Markets agreed to resolve this case and, therefore, qualified for a 30% discount – without this discount, the fine would have been £17,934,030. The Final Notice to Citigroup Global Markets Limited has been published.

- (c) *FCA Decision Notice to Carillion*. On 28 July 2022, the FCA announced the publication of a Decision Notice to Carillion plc (in liquidation) and Decision Notices to three of Carillion's former executive directors. The FCA decided to publish a statement censuring Carillion for contraventions of MAR and the Listing Rules. Specifically, Carillion contravened Article 15 of MAR (prohibition of market manipulation), Listing Rule 1.3.3R (misleading information must not be published), Listing Principle 1 (procedures, systems and controls) and Premium Listing Principle 2 (acting with integrity). Were it not for Carillion's financial circumstances, the FCA would have imposed a financial penalty of £37,910,000. The FCA considers that Carillion recklessly published announcements that were misleading and did not accurately or fully disclose the true financial performance of Carillion and that Carillion's systems, procedures and controls were not sufficiently robust to ensure that contract accounting judgments made in its UK construction business were appropriately made, recorded and reported internally to the Board and the Audit Committee. The FCA also considers that the three former directors acted recklessly and were knowingly concerned in Carillion's contraventions. The three individuals have referred their respective Decision Notices to the Upper Tribunal, therefore, any findings in the individuals' Decision Notices are provisional.
- (d) *Insider lists of EU SME Growth Market issuers*. On 14 July 2022, the Commission Implementing Regulation (EU) 2022/1210 of 13 July 2022 laying down implementing technical standards for the application of Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to the format of insider lists and their updates was published in the Official Journal. The regulation entered into force on the twentieth day following that of its publication in the Official Journal.

5.6 Auditing and accounting

- (a) *FRC latest audit quality review results*. On 20 July 2022, the FRC announced the publication of its annual inspection and supervision results of the largest audit firms (BDO, Deloitte, EY, Grant Thornton, KPMG, Mazars and PwC). The press release states that overall 75% of audits inspected were good or required limited improvement (compared to 71% in 2021 and 67% in 2020) and five of the largest firms had no inspected audits requiring significant improvement.

5.7 Takeovers

- (a) *Panel Bulletin 5*. On 20 July 2022, the Panel Executive released Panel Bulletin 5 (possible offer announcements) on the timing and content of possible offer announcements under Rule 2 of the Takeover Code.

5.8 Miscellaneous

- (a) *Retained EU Law (Revocation and Reform) Bill*. On 22 September 2022, BEIS announced that the Retained EU Law (Revocation and Reform) Bill has been introduced to Parliament. Explanatory notes to the Bill have also been published. The Bill is also referred to as the Brexit Freedoms Bill as it provides for the expiry of retained EU law. The Bill will enable the Government via

Parliament to amend more easily, repeal and replace retained EU Law. The Bill includes a sunset date (being 31 December 2023) by which all remaining retained EU law will either be repealed or assimilated into UK domestic law. The sunset date may be extended for specified pieces of retained EU law until 23 June 2026.

- (b) *Consultation on self-certification of eSignature platform providers*. On 26 July 2022, the Industry Working Group on the Electronic Execution of Documents launched a public consultation on self-certification of eSignature platform providers. The consultation closed on 9 September 2022.
- (c) *Financial Services Future Regulatory Framework Review*. On 20 July 2022, HM Treasury published its response to the second consultation paper launched in November 2021 relating to Phase II of its FRF Review. The FRF Review was established to determine how the financial services regulatory framework should adapt to the UK's new position outside of the EU. In the response, HM Treasury summarises the key themes raised by respondents and sets out the Government's final policy position on the FRF Review reforms. HM Treasury issued a press release on 20 July on the Chancellor's speech at Mansion House where he set out the plans to transform the UK financial services sector post-Brexit by revoking EU retained law governing financial services. See minute 4.4.

5.9 Cases

- (a) *Allianz Global Investors GmbH and others v G4S Limited (formerly known as G4S PLC) [2022] EWHC 1081 (Ch)*. The High Court clarified the meaning of the expression "person discharging managerial responsibility" or PDMR under section 90A and Schedule 10A of the Financial Services and Markets Act 2000 (FSMA). The issue arose in claims brought by former institutional shareholders in G4S PLC for breaches of those provisions in relation to allegedly false and misleading statements made by G4S regarding its billing practices. Statutory issuer liability for statements made in such published information only arises where a PDMR within the issuer knew or was reckless about the offending statement or dishonestly concealed material facts or a PDMR acted dishonestly in delaying the publication. G4S argued successfully that the term "PDMR" should bear the meaning given in the definition of "PDMR" in FSMA (paragraph 8(5)(a) of Schedule 10A) and that, as applied to its specific situation, it meant directors of G4S or any person occupying the position of director by whatever name so called. The High Court agreed, finding that: (i) for the purposes of a section 90A and Schedule 10A claim, the concept of PDMR in respect of those issuers who have directors (as G4S PLC did) means its *de jure*, *de facto* or (arguably) shadow directors, at the relevant times. In reaching this conclusion, the judge reviewed the different definitions of PDMR in UK law. It was also necessary to consider what functions the relevant individuals actually performed rather than solely considering the roles allocated to them in the corporate governance structure. This could only be properly established through a trial.
- (b) *Zavarco plc v Ranjeet Singh Sidhu [2022] EWCA Civ 1040*. The Court of Appeal dismissed an appeal by Mr Sidhu against the High Court decision which

held that he was liable under section 593 CA 2006 to pay Zavarco plc a sum equal to the entire nominal value of the shares allotted to him because the shares had been allotted for non-cash consideration without an independent valuation report in breach of section 593. Mr Sidhu argued that the shares had been allotted pursuant to a share sale arrangement that fell within the share for share exception to the section 593 requirement in section 594 CA 2006. The Court of Appeal held that section 593 did not apply, but that Mr Sidhu was liable under section 584 CA 2006 pursuant to his undertaking in the memorandum as a subscriber to pay cash for the shares that he took on incorporation as shown in the statement of capital and initial shareholdings filed at Companies House (the **Statement**). The Court of Appeal held that, pursuant to the CA 2006, subscribers to the memorandum subscribe for the number and type of shares identified in the Statement and section 584 requires shares taken by a subscriber pursuant to his undertaking in the memorandum to be paid up in cash. It was further held that relief could not be granted under section 606 CA 2006 because in the court's view section 606 does not enable the court to grant relief to a subscriber in respect of his duty to pay cash for shares taken pursuant to his undertaking in the memorandum.

- (c) *Re Active Wear Limited [2022] EWHC 2340 (Ch)*. The High Court departed from the recent obiter comments of Mr Richard Farnhill (sitting as a deputy judge of the same division) in *Re Fore Fitness Investments Holdings Ltd [2022] EWHC 191 (Ch)*, who had expressed his view that amendment is required for the Model Articles to permit a single director to run a company (such amendment to include the deletion of Model Article 11(2), which sets the quorum for board meetings (unless otherwise fixed) at two and provides that it must never be less than two). In this case, which related to a company that had adopted the Model Articles in unamended form since incorporation, the High Court found that it would be wrong to read the unamended Model Articles in such a way that the quorum requirement in Model Article 11(2) has the effect of ruling out the operation of Article 7(2), the judge commenting that it cannot have been the intention that the Model Articles would need to be amended before Model Article 7(2) could operate at all. The judge also commented that Article 7(2) applies only where a company has never had a greater number of directors than one.

6. Any other business

- 6.1 *LSCLC / CLLS note on the execution of a document using an electronic signature*. The Chair noted that a final 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 circulated to members on 5 October 2022.
- 6.2 *BTI 2014 LLC v Sequana SA and others [2022] UKSC 25*. Members of the Committee noted that the *BTI 2014 LLC v Sequana SA* decision was handed down on 5 October 2022. In the judgment the Supreme Court has confirmed that there are certain circumstances in which directors are required to consider the interests of creditors and given guidance on when this "creditor duty" arises and how directors should exercise it.

6.3 *Dates for next year's Committee meetings.* The Secretary agreed to circulate the dates for next year's Committee meetings following the meeting.

22 November 2022