**THE CITY OF LONDON LAW SOCIETY**

**COMPANY LAW COMMITTEE**

**Response to the Institute of Directors’ consultation on a Code of Conduct for Directors (“the Code”)**

This response has been prepared by the Company Law Committee of the City of London Law Society (the "**CLLS**"). The CLLS represents approximately 20,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 21 specialist committees. The CLLS Company Law Committee ("**CLLS CLC**") is made up of senior and specialist corporate lawyers.

**Executive Summary**

The CLLS CLC supports the policy intention behind the Code, as set out in the Consultation Paper, since seeking to improve the standing of companies and their directors in the eyes of the public is generally a laudable aim.

However, it should be noted that many companies have already adopted a voluntary code of conduct to be adopted by both their directors and employees generally, which assists with the aim of ensuring appropriate workplace behaviour. Additionally, any such company-wide code of conduct is likely to have been tailored for that particular company and/or its circumstances, scope of operations or industry sector. Furthermore, there are other existing and widely adopted codes, such as the UK Corporate Governance Code, to which certain companies are subject which are relevant to directors' conduct. Therefore, the proposed Code will not necessarily be appropriate for all companies.

While a code of conduct might help directors in their approach to decision-making, it is not a substitute for directors having a firm understanding of their duties as reflected in the Companies Act 2006. In fact, it should be emphasised that the statutory duties of directors (as set out in chapter 2 of Part 10 of the Companies Act 2006) remain authoritative in any case – compliance with any code of conduct is always subject to, and cannot supersede, these statutory duties. Directors need to appreciate that fulfilling those statutory duties will often involve difficult decisions and challenges in balancing competing interests and doing what is right in light of the director's legal responsibilities, which may not fit with any aspirational preferences (as contemplated by the Code). These comments echo a number of concerns that members of the CLLS CLC had raised during our initial conversation with members of the IoD Commission in advance of the draft Code being published for comment. In our view, the Code in its current form does not sufficiently address these concerns.

Consequently, whilst we acknowledge that the Code is well intentioned, it is not in a form that the CLLS CLC could publicly endorse or recommend to our clients for the reasons expanded on below.

We would encourage the Institute of Directors to reflect on the approach outlined in the Code and in particular, on the nature of the undertakings proposed to be given and the scope of any transparency obligations, with an acknowledgment that any form of aspirational behaviour needs to be subject to any overriding legal duties and responsibilities.

**Overview**

The CLLS CLC notes the intention of the Institute of Directors (“**IoD**”) in preparing the Code is to provide guidance at an individual level for directors to assist them with their decision-making, to help develop trust with the broader community and to signal that directors are prepared to hold themselves to high ethical standards. In this respect, the aim is to provide guidance on how directors can act with integrity, and take personal responsibility for their actions and consequences.

The CLLS CLC notes the framework of the Code and its six key principles as set out in the consultation document published by the IoD (the “**Consultation Paper**”). However, the CLLS CLC thinks it is important to reflect on the underlying legal, practical and logistical implications of the potential adoption and application of the Code in practice.

During our initial conversation with members of the IoD Commission prior to the publication of the Consultation Paper, members of the CLLS CLC expressed their concerns that directors do not always fully appreciate the nature of their legal duties. We consider that reminding directors of those duties and responsibilities (and the need to seek professional advice at an early stage if they are uncertain as to how best to discharge those duties) would be a helpful starting point in ensuring that both individual directors and society more broadly better understand the position. In that initial conversation members of the CLLS CLC also expressed concerns that it would be important that any proposed code of conduct which was directed at directors specifically did not result in confusion (rather than assistance) as regards the responsibilities of directors and/or potentially result in conflicts with the statutory duties of directors (as set out in chapter 2 of Part 10 of the Companies Act 2006 (the “**Act**”)) (the “**Primary Duties**”).

We remain of the view that any code of conduct for directors should set out or at least refer to these Primary Duties, so that directors’ awareness of the Primary Duties is increased and, in turn, this may assist them in giving effect to such duties when considering issues and making decisions. As such we consider the Code would be more effective if it set out the Primary Duties in full, emphasising the importance of seeking professional advice if uncertain as to how such duties can (or should) be discharged and expressly considers how the Code interacts (and assists directors) with such duties. For example, the Code could, in our view, be positioned as setting out an aspirational framework for how business leaders should behave, albeit one that is subject to what may be required of a director in a particular set of circumstances in order to properly discharge their Primary Duties.

It will be important that the Code does not create confusion in the minds of directors or society at large as to the distinction between the legally binding Primary Duties and the voluntary and non-binding nature of the Code. As such, we suggest the Code should also make a clear distinction between directors’ statutory duties, any contractual duties (such as under terms of employment or service) and the provisions set out in a voluntary non-binding Code.

We also consider that referring to the Primary Duties (as well as other duties imposed on directors by other legislation, such as the Financial Services and Markets Act 2000, and case law) as the “legal baseline” for director conduct is unhelpful, to the extent that it may suggest that directors can voluntarily adopt some different standard (whether through a code of conduct or otherwise). The Primary Duties are the legal duties of directors (separate from their conduct) and failure to comply with such duties can result in civil and/or criminal sanctions for directors. It is imperative that directors understand their legal duties as directors, and to whom they are owed, as these are paramount and breach of them could have serious repercussions for directors. Whilst the Code may set out ways in which individual directors can seek to conduct themselves as leaders of the relevant business, it is important that it does not inadvertently seek to suggest that, by adopting or complying with the Code, it is possible to apply a different standard from a legal perspective with regard to the discharge of their Primary Duties. As noted below, the use of "I undertake to…" in the Code suggests a binding obligation to act in a certain way. However, depending on the particular circumstances, acting in that way might not be consistent with the director's legal responsibilities and we consider the language in the Code should be changed to reflect this.

The Code also appears to seek to impose additional responsibilities on directors, over and above their Primary Duties (and other legal duties), while stating that it “is not intended to … create a new burden of compliance”. It is difficult to understand how directors can meet the proposed personal undertakings set out in the Code without taking on additional compliance obligations (such as in assessing their actions and behaviours against the stated outcomes). In this respect, it is unclear how the Code will not result in further burdens on directors, on top of those already owed to their company (whether under the Primary Duties and/or any other separate code of conduct that the company may already have in place).

We note the Code acknowledges the receipt of views from the CLLS CLC prior to the publication of the Consultation Paper. However, we have not previously had an opportunity to review a draft of the Code itself and a number of the concerns raised during our initial discussion (in particular as regards the risk of conflict with the Primary Duties) have not been reflected in the draft Code as published. Accordingly, the CLLS CLC continues to have material concerns in relation to the Code as drafted and would not be able to endorse the Code as published (contrary to what could be inferred from the Acknowledgements at the end of the Consultation Paper) nor recommend to our clients that they adopt it. In this respect, the Code is just one example of a code of conduct or framework providing suggestions on how directors approach their decision-making.

Given our concerns with the Code’s framework as a whole, we have not sought to analyse and assess the suitability of each specific principle or undertaking within the Code as part of this response.

**Responding to the Consultation**

We set out below our feedback to the specific questions raised in the Consultation Paper.

* *Are there any additional issues that should be addressed in the Code?*

Please see the further discussion points set out in this response.

* *How can awareness of the Code be encouraged amongst directors and the wider public?*

We suggest this issue should be considered once the Code has been developed further in line with this response and other feedback received by the IoD.

* *Should directors make a public declaration or disclosure of their adoption of the Code?*

No. For the reasons set out in this response, we believe that a public declaration or disclosure of the adoption of the Code may create potential difficulties for directors. In particular, it could encourage stakeholders to seek confirmations as to whether (i) all directors of a particular company have agreed to adopt the Code (which may impose an expectation of compliance for other directors on what is intended to be a voluntary code) and (ii) if adopted, directors have complied with the provisions of the Code. Further, it may give rise to expectations (for example, regarding transparency) that directors may not be able to meet. We would not be in favour of importing any “comply or explain” reporting into a company’s annual report in relation to the Code. We do not believe it would be helpful for the Code to be seen to increase the regulatory burden on directors, which any such declaration might.

* *Is there a role for government, regulators or professional bodies in encouraging adoption of the Code?*

As a general matter, we would consider that adoption of the Code should remain a voluntary matter for directors, without additional encouragement from other regulators or professional bodies. As noted below, there is significant scope for conflict between the Code and the Primary Duties, as well as potential conflict with other codes of conduct and non-statutory best practice (such as the UK Corporate Governance Code).

* *If you are currently serving as a director, would you be willing to commit yourself to the principles and undertakings of this Code?*

N/A.

As noted above, given the concerns outlined to members of the IoD Commission prior to the publication of the Consultation Paper in relation to the proposed implementation of the Code, we have prepared a broader response to the Consultation Paper and included a number of points for further consideration by the IoD relating to the proposed adoption of the Code. We would welcome the opportunity to discuss these points with the IoD Commission.

**Introducing added complexities and uncertainties for directors**

The primary framework governing directors’ conduct is that established by the directors’ duties provisions in the Act). The introduction to the Code then raises the question as to how principles, undertakings and guidance set out in (or to accompany) the Code should be viewed within this legislative framework, and more importantly how they interact with the existing provisions of the Act, particularly the Primary Duties. Whilst the ‘Introduction to the Code’ section of the Consultation Paper suggests that the Code “does not add to these legal obligations” but rather “sets a bar for director conduct beyond the legal baseline…”, we believe this wrongly suggests some flexibility in being able to voluntarily re-set those legal obligations, when in fact the Act (and applicable case law) sets out, and is the authoritative source of, the general legal duties which a director must comply with.

In considering the Primary Duties, directors already have a duty to “have regard (amongst other matters) to...” the various factors set out in section 172(1) of the Act, but these are not a checklist of factors to consider and directors have a duty to consider all relevant factors in making a decision. This is an area that they sometimes seek guidance on from their advisers. Additionally, other stakeholders sometimes have difficulty understanding how much weight directors should attribute to each factor specified in section 172(1) of the Act. If the Code, as the Introduction to it states, is truly “designed to complement such mechanisms”, then it may be more helpful for the Code to remind directors of, and summarise the text of, the existing Primary Duties while emphasising that compliance with the Code is subject to compliance with these over-riding Primary Duties, rather than introduce new undertakings and obligations that neither reference section 172 of the Act nor other aspects of the Primary Duties. Given the Code aims to “prove useful for those stepping up into director roles for the first time”, developing it in this way could make it a more useful document for new directors.

We note that the Code is structured around six key principles of director conduct. In and of themselves, such key principles are not objectionable as being aspirational goals and setting a "tone from the top" for how people across the relevant company should seek to behave. Many of those principles can be seen (in the same or similar format) in other codes of conduct (including for professional bodies and/or companies’ own internal codes applying to all workers within an organisation). However, we would note that a number of these are not specific to directors in their capacity as directors (for example, fairness), but are broader guides to appropriate workplace behaviour. In addition, Principle 6 of the Code goes to the purpose and conduct of the business, rather than to the behaviour of individual directors.

As drafted, directors would have to consider how the Code’s key principles interact with the Primary Duties, as well as with any other relevant codes of conduct (such as those of their company that already apply to its workforce more broadly). Directors would also need to assess how and whether they are able to comply with any particular undertakings to meet the requirements of the Code, in addition to compliance with their legal and/or contractual obligations to meet their Primary Duties, the requirements of any internal conduct code and/or the provisions of their employment contracts or letters of appointment.

Where a company has already adopted an internal code of conduct, this is likely to have been tailored to deal with the particular circumstances or priorities of the company, as well as the scope of operations and/or industry sector. In this respect, the Code might be better aimed at directors of companies that have not adopted a code of conduct. We also recognise that the Code may be a helpful reference for companies looking to update any existing code of conduct. So it may be beneficial to refer to this flexibility when considering the application (and applicability) of the Code.

The Consultation Paper does not specify how directors should seek to comply with the Code and it is not stated to be “associated with a formal enforcement mechanism”. If directors were to make any statement of adherence to the Code (and we would not be in favour of importing any “comply or explain” reporting into a company’s annual report), it would be open to shareholders and other stakeholders to seek information as to how such undertakings have been discharged (or information on any non-compliance).

Any self-reporting of non-compliance could give rise to a risk of a claim for breach of statutory duty, and therefore directors would appear to have limited self-interest in making any such disclosures. In this way, the Code could become more “inward-facing” rather than a projection of good governance for external stakeholders.

Reference is made, on page 6 of the draft Code, to guidance containing examples of how the Code can be applied in various specific scenarios. There is a risk that this could be unhelpful if it sets up expectations that directors should behave in a particular way in a particular hypothetical scenario, or potentially create an impression that there can be a different interpretation of how to discharge their Primary Duties for those directors who have signed up to the Code as opposed to those who have not. This could be used as “evidence” that directors in similar scenarios have acted improperly if they have not acted in accordance with the guidance, when in fact there would likely be added nuances that cannot be ignored when considering how to discharge the Primary Duties.

Any such guidance would need to be drafted with care and appropriate caveats. While most of the undertakings in the Code itself are (as the Introduction says), to a great extent matters of “common sense”, it is much more difficult to write scenario-specific guidance that is not too prescriptive (unless it is meaninglessly bland).

* One way in which the Code could be more helpful is to steer away from attempting to provide “guidance” in this way or position these examples and scenarios as “guidance”, but instead to provide (non-exhaustive) illustrations of behaviour. In this way, there may be less expectation that following such guidance will produce the stated outcome related to the underlying undertaking.
* This could be achieved by using examples of what has actually gone wrong in the past (by reference to relevant judicial decisions or investigations and/or sanctions imposed by the FCA, etc.). The Code could, for example, refer to the corporate governance collapses of BHS, Carillion and Patisserie Valerie and explain how the directors in those cases acted inappropriately. In this way directors may learn by example from specific difficult, but actual, scenarios, rather than from potential hypothetical scenarios.
* This may also provide more scope to avoid overly generic descriptions of potential behaviour and allow directors to consider a nuanced approach to a more challenging or complex situation. The Code should also emphasise the need to obtain appropriate professional advice at an early stage if directors are facing such a situation.
* Equally, there might be scope for guidance that makes clear what is not required, for example, by way of disclosure/transparency (as noted below), if this principle is retained.

Finally, we note that the Code is proposed to be a voluntary code adopted by directors on an individual basis. This differs from (for example) the UK Corporate Governance Code (the “**UK CGC**”), which is adopted by the company itself and applies to the company and all relevant directors. This may further increase the risk that different directors at the same company may consider they are subject to different or additional obligations when considering their Primary Duties.

**Delivering outcomes**

The Code contemplates that it will help “directors to fulfil their responsibilities by providing a clearly articulated statement of what good conduct looks like”. Yet, the Code merely asks directors to undertake to comply with certain high level undertakings, and assumes that such compliance will deliver the stated outcomes. Some of the undertakings are aspirational statements which are very broad in nature, and therefore may not be capable of being complied with in full. It is certainly not clear that these broad undertakings alone will deliver the intended aspirational outcomes (as other factors may intervene). In setting out such aspirational undertakings and outcomes, the Code may result in directors failing to meet their undertakings and not achieving the stated outcomes, resulting in them being less willing to continue to seek to meet such undertakings. This would serve to further undermine trust from the broader community and cause the purpose of the Code to be undermined as it would be aspirational yet very difficult to achieve in practice.

The IoD Commission may wish to consider whether the intentions of the Code are better served by an alternative formulation of how directors should conduct themselves, rather than in the form of compliance with undertakings which may not ensure the delivery of stated outcomes.

* For example, the “Outcomes” for Principle 1 could be rephrased as “These behaviours can help you to earn respect and trust as an authentic leader. Positive behaviours can inspire and influence others to emulate them. This in turn can help build loyalty, confidence in your leadership and sustainable business relationships.”

The Code is also intended to be “applicable to directors of organisations of all sizes in the private, public and not-for-profit sectors”. Yet it is not clear that the Code takes into consideration the very broad range of director roles, company sizes, industry sectors and types and issues faced by directors in assessing how properly to discharge their Primary Duties. The IoD refers to directors taking “key decisions on behalf of major companies” affecting communities. The directors of such companies are more likely to be experienced directors who have the benefit of external legal advice in considering their duties as directors, but the Code does not seek to modify its application for less experienced directors in small private companies or start-up operations. The reference to “corporate scandals and collapses” in the IoD’s proposed Voluntary Code of Conduct for Directors (June 2022) (“**2022 Proposed Voluntary Code**”), as well as to “corporate scandals” in the IoD’s announcement of the Code (each of which refer to high profile large businesses) further suggests that the Code may be more relevant for larger or listed companies (which are already subject to additional regulatory and governance obligations). Directors at smaller companies may be over-whelmed by the additional layer of complexity they would be taking on if they commit to the undertakings in the Code, when in practice they would welcome more guidance on how to meet their existing legal obligations and duties.

**Embedding values**

We note that the IoD wants the Code to help directors set “high standards of ethical behaviour”, including as regards “environmental, social and governance” matters and “embed the values of the organisation”. While a board of directors should determine their company’s values and purpose, these need to take account of the views of members and be consistent with the Primary Duties. It should be noted that such values may evolve over time (or the relevant concepts may expand – noting the journey from “CSR” to “ESG” to sustainable and responsible business) and, in places, the Code runs the risk of focusing on specific current issues which may not be as critical in future decision-making. Equally, other or additional concerns, less prevalent historically, may become relevant for consideration, such as cybersecurity risks or the potential impact of generative artificial intelligence on the workforce.

Related to this, Principle 6 goes to the purpose and conduct of the business, rather than to the behaviour of individual directors. As such, its provisions are more likely to conflict with the director’s legal duties.

We note that the Financial Reporting Council, when consulting on the update to the UK CGC for 2024, elected to drop any reference to “environmental, social and governance” factors from relevant provisions in the UK CGC, primarily based on feedback to the consultation. In addition, social and environmental impacts are already factors directors need to take into account in their decision-making, since Section 172(1) of the Act already requires a director to “have regard (amongst other matters) to … the impact of the company’s operations on the community and the environment”.

In light of this, we believe it is worth considering whether the Code is the right vehicle to import social obligations based on specific current societal values and concerns into directors’ conduct considerations– and whether these are truly representative of “the ethics and values that are already adopted as a matter of course by most responsible business leaders”. Should the Code seek to embed subjective and potentially changeable principles into the regulatory framework of directors’ duties and behaviour?

**Conflicting obligations**

As noted above, the adoption of the Code gives rise to the potential for conflict with the Act, and/or other codes of conduct or guidelines regulating similar behaviours. One example is an organisation’s internal code of conduct – currently many companies will have a single set of internal conduct rules that apply to all employees/workers, including directors. However, the introduction of the Code would create a separate, distinct set of additional rules only applicable to directors, on top of their organisation’s internal code of conduct and in addition to the Primary Duties. This may result in conflict and therefore confusion for directors. Unless it is made clear that taking the steps necessary to discharge applicable Primary Duties overrides any code of conduct where a conflict does become apparent, directors may face a difficult choice: compliance with an undertaking in the Code which results in a breach of their company’s code of conduct could give rise to breach of contract, disciplinary action and/or termination of their employment.

We believe the Code would benefit from a general caveat and reminder on this point. An example of such language is set out below for your consideration:

*The Provisions of the Code reflect a synthesis of best practice recommendations at the time of publication. They do not constitute legal, or other professional advice and should not be relied upon as such. Nothing in the Code is intended to override, substitute, or alter existing legal or regulatory requirements or commitments, including, without limitation, duties of the company’s directors and the company’s constitutional documents.*

*Nothing in this Code should be understood to require the disclosure of commercially sensitive information. No such disclosure is required where such disclosure would otherwise be contrary to the director's legal duties or is not permitted or appropriate due to applicable legal, regulatory or contractual requirements.*

*Where directors are in doubt as to how they should discharge their duties as directors, they should seek separate legal advice.*

Similarly seeking to comply with aspirational undertakings as to behaviour as set out in the Code, when faced with difficult decisions which require judgment and the factoring in of specific matters set out in the Act, may give directors no option other than to breach an undertaking given in respect of the Code (as the consequences of breaching a conflicting Primary Duty would be more adverse to the director). Any conflicts between obligations under the Code and the Act itself would, of course, require directors to prioritise the Act. As noted above, we do not consider it helpful for directors to have to consider whether they are complying with voluntary personal undertakings set out in the Code in such situations and this may therefore call into question the usefulness of the Code at the most challenging times (and whether the Code can really be a “roadmap” to follow “in the face of complex challenges”).

Companies regularly face conflicting obligations, where compliance with different sets of laws or regulations (which may include laws and regulations outside the UK) which conflict with each other is not always possible. In such circumstances, directors may not be able to “comply with the letter and spirit of applicable law” as set out under Principle 2, yet this should not be seen as a breach of Principle 2 (which would appear to be the case under the Code). In this specific undertaking under Principle 2, we also question what is meant by “the spirit of applicable law”, which would seem to be incapable of being complied with as a general matter. How are directors meant to interpret this and then seek to comply with such undertaking on behalf of the company? We do not believe we would be in a position to advise directors on what was meant by "the spirit of applicable law".

We note the substantial overlap between certain proposed undertakings and specific legal duties on directors under the Act, yet such undertakings are not aligned with the Act. Examples (on a non-exhaustive basis) include:

* Principle 2 – “*Be alert to perceived conflicts of interest and manage them when they arise*”. Section 175 of the Act requires a director of a company to avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. Sections 177 and 182 of the Act also require directors to declare interests in proposed or existing transactions or arrangements with the company. This is an area of significant case law with no simple “one size fits all” as to how any such conflict can be managed, whether actual or perceived. Moreover, the introduction of the additional concept of “perceived” conflicts (which is not within the scope of the Act) adds greater challenge – we suggest that the word "perceived” is omitted as it is not clear whose perception would be relevant.

Further, a company’s articles of association will often seek to address how a conflicts issue may be managed in a particular situation, such that a blanket statement is not possible to accommodate the breadth of potential conflicts.

* Principle 2 – “*be willing to cooperate fully with regulatory authorities*” – although some regulators have their own rules about directors being open and cooperative with regulators (such as the Financial Conduct Authority or the Takeover Panel) it will not always be in the interests of the company to cooperate with a regulatory authority – for example, there may be genuine and reasonable legal disputes with an authority which directors should be able to pursue or an overseas regulator may attempt to overreach its authority and it may not be in the company’s interests to engage with it.
* Principle 6 – “*Consider the consequences of my decisions for society, local communities and the environment*”. Section 172(1) of the Act already requires a director to have regard to the impact of the company’s operations on the community and the environment – it is unclear how this principle adds any further guidance for directors on how they should behave.
* Principle 6 – “*Avoid prioritising the short-term financial interests of shareholders above the longer-term interests of the organisation as a whole*”. Section 172(1) of the Act requires a director to act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and to have regard to the likely consequences of any decision in the long term. There may be circumstances where the short-term interests of shareholders (such as on a takeover offer) can be prioritised above any longer-term perspective “of the organisation”, and directors would need to take this into account.

This formulation may also create different obligations from those set out in Principle A of the UK CGC (2024), which provides that “*A successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society*.”

Equally, where a company is in the “zone of insolvency”, directors will face complex questions regarding the priority of interests of creditors and members, which cannot be easily managed in compliance with this statement.

In order to establish that the general directors’ duties provisions in the Act are to remain as the authoritative source of legal obligations governing directors’ conduct and are not to be superseded by any provision of the Code, the undertakings should explicitly set out the qualification that directors are “subject to their directors’ duties, which take precedence”. Further they should be reframed as aspirational goals and not binding undertakings on the part of the individual director. This will clarify that the role of the Code is to encourage directors to reach, (or aspire to reach) certain behavioural goals, but it will never trump their duties under the Act.

**Transparency**

Principle 3 of the Code introduces a requirement for transparency. We note that the concept of transparency was considered as part of the consultation on the 2022 Proposed Voluntary Code. In the 2022 Proposed Voluntary Code, the IoD had identified that transparency was, perhaps unsurprisingly, not a requirement in any of the codes of professional conduct set out by the Solicitors Regulation Authority, Chartered Institute of Personnel and Development, etc. (see Table 1 (*Principles highlighted in codes of professional conduct*) on page 3). Further, the IoD did not, in the circumstances, include transparency as part of the 2022 Proposed Voluntary Code.

Noting that the contents of the Code draw extensively from the 2022 Proposed Voluntary Code (and/or mirrors the earlier draft code in many ways), we query why a principle of transparency has now been imported into the Code, particularly given that this may be an area where directors have limited scope to be able to comply with the proposed undertakings.

Indeed, we regard this element of transparency as extremely difficult to both ascertain and abide by. It is unclear what level of compliance is expected, not least because transparency is by its nature conceptually demanding, but also in light of the onerous and wide-encompassing wording under Principle 3: “…transparent to…the board and **relevant** **stakeholders** in respect of **anything that might be perceived** as affecting…objectivity.”

* It is not clear who the “relevant stakeholders” may be – are they inward-looking (for example, employees) or outward-looking (for example, shareholders or regulators)?
* Are the transparency obligations intended to be similar as between different stakeholders, or would different stakeholders be treated differently and in potentially conflicting ways?
* What are the limits as regards “**anything that might be perceived** as affecting…objectivity” where the Code does not include any materiality threshold?

As noted elsewhere, if directors are unable to comply with the relevant undertakings, this may undermine the relevance of the Code as a means to guide behaviour. Equally, while a company may be required to be transparent in accordance with its reporting obligations under applicable laws or regulations, this transparency obligation does not necessarily apply to a director in an equivalent manner (particularly if there is no underlying law or regulation compelling any such disclosure).

It should be noted that any such transparency may, in itself, give rise to further claims against directors. For example, seeking an outcome where “*By demonstrating the rationale behind your decision-making, you will promote clarity and understanding*” could actually invite further challenges, such as where the minuting of relevant decisions does not reflect all the nuances of discussions when directors are facing challenging circumstances. Will directors really want their decision-making behind the boardroom door to be dissected in public fora? It is also not clear that being transparent in the manner contemplated is (or will always be) compatible with a director’s fiduciary duty of confidentiality or contractual undertakings in letters of appointment or employment contracts.

The undertaking to “*communicate with stakeholders in a straightforward and accessible manner, providing proactive, relevant and timely information*” could invite stakeholders to launch fishing expeditions for information, creating a considerable burden for directors and management. If any provision of this kind is included there would be a case for including guidance as to what is not required to be provided – for example, information which is confidential, commercially sensitive or not readily available (in addition to legal confidentiality constraints).

Guidance as to what “*the limits of transparency*” are, which directors will have to be “*candid with stakeholders*” about, is also missing. Such limits may be statutory or contractual or fiduciary, or imposed by third parties (such as regulators, governmental authorities or courts), necessary to protect the legitimate interests of the company or simply because the burden of obtaining information would be disproportionate. The breadth of the undertaking, coupled with the realities of various restrictions on disclosing information to third parties, could mean such undertakings are of limited practical benefit. There is a risk that the undertakings could give rise to expectations which could not be met in practice.

* For example, we would assume that the Code does not intend directors to disclose confidential information in breach of the UK Market Abuse Regulation or the Criminal Justice Act 1993 (which create civil and criminal offences in relation to the unlawful disclosure of inside information), or in a manner that might adversely affect the company’s legitimate interests – yet the undertaking to provide timely information could be interpreted in this manner.

It would equally be an odd situation for directors of a listed company to have to notify shareholders about the limits of transparency under applicable securities laws in order to satisfy the relevant undertaking in the Code. Being candid might mean that directors would still be expected to give reasons for not responding to requests for information, which itself could create considerable burdens. Whilst it may be appropriate for some high-level explanation to be provided as to why it is not possible or appropriate to respond to a request for information, it is important that this is proportionate and not unduly burdensome on the company in question, while also not opening the company (or relevant director) to challenge.

**Lack of incentive to adopt the Code**

While the IoD emphasises that the Code represents a “voluntary commitment”, in choosing to adopt the Code, directors may be inviting potential liability for themselves – and when accompanied with the additional complexities and difficulties as expressed above, this may limit the attraction of the Code for directors in practice.

The Consultation Paper asks that a director “undertakes” to carry out a specified list of actions in satisfying each Principle. As legal advisers, we would be remiss in our duties to client directors if we ignored the potential legal implications of giving an undertaking (which may well be perceived as creating a binding obligation) and our advice might increase the discomfort and unwillingness of directors to give such undertakings. For example, under English law such an undertaking could be construed as a representation, and the position under overseas law, which may also be relevant for shareholders or other stakeholders located overseas, is unclear. The foreword to the Consultation Paper also refers to the provisions of the Code as “undertakings”, which bolsters the inference that attaching liability to a breach of such provisions – or “undertakings” – was in fact the intention of the IoD when drafting the Code.

We believe directors might be more prepared to accept and embrace the Principles in the Code (consistent with the voluntary and non-binding nature of the Code) if the introductory wording under each Principle is along the lines of a director “endeavouring to”, “considering” or “taking into account the need to”, rather than “undertaking to” carry out a suggested (and not rigidly prescribed) list of actions. This would hopefully help to clarify that the provisions of the Code are guidelines or statements of ambition/intention that are goals and not binding obligations and that they invite no potential personal liability.

* To assist with this, we suggest the IoD considers de-personalising the statements so that the current references to a first-person pronoun (“I undertake…”) are replaced by a de-personalised statement that “a director may wish to endeavour to…” carry out certain suggested actions.
* It may be equally helpful to caveat that the endeavour to do so is always subject to exceptional circumstances, or materiality, etc. as well as the directors’ legal and other duties and obligations.

We note that there has previously been a discussion about having a register of signatories (but this is not contemplated in the Code). We agree that any disclosure about the adoption of the Code should purely be a voluntary matter for the directors and that there should be no mandatory register. However, in the absence of such a register, how will stakeholders know whether individual directors have agreed to comply with Code? Does the IoD believe there is merit in members knowing whether there is any take up by directors?

**Contributing to the debate**

We consider that the IoD is well placed to provide input into the debate on the conduct of directors. However, the Code does not appear to do so in a meaningful way, as it does not assist directors in their approach to decision-making in order to discharge the Primary Duties (despite the stated intention). As noted, the Code appears to be focused on personal behaviour as a means to deliver “the trust of the wider public in [their] business activities” without aligning this with the overriding legal obligations of the directors when it comes to the formal discharge of their Primary Duties.

It is important that the provisions and Principles of the Code are not seen as being a mechanism by which directors “fulfil”, satisfy or discharge their duties and responsibilities – the business world is an increasingly complex place and the aspirational statements of behaviour set out in the Code will not necessarily fit neatly with the obligations of directors under the Primary Duties. Yet the Code appears to suggest that simply complying with such undertakings will result in stated outcomes.

We would encourage the IoD to consider and take account of the comments in this submission as a means of enabling the Code to take one step closer towards becoming a “practical tool”, as it envisages, “to help directors make better decisions”. Otherwise, the IoD risks “[holding] back directors” or “[creating] a new burden of compliance”, which is exactly what it has emphasised the Code is not intended to do.

We note that the IoD proposes to publish guidance on how the Code can be applied in various specific scenarios. As noted above, it may be more effective for the guidance to emphasise what has gone wrong in the past (for example, by reference to relevant judicial decisions or investigations by the FCA), rather than trying to create potential scenarios. We would welcome the opportunity to consider any “exposure draft” of such guidance prior to formal adoption, so that the IoD can take into account views and responses from relevant stakeholders in advance.

Date: 16 August 2024

**For further information please contact**:

Allan Taylor

Member of the CLLS Company Law Committee

White & Case LLP

ataylor@whitecase.com