

THE CITY OF LONDON LAW SOCIETY  
COMPANY LAW COMMITTEE

Minutes

for the 319<sup>th</sup> meeting  
at 9:00 a.m. on 25<sup>th</sup> January 2023

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1. **Welcome and apologies**

*In attendance:* Sam Bagot; Edward Baker; Adam Bogdanor; Robert Boyle; Tom Brassington; Lucy Fergusson; Chrissy Findlay; Sarah Hawes (alternate for Caroline Rae); Nicholas Holmes; James Innes (alternate for Chris Horton); Sharon Jenman (alternate for John Adebisi); Vic Kershaw (alternate for Mark Austin); Vanessa Knapp; Stephen Mathews; Juliet McKean (Secretary); John Papanichola; Jon Perry; David Pudge (Chair); Lucy Reeve (Chair of the Law Society Company Law Committee (LSCLC)); Richard Spedding; Patrick Speller; Allan Taylor; Liz Wall; and Victoria Younghusband.

*Apologies:* John Adebisi; Mark Austin; Kevin Hart; Chris Horton; Caroline Rae; and Matthew Rous.

The Chair welcomed Chrissy Findlay of Pinsent Masons to the meeting of the Committee, who joined the meeting as a guest.

The Chair informed the Committee that an advertisement seeking applicants to join the Committee has been posted on the CLLS website and encouraged members of the Committee to share the advertisement with any contacts that might be interested in joining the Committee.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 30 November 2022 was circulated to members on 12 January 2023. The Chair asked members to send any comments on the minutes to the Secretary during the course of the next week, otherwise the minutes would be considered settled.

3. **Matters arising**

- 3.1 *EU Foreign Subsidies Regulation.* The Chair reported that on 23 December 2022 the EU Regulation on foreign subsidies distorting the internal market was published in the EU Official Journal. The Chair also reported that the Regulation gives the European Commission powers to review on subsidy grounds any transaction involving an acquisition of decisive influence that signs on or after 12 July 2023, and from 12 October 2023 mandatory filing and standstill obligations will apply to any acquisition of decisive influence where: (i) the target (or a subsidiary) is established in the EU and has EU wide turnover of EUR 500 million or more; and (ii) the parties (i.e. acquirer(s)

and target) in combination received "financial contributions" from non-EU countries of more than EUR 50 million over the previous three years.

- 3.2 *ROE verification.* The Chair reported that the Register of Overseas Entities (Verification and Provision of Information) (Amendment) Regulations 2022 were made on 20 December 2022 and came into force on 12 January 2023. The Chair also reported that the regulations amend the Register of Overseas Entities (Verification and Provision of Information) Regulations 2022 to exclude from the requirements for verification information about governments, public authorities or beneficiaries of certain pension scheme trusts and information which has previously been verified and submitted to Companies House in connection with the annual updating duty and applications for removal from the register. The Chair further reported that the regulations provide (amongst other things) that a relevant person may verify certain information relating to beneficial ownership on the basis of documents or information from a non-independent source. The Committee also noted that on 12 January 2023 BEIS published updated guidance for the registration of overseas entities on the UK Register of Overseas Entities.
- 3.3 *RS 2022/2: Presumptions of the definition of "acting in concert".* The Chair reported that on 14 December 2022 the Takeover Panel announced the publication of Response Statement RS 2022/2 and Instrument 2022/6 which contains amendments to the Takeover Code following the consultation on proposed amendments to the presumptions of the definition of "acting in concert" and related provisions of the Takeover Code. The Chair noted that the amendments take effect on 20 February 2023. The Chair also noted that the Panel Executive is hosting a webinar on the Response Statement on 1 February at midday.
- 3.4 *Economic Crime and Corporate Transparency Bill.* The Chair reported that on 29 November 2022 the Economic Crime and Corporate Transparency Bill completed its committee stage in the House of Commons and that Parliament had published a revised version of the Bill, as amended in Public Bill Committee. The Chair also reported that the Bill was now in the third reading stage in the House of Commons and once that was completed the Bill would move into the House of Lords.
- 3.5 *Retained EU Law (Revocation and Reform) Bill.* The Chair reported that on 29 November 2022 the Retained EU Law (Revocation and Reform) Bill completed its committee stage in the House of Commons and that Parliament published a revised version of the Bill, as amended in Public Bill Committee. The Chair also reported that the Bill had now completed its passage through the House of Commons and had also completed its first reading in the House of Lords.
- 3.6 *Takeover Panel consultation responses.* The Chair reported that on 13 January 2023 the Joint CLLS/Law Society Takeovers Working Group submitted responses to PCP 2022/3 (consultation on the offer timetable in a competitive situation) and PCP 2022/4 (consultation on miscellaneous amendments to the Takeover Code).

#### 4. **Discussions**

- 4.1 *FCA/CLLS CLC Liaison Committee call.* Victoria Younghusband provided an update to the Committee in respect of the FCA/CLLS CLC Liaison Committee call that was held on 16 January 2023.

- 4.2 *FCA Market Watch 71.* The Chair reported that on 13 December 2022 the FCA published Market Watch 71 (**MW71**) in which the FCA shares its observations about changes in advisory firms' insider lists since the publication of Market Watch 60 and reminds firms of the requirement within UK MAR to include personal information in insider lists and the importance of firms maintaining accurate insider lists and strictly limiting access to inside information to employees who require access to perform their role in order to prevent market abuse. The Chair noted that there appear to be a couple of differences between the commentary in MW71 and the EU MAR Q&A prepared by the Committee and the LSCLC (**EU MAR Q&A**), being in MW71 the FCA: (i) reminds firms of the need for UK nationals to complete the "national identification" number field in the MAR standard insider list template by inserting their national insurance number as their "first priority identifier". Q&A 30 of the EU MAR Q&A states that the "national identification" number field can be left blank for UK nationals because UK citizens do not have national identification numbers so the requirement to provide one cannot apply; and (ii) states that contractors' details must be included on advisers' insider lists. The Committee noted that Q&A 29 of the EU MAR Q&A does not explicitly address this. The Committee agreed to consider whether the EU MAR Q&A should be updated to reflect MW71.
- 4.3 *The Edinburgh Reforms – including possible reforms to prospectus regime.* The Chair reported that on 9 December 2023 the Chancellor of the Exchequer announced a set of reforms to drive growth and competitiveness in the financial services sector. The Chair reported that as part of these reforms HM Treasury has published: (i) a policy statement on building a smarter financial services framework for the UK that sets out its approach to the repeal of financial services retained EU law (including UK PR and UK MAR); (ii) an illustrative statutory instrument (Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023) to show how the Government will make its proposed changes to the existing prospectus and public offers regime using the powers set out in the Financial Services and Markets Bill (due to receive Royal Assent in Spring 2023) – it was noted that this covers the majority of the changes announced by the Government in March 2022 in the outcome of its consultation on the UK prospectus regime; and (iii) a policy note on public offers and admissions to trading regime which accompanies the above mentioned illustrative statutory instrument. The Chair also reported that HM Treasury is welcoming feedback on the illustrative statutory instrument and, therefore, the Joint Prospectus and Listing Rules Working Group is meeting in order to discuss comments on the SI with a view to submitting comments to HM Treasury. The Chair further noted that on 9 December 2022 the FCA published its approach to implementing the outcomes of HM Treasury's Future Regulatory Framework Review.
- 4.4 *Audit and Corporate Governance Reform – Draft reporting regulations.* The Chair updated the Committee in respect of draft reporting regulations that BEIS had shared with the Committee for comment.
- 4.5 *FRC consultation on audit committees standard.* Patrick Speller updated the Committee on the Committee's proposed response to the FRC's consultation on its draft proposal for a minimum standard for audit committees.

## 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 commenting on items 5.3(e), 5.4(b) and 5.9(a).

### 5.1 Company law

- (a) No items to consider.

### 5.2 Corporate governance

- (a) *EU law to improve gender balance on company boards.* On 7 December 2022, the new EU directive on improving the gender balance among directors of listed companies and related measures was published in the EU Official Journal and entered into force 20 days thereafter. The directive is in substantially the same form as the text adopted by the Council of the EU on 17 October 2022 and the European Parliament on 22 November 2022. Member states must adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 28 December 2024.
- (b) *ISS 2023 benchmark policy updates.* On 1 December 2022, Institutional Shareholder Services Inc. announced the publication of updates to its 2023 ISS benchmark proxy voting policies, including the United Kingdom and Ireland Proxy Voting Guidelines – an executive summary of the key updates and policy development process has also been published. The updated policies will generally be applied for shareholder meetings taking place on or after 1 February 2023, except for those updates that are being announced with a one-year transition period and which will become effective in 2024.
- (c) *EU Corporate Sustainability Reporting Directive.* On 28 November 2022, the Council of the European Union announced that it has given its final approval to the Corporate Sustainability Reporting Directive (**CSRD**). The text adopted by the Council is in substantially the same form as the text adopted by the European Parliament on 10 November 2022. On 16 December 2022, the CSRD was published in the EU Official Journal and entered into force 20 days thereafter. Member states must bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 3 of the CSRD by 6 July 2024.

### 5.3 Reporting and disclosure

- (a) *FCA consultation on streamlining its rules on structured digital reporting of financial statements.* On 12 January 2023, the FCA announced the publication of a consultation on streamlining its transparency rules on structured digital reporting of annual financial statements by companies. The consultation closes on 24 February 2023.
- (b) *ARGA funding consultation feedback statement.* On 19 December 2022, the FRC published a feedback statement in response to its consultation on the proposed funding arrangements for the Audit, Reporting and Governance Authority (**ARGA**). The feedback statement summarises stakeholders' views

on the proposed funding arrangements, sets out the FRC's responses and notes those issues on which there will be further consultation.

- (c) *FRC draft 3-year plan for 2023-2026.* On 16 December 2022, the FRC announced the publication of its draft 3-year plan for 2023-2026, which sets out its priorities for the next three years and the resources it will need to achieve them. The press release states that the plan reflects the delay of anticipated legislation to create ARGAs.
- (d) *FRC supervisory focus for 2023/24.* On 16 December 2022, the FRC announced its areas of supervisory focus for 2023/24, including priority sectors, for corporate reporting reviews and audit quality inspections.
- (e) *FRC report on 'What makes a good Annual Report and Accounts'.* On 13 December 2022, the FRC announced the publication of a report on 'What makes a good Annual Report and Accounts', which sets out the FRC's view of the characteristics associated with a high-quality Annual Report and Accounts.

#### 5.4 Equity capital markets

- (a) *UKSA position paper on dematerialisation.* On 30 December 2022, the UK Shareholders' Association announced the publication of its position paper on dematerialisation that contains a summary of the problems that exist with the current dematerialised CREST system and outlines the changes that the UKSA considers to be necessary to address these issues in order to meet the needs of shareholders.
- (b) *FCA fines Metro Bank PLC for breach of LR 1.3.3R.* On 12 December 2022, the FCA announced that it has fined Metro Bank PLC £10,002,300 for breaching Listing Rule 1.3.3R (misleading information not to be published) by publishing incorrect information to investors (see the Final Notice for Metro Bank) and Metro Bank's former Chief Executive and former Chief Financial Officer £223,100 and £134,600, respectively, for being knowingly concerned in Metro Bank's breach. The two former executive directors have referred their respective Decision Notices to the Upper Tribunal and, therefore, the FCA's findings in their Decision Notices are provisional.
- (c) *PMB No. 42.* On 12 December 2022, the FCA published Primary Market Bulletin 42. In this edition, the FCA covers a number of topics, including: (i) climate-related financial disclosures; (ii) the relationship between UK MAR, the Listing Rules and the National Security and Investment Act 2021; (iii) some key features of the FCA's decision on Gent and some general themes arising, and concerning behaviours identified, in enquiries that the FCA's Primary Market Oversight department has carried out recently in respect of suspected unlawful disclosures; (iv) a reminder for shell companies (which includes companies that are cash shells or SPACs) of the FCA's rules and guidance in relation to reverse takeovers; and (v) a summary of the findings in the Financial Reporting Council's Lab report entitled 'Structured Digital Reporting – Improving Quality and Usability'.

- (d) *EU Listing Act.* On 7 December 2022, the European Commission announced reforms under the umbrella of its "Capital Markets Union" programme to simplify listing and post-listing requirements for issuers of shares in the EU and to attract more companies (particularly SMEs) to its markets, including reforms to EU PR, MAR and MiFID II/MiFIR. A factsheet on simpler listing rules for companies (especially SMEs) and a Q&A on the Commission's proposals on listing have been published.
- (e) *AFME briefing note on increasing payment of dividends through CREST.* AFME has published a briefing note dated November 2022 on increasing payment of dividends through CREST.

## 5.5 **MAR**

- (a) *FCA fines three broker firms for failures relating to the detection of market abuse.* On 8 December 2022, the FCA announced that it has fined BGC Brokers LP, GFI Brokers Limited and GFI Securities Limited £4,775,200 (discounted by 30% from £6,821,800 for early resolution) for failing to ensure they had appropriate systems and controls in place to effectively detect market abuse.
- (b) *FCA fines and bans three bond traders for market manipulation.* On 7 December 2022, the FCA announced the publication of Decision Notices given to three bond traders for market manipulation. The FCA has decided to ban the three bond traders from performing any functions in relation to regulated activity and also imposed fines on each of them. The traders have referred the Decision Notices to the Upper Tribunal and, therefore, the proposed action outlined in the Decision Notices has no effect pending the determination of the case by the Upper Tribunal.
- (c) *ESMA Q&A on MAR.* On 25 November 2022, ESMA published an updated version of its Q&A on MAR, which includes a revised Q&A on persons professionally arranging or executing transactions (see Q&A 6.1).
- (d) See minute 4.2 (*FCA Market Watch 71*) and item 5.4(b) (*FCA fines Metro Bank PLC for breach of LR 1.3.3R*).

## 5.6 **Auditing and accounting**

- (a) *FRC firm-level audit quality indicators feedback statement.* On 6 December 2022, the FRC announced the publication of its feedback statement to its consultation on publishing audit quality indicators (**AQIs**) for the largest UK audit firms. The AQIs will provide users of audit services with more information about factors that drive audit quality to help them make an informed choice when selecting an auditor. The 11 AQIs, listed in the Appendix to the feedback statement, include a range of comparable indicators on perceived culture within an audit firm, audit quality inspection results, staff workloads and the level of partners' involvement in audits.
- (b) *FRC policy paper on competition in the audit market.* On 1 December 2022, the FRC announced the publication of a policy paper that outlines the regulator's approach to competition in the audit market. The paper sets out how

the FRC is seeking to progress the Government's seven competition policy proposals and how it proposes to deliver on the operational objective for ARGAs to promote effective competition in the market for statutory audit.

## 5.7 Takeovers

- (a) *Panel Statement 2022/22*. On 28 December 2022, the Takeover Panel published Panel Statement 2022/22, which is an example of Takeover Panel consent to a contractual offer timetable suspension.
- (b) See minute 3.3 (*RS 2022/2: Presumptions of the definition of "acting in concert"*).

## 5.8 Miscellaneous

- (a) *BEIS independent review of net zero*. On 13 January 2023, BEIS announced the publication of the independent review of the Government's approach to delivering its net zero target.
- (b) *FCA consultation on financial promotions*. On 6 December 2022, the FCA announced the publication of a consultation on introducing a gateway for firms who approve financial promotions (CP22/27), which sets out how it plans to operate a new gateway so that all authorised firms wanting to continue approving financial promotions for unauthorised persons will need to apply for permission. The consultation closes on 7 February 2023.

## 5.9 Cases

- (a) *Peter Gould v HMRC [2022] UKFTT 00431 (TC)*. Under UK tax legislation, a dividend of a UK resident company is subject to income tax in the hands of a shareholder on the date it becomes "due and payable". In contrast to a shareholder-declared dividend, the general position is that a director-declared dividend (known as an "interim" dividend in Table A and the model articles of association) does not become a debt until it is actually paid and, therefore, is only taxed when paid. In this case, the directors resolved to pay a dividend, however, the shareholders agreed to be paid, and were paid, the dividend on different dates in different tax years. HMRC argued that where one shareholder (first) is paid an "interim" dividend ahead of another (second) holding the same class of shares, the second shareholder can enforce payment of the dividend from the date of payment to the first shareholder so that the "interim" dividend should be treated for tax purposes as "due and payable" from that date – broadly because general principles require shareholders to be treated equally. The First-tier Tribunal disagreed and confirmed that an "interim" dividend does not become a debt until it is actually paid, even if the company has paid another shareholder of the same class their interim dividend on an earlier date – although the unpaid shareholders may have other remedies, including a petition in unfair prejudice.
- (b) *Burnford and others v Automobile Association Developments Limited [2022] EWCA Civ 1943*. This Court of Appeal decision contains a helpful list of points on the "reflective loss" principle drawn from previous authorities (see paragraph

30). The Court of Appeal upheld the High Court's decision to grant an application to strike out a claim brought by former shareholders of a dissolved company for misrepresentation and/or breach of contract relating to an investment agreement entered into by the defendant, the shareholders and the company on the basis that the shareholders' claim was barred by the rule against the recovery of reflective loss. The Court of Appeal held that the shareholders did not have "separate and distinct" losses - the law does not regard a reduction in the value of shares or distributions which is the consequence of loss sustained by the company in respect of which the company has a cause of action against the same wrongdoer as "separate and distinct". The Court of Appeal rejected the argument that the strike out/summary judgment was unsuitable for summary determination on the basis that the "reflective loss" principle is uncertain and developing.

6. **Any other business**

- 6.1 *Committee vacancy.* As noted above, the Chair informed members that an advertisement seeking applicants to join the Committee has been posted on the CLLS website.

21 February 2023