

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 322nd meeting
at 9:00 a.m. on 19th July 2023

1. **Welcome and apologies**

In attendance: John Adebiyi; Adam Bogdanor; Tom Brassington; Richard Burrows; Lucy Fergusson; Chrissy Findlay; Jaya Gupta (alternate for Simon Wood); Sarah Hawes (alternate for Caroline Rae); Chris Horton; Vanessa Knapp; Stephen Mathews; Juliet McKean (Secretary); Ziyad Nassif (guest attendee); John Papanichola; James Parkes; Jon Perry; David Pudge (Chair); Lucy Reeve (Chair of the Law Society Company Law Committee (**LSCLC**)); Mohammed Senouci (alternate for Richard Spedding); Allan Taylor; Liz Wall; and Victoria Younghusband.

Apologies: Edward Baker; Kevin Hart; Nicholas Holmes; Caroline Rae; Matthew Rous; Richard Spedding and Simon Wood.

The Chair welcomed Ziyad Nassif of Freshfields who had joined the meeting as a guest but who has also submitted an application to join the Committee as part of the process mentioned below. The Chair also informed the Committee that Mark Austin of Freshfields and Sam Bagot of Cleary Gottlieb Steen & Hamilton have stepped down as members of the Committee. The Chair further informed the Committee that an advertisement seeking to fill two positions on the Committee has been published.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 24 May 2023 was circulated to members on 13 July 2023. The Chair asked members to send any comments on the minutes to the Secretary by the middle of the following week, otherwise the minutes would be considered settled.

3. **Matters arising**

- 3.1 *EU Foreign Subsidies Regulation.* The Chair reported that on 10 July 2023 the European Commission announced that it has adopted the Implementing Regulation for the Foreign Subsidies Regulation (EU) No. 2022/2560 (**EU FSR**). The Chair noted that the Implementing Regulation details procedural aspects of the implementation of the EU FSR and contains the notification forms. The Chair also reported that the European Commission has published a Q&A document on the EU FSR which clarifies that the Commission considers that a filing is required for any qualifying transaction that meets the thresholds and which signs on or after 12 July 2023, but which has not closed before 12 October 2023. The Chair further noted that the Q&A document states that notifying parties are encouraged to engage in pre-notification contacts in advance to facilitate the submission of notifications as from 12 October 2023.

- 3.2 *ECCT Bill*. The Chair reported that on 4 July 2023 the Economic Crime and Corporate Transparency Bill (**ECCT Bill**) had its third reading in the House of Lords and that final amendments were made to the ECCT Bill during the third reading on 4 July and it will now go to the House of Commons for consideration of Lords amendments. The Chair noted that during its passage through the House of Lords, the LSCLC had written to DBT to raise questions and concerns with new section 113C of the Companies Act 2006 that would require nominee shareholders to declare whether or not they are holding any shares in the company "on behalf of, or subject to the direction of", another person and if they are provide the name and service address of such person. See also minutes 3.6, 3.7 and 3.8 below.
- 3.3 *Financial Services and Markets Act 2023*. The Chair reported that on 29 June 2023 the Financial Services and Markets Bill received Royal Assent, becoming the Financial Services and Markets Act 2023 and that the Financial Services and Markets Act 2023 (Commencement No. 1) Regulations 2023 were made on 10 July 2023. The Chair also reported that on 11 July 2023 HMT published a plan for delivery in relation to its policy approach to building a smarter Financial Services Regulatory Framework for the UK.
- 3.4 *Retained EU Law (Revocation and Reform) Act 2023*. The Chair reported that on 29 June 2023 the Retained EU Law (Revocation and Reform) Bill received Royal Assent, becoming the Retained EU Law (Revocation and Reform) Act 2023.
- 3.5 *Law Commission final report on digital assets*. The Chair reported that on 28 June 2023 the Law Commission announced the publication of its final report on digital assets that contains its recommendations for reform and development of the law in this area. The Chair noted that a summary of the final report has also been published.
- 3.6 *ROE updates*. The Chair reported that on 20 June 2023 the Government lost an amendment to the ECCT Bill in the House of Lords that would require overseas entities to: (i) provide event-driven verified updates to the Register of Overseas Entities within 14 days of becoming aware of the relevant change; and (ii) either to provide such updates or to confirm to Companies House that there has been no relevant change no more than 14 days prior to the acquisition or disposal of any qualifying estate. It was noted that on 28 June 2023 Companies House published guidance on how to file an update statement for an overseas entity and its beneficial owners or managing officers and on 21 June 2023 Companies House published guidance on how it will use its enforcement powers in relation to the Register of Overseas Entities. It was also noted that the Register of Overseas Entities (Penalties and Northern Ireland Dispositions) Regulations 2023 were made on 22 June 2023 and came into force on 23 June 2023. It was noted that, save for the commencement date, the regulations are in the same form as the draft regulations published in April, which were considered at the meeting of the Committee held in May.
- 3.7 *ECCT Bill: identity verification for shareholders*. The Chair reported that on 20 June 2023 the Government published a factsheet on shareholder identity verification that explains the Government's position for not proceeding with identity verification requirements for shareholders who are not PSCs as part of the reforms being brought about by the ECCT Bill. The Chair noted that the publication of this factsheet followed non-Government amendments to the ECCT Bill which were tabled that would have required shareholders holding more than 5% of any class of shares or more than 5% of the total voting rights to verify their identities.

- 3.8 *ECCT Bill: reform of identification doctrine.* The Chair reported that on 15 June 2023 the Government announced that it had tabled an amendment to the ECCT Bill to significantly reform the common law identification doctrine and allow for the attribution of criminal liability to corporates where senior managers commit certain economic crime offences. The Chair noted that the provisions would bring senior managers within the scope of who can be considered the 'directing mind and will' of a company in relation to economic crime and place the identification doctrine on a statutory footing. It was noted that a factsheet on the identification principle for economic crime offences has been added to the suite of factsheets on the ECCT Bill.
- 3.9 *Proposed equity listing rule reforms.* The Chair noted that on 28 June 2023 the Joint Prospectus and Listing Rules Working Group submitted a response to CP23/10 - Primary Markets Effectiveness Review: Feedback to DP22/2 and proposed equity listing rule reforms.
- 3.10 *HMRC consultation on modernising stamp taxes on shares.* The Chair reported that on 22 June 2023 the CLLS Revenue Law Committee, in consultation with the Committee, submitted a response to HMRC's consultation on proposals to modernise the stamp taxes on shares framework.

4. **Discussions**

- 4.1 *FCA/CLLS CLC Liaison Committee call.* Victoria Younghusband updated the Committee in respect of the call that was held on 7 June 2023.
- 4.2 *Reforms to the prospectus regime.* The Chair noted that the Joint Prospectus and Listing Rules Working Group is preparing a response to the questions raised in the FCA's engagement papers published in May. It was noted that the closing date for submitting a response is 29 September 2023. The Chair also noted that on 11 July 2023 HMT published a near-final version of the Public Offers and Admissions to Trading Regulations 2023 together with the accompanying Policy Note and that HMT has requested that any technical comments be provided to HMT by 21 August 2023.
- 4.3 *PCP 2023/1.* The Chair updated the Committee on the Joint CLLS/Law Society Takeovers Working Group's draft response to PCP 2023/1, which sets out proposed amendments to the Takeover Code in relation to Rule 21 (Restrictions on frustrating action) and other matters.
- 4.4 *Takeover Code – "Phase 2" conditions.* The Chair updated the Committee on discussions with the Takeover Panel on "Phase 2" conditions in Code governed takeover offers/schemes of arrangement.
- 4.5 *FRC consultation on UK Corporate Governance Code.* The Chair reported that on 24 May 2023 the FRC announced the publication of a public consultation on proposed revisions to the UK Corporate Governance Code. It was noted that, following the meeting of the Committee held in May, a joint working group of the Committee, the LSCLC and the CLLS ESG Committee, led by Allan Taylor, has been formed to respond to this consultation and that the closing date is 13 September 2023. It was further noted that the FRC press release states that the FRC will also review the existing guidance which supports the UK Corporate Governance Code i.e., Guidance on Audit

Committees, Guidance on Board effectiveness and Guidance on risk management, internal control and related financial and business reporting.

- 4.6 *DBT call for evidence on non-financial reporting.* The Chair reported that on 24 May 2023 DBT announced the publication of a call for evidence on the non-financial reporting requirements that UK companies need to comply with to produce their annual report. It was noted that, following the meeting of the Committee held in May, a joint working group of the Committee, the LSCLC and the CLLS ESG Committee, led by John Papanichola, Harriet Redwood and Julie Stanbrook, has been formed to respond to this call for evidence and the closing date is 16 August 2023. It was also noted that the Government intends to use the information collected to develop detailed proposals for public consultation next year. It was further noted that on 24 May the FRC announced that it welcomes this call for evidence and is supporting DBT in performing the review.
- 4.7 *NSI Act.* Liz Wall updated the Committee on a Government request to open a dialogue with the Law Society and the CLLS on how notifications under the National Security and Investment Act are working in practice and how best to avoid unnecessary notifications. It was noted that the Law Society and the CLLS are liaising with the Government with regard to a roundtable event to discuss the practicalities of the notification regime, which is being scheduled for 25 July 2023. It was also noted that on 11 July 2023 the Cabinet Office published the second Annual Report under the NSI Act, which covers the period from 1 April 2022 to 31 March 2023, along with supplementary background information.
- 4.8 *Digitisation Taskforce Interim Report.* The Chair reported that, following a recommendation made in the Secondary Capital Raising Review, the Digitisation Taskforce (chaired by Sir Douglas Flint) was launched by the Chancellor on 19 July 2022 to drive forward the modernisation of the UK's shareholding framework. The Chair further reported that on 10 July 2023 the Digitisation Taskforce published an interim report setting out a number of potential recommendations and questions for industry to consider. It was noted that Sir Douglas Flint will be conducting a period of open engagement over the next six months, ahead of delivering the final report to the Government and that the closing date for providing feedback on the interim report is 25 September 2023.

5. **Recent developments**

The Committee briefly discussed the cases in section 5.9. The Committee noted the following additional items in sections 5.1 to 5.8 which time did not allow them to consider in the meeting, other than the Chair briefly commented on item 5.2(b).

5.1 **Company law**

- (a) See minutes 3.2 and 3.7 above.

5.2 **Corporate governance**

- (a) *Revised CGI Code of Practice for board reviewers.* On 4 July 2023, the Chartered Governance Institute UK & Ireland announced the publication of a revised Code of Practice for board reviewers and its related Principles of Good

Practice for listed companies using external board reviewers and guidance for listed companies on reporting on board performance reviews.

- (b) *IA member guidance on effective requisitioning of shareholder resolutions.* On 30 June 2023, the IA published member guidance on effective requisitioning of shareholder resolutions.
- (c) *Research report on Audit Committee Chairs' views on, and approach to, ESG.* On 19 June 2023, the FRC announced the publication of a research report about Audit Committee Chairs' views on, and approach to, ESG activities and reporting. The report, commissioned by the FRC and conducted by independent research agency YouGov, involved qualitative interviews with 40 ACCs of Public Interest Entities.

5.3 Reporting and disclosure

- (a) *FRC Lab insight report on disclosure of dividends.* On 29 June 2023, FRC Lab published Insight report: Disclosure of dividends revisited, which updates the FRC Lab's project report on disclosure of dividends – policy and practice published in November 2015.
- (b) *ISSB global sustainability disclosure standards.* On 26 June 2023, the International Sustainability Standards Board (**ISSB**) announced the publication of its inaugural standards (IFRS S1 and IFRS S2) that create a common language for disclosing the effect of climate-related risks and opportunities on a company's prospects. IFRS S1 provides a set of disclosure requirements designed to enable companies to communicate to investors about the sustainability-related risks and opportunities they face over the short, medium and long term and IFRS S2 sets out specific climate-related disclosures and is designed to be used with IFRS S1. The standards fully incorporate the recommendations of the Task Force on Climate-related Financial Disclosures. A project summary document has been published which provides an overview of the requirements in the new standards. The new standards are effective for annual reporting periods beginning on or after 1 January 2024, but individual jurisdictions will decide whether companies will be required to comply with the standards. The Government has stated that it will consult on a framework to adopt and endorse the standards for the UK and the FCA also intends to update its reporting requirements for listed companies in line with the standards once they are endorsed for use in the UK.
- (c) *Consultation on draft delegated regulation on European sustainability reporting standards.* On 9 June 2023, the European Commission published a consultation on a draft delegated regulation that sets out the first set of European sustainability reporting standards (**ESRS**). The Corporate Sustainability Reporting Directive 2022 ((EU) 2022/2464) amended the Accounting Directive (2013/34/EU) to introduce requirements for in scope companies to report against the ESRS. This first delegated act sets out cross-cutting standards and standards for the disclosure of ESG information. The consultation closed on 7 July 2023.

5.4 **Equity capital markets**

- (a) *ESMA public statement on sustainability disclosure in prospectuses.* On 11 July 2023, ESMA announced the publication of a public statement on sustainability disclosures in prospectuses.
- (b) See minutes 3.9, 4.1 and 4.2 above.

5.5 **MAR**

- (a) *Insider dealing order supplementing the CJA 1993.* On 25 May 2023, the Insider Dealing (Securities and Regulated Markets) Order 2023 was made and published together with an explanatory memorandum. The order came into force on 15 June 2023. No substantive changes have been made to the draft order that was published on 17 April 2023, which was noted at the meeting of the Committee held in May. The order updates Schedule 2 of the Criminal Justice Act 1993 (**CJA 1993**) to broadly align the securities and markets on which the criminal offence of insider dealing can be committed under Part 5 of the CJA 1993 with those to which UK MAR applies.

5.6 **Auditing and accounting**

- (a) *FRC 2023 audit quality inspection and supervision reports.* On 6 July 2023, 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).

5.7 **Takeovers**

- (a) *Consequential amendments to practice statements.* On 22 May 2023, the Takeover Panel made some consequential amendments to Practice Statement No 20, Practice Statement No 22, Practice Statement No 28 and Practice Statement No 33 principally to update references to Takeover Code Rules and Notes on the Rules to reflect changes to the Code that took effect on 22 May.
- (b) See minutes 4.3 and 4.4 above.

5.8 **Miscellaneous**

- (a) *Consultation on the Digital Securities Sandbox.* On 11 July 2023, HMT announced the publication of its consultation on the first financial market infrastructure sandbox, referred to as the 'Digital Securities Sandbox', which will enable digital securities to be tested and ultimately adopted across financial markets. The consultation closes on 22 August 2023.
- (b) *Investment Research Review.* On 10 July 2023, HMT announced the publication of a report containing the outcomes of the UK Investment Research Review. The FCA also published a press release that states that it will carefully consider the report and its recommendations and start to engage immediately with market participants. The FCA also confirms that it intends to consult on an accelerated timetable on potential regulatory changes that could introduce more options on

how to pay for investment research and that it aims to make relevant rules in H1 2024.

- (c) *UK-EU Memorandum of Understanding on Financial Services Cooperation.* On 27 June 2023, the UK and EU signed the memorandum of understanding on regulatory cooperation in financial services. The MoU establishes an ongoing forum (the Joint EU-UK Financial Regulatory Forum) for HM Treasury and the European Commission to discuss regulatory matters of mutual interest.
- (d) *Research on impact of proxy advisers and ESG ratings agencies on companies and investors.* On 15 June 2023, the FRC announced the publication of detailed research into the impact of proxy voting advisors and ESG ratings agencies on actions and reporting by FTSE350 companies and investor voting decisions. The research was conducted by Durham University and Morrow Sodali.
- (e) *European Commission call for evidence on screening of foreign direct investment.* On 14 June 2023, the European Commission published a call for evidence on the current EU framework for the screening of foreign direct investment (FDI) into the EU (Regulation (EU) 2019/452). The aim of this initiative is to evaluate and revise this Regulation to ensure that the framework remains fit for purpose in a changing global security context. The call for evidence closed on 12 July 2023.
- (f) *European Commission measures on improving sustainable finance framework.* On 13 June 2023, the European Commission announced the publication of a new package of measures to build on and strengthen the foundations of the EU sustainable finance framework. The aim is to ensure that the framework continues to support companies and the financial sector, while encouraging the private funding of transition projects and technologies as part of the transition to a climate-neutral and sustainable economy by 2050. Key measures in the package include: (i) a new set of EU Taxonomy criteria for economic activities making a substantial contribution to one or more of the non-climate environmental objectives; and (ii) the proposal for a regulation of ESG ratings providers to improve the reliability and transparency of ESG ratings activities, which will require that ESG rating providers offering services to investors and companies in the EU be authorised and supervised by ESMA.
- (g) *Regulation of cryptoassets financial promotions.* On 8 June 2023, the FCA published a press release announcing new rules for marketing cryptoassets and its policy statement on financial promotion rules for cryptoassets (PS23/6), which includes near final Handbook rules (see also the FCA PS23/6 webpage). New final rules have been published to give firms marketing cryptoassets to UK consumers as much time as possible to prepare for the new regime and the FCA expects that the rules will have effect from 8 October 2023. The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023 was made on 7 June 2023, which brings promotions of qualifying cryptoassets within scope of the financial promotion regime by amending the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005. The FCA has also published a guidance consultation on guidance on cryptoasset financial promotions (GC23/1). The consultation closes on 10 August 2023 and the FCA intends to publish final guidance in autumn 2023.

- (h) *Digital Markets, Competition and Consumers Bill*. On 24 May 2023, the House of Lords Communications and Digital Committee announced the publication of a call for evidence on the Digital Markets, Competition and Consumers Bill. The Communications and Digital Committee is examining the extent to which the proposed legislation will deliver on the Government's objectives to improve consumer protection, regulate digital markets in a new way and strengthen competition enforcement powers, with a focus on Parts 1 and 2 of the Bill which deal with digital markets and competition. The closing date for written contributions was 12 June 2023. Separately, on 18 May 2023, the House of Commons Public Bill Committee published a call for written evidence on the Bill.

5.9 Cases

- (a) *PA (GI) Limited v Cigna Insurance Services (Europe) Limited [2023] EWHC 1360 (Comm)*. The High Court found that an indemnity in a business transfer agreement under which the buyer assumed liability for and indemnified the seller against all liabilities of the transferring business covered liabilities in respect of historic PPI mis-selling by the seller's own agent (other than where such liabilities arose as a result of fraud or dishonesty on the part of the agent). Whilst the court observed the need from previous authority to bear in mind that so far as negligence is concerned a party is "*unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words*", it also noted case law that there is no need for express words to have been used to exclude negligence. Nevertheless, despite the buyer's citation of the principle approved by the Court of Appeal that it is "*inherently improbable that one party should agree to assume responsibility for the consequences of the other's negligence*", the court found on the facts that it was unlikely that negligence was to be excluded from the scope of the indemnity given that (amongst other things) the transaction was structured as the sale of a business where the seller transferred all liabilities of the business unless specifically excluded, the agreement included warranties elsewhere indicating that the parties were aware of the mis-selling risk and express exclusions for mis-selling and liability for negligence by the seller (and its agents) were included in related agreements.
- (b) *Finsbury Food Group Plc v Axis Corporate Capital UK Limited and others [2023] EWHC 1559 (Comm)*. The High Court observed that a MAC warranty that "*since the Accounts Date...there has been no material adverse change in the trading position of any of the Group Companies or their financial position, prospects or turnover and no Group Company has had its business, profitability or prospects adversely affected by the loss of any customer representing more than 20% of the total sales of the Group Companies*" was "*not well drafted*" and held that it should be construed as two separate warranties, with the 20% loss of sales threshold in the "second" warranty not to be used to define the material adverse change necessary for the purposes of the "first" warranty. Instead, but without detailed discussion of his rationale, the judge concluded that, on the facts, a material adverse change needed to exceed 10% of the total group sales of the target for there to be a breach of the "first" warranty, this being "*to [his] mind a sufficiently significant or substantial change over the relevant period of 9 months*". In addition, the court found that price reductions **agreed** before but

not **implemented** until after the Accounts Date did not breach a warranty that "*since the Accounts Date...no Group Company has offered or agreed to offer ongoing price reductions or discounts or allowances on sales of goods*", construing the warranty to be directed at the date upon which the price reduction was offered or agreed to be offered, and not the date upon which it actually became effective.

29 August 2023