# CP08/21 - Consultation on the structure of the Listing Regime

## Joint response of Law Society Company Law Committee and City of London Law Society Company Law Committee

This memorandum sets out the response of a joint working party of the Law Society's Standing Committee on Company Law and the City of London Law Society's Company Law Committee.

The Law Society is the representative body for over 100,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators, governments and others.

The City of London Law Society (CLLS) represents over 13,000 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 comments on issues of importance to its members through its 17 specialist committees. The Company Law Committee is made up of solicitors who are expert in their field.

## General issues

We note the statement in paragraph 2.18 of the feedback statement that the FSA believes "that any additional regulatory standards on GDRs over and above the EU minimum standards should be applied on a pan-European basis and driven by the EU Commission or the Committee of European Securities Regulators (CESR). The EU Commission is currently reviewing the Prospectus Directive and we aim to engage with that process to ensure that the regulatory requirements for GDRs reflect their growing use as substitutes for equity investments."

We are concerned at the implication that GDRs should be treated as equity. Imposing a higher degree of disclosure and due diligence on GDRs could, instead of ensuring GDRs are listed with better disclosure, deter emerging market GDR issuers from coming to EU markets altogether. This would mean that investors who wanted exposure to the underlying shares would either have to buy the shares themselves in the local market; or the GDR would be packaged elsewhere, outside the EU (i.e. rather than giving EU investors more protection, it would remove the EU protections they currently enjoy under EU law).

GDRs are traded on a separate order book on the London Stock Exchange. We believe that investors do not invest in GDRs thinking that they are primary listed equity, but rather that they are locally listed equity with a GDR "wrapper" that is convenient for currency and settlement reasons (among other things). If this is not clear to the market, then it could be made clearer through the same education and labelling steps that the FSA is proposing in connection with the other changes proposed in the consultation paper.

Other steps to ensure that overseas companies' shares in GDR form are not confused with directly listed shares and, for example, mis-sold to retail investors, would include appropriate provisions in the Conduct of Business Rules. We would also not object to a requirement for additional risk warnings on GDR prospectuses to make clear that the level of disclosure is not the same as for shares.

## Responses to consultation questions

**Q1: Do you agree with the segmentation and labelling of the Listing Regime as described above?**

Yes

**Q2: Do you agree with the labels 'premium' and 'Standard' labels? If not, please provide suggestions for alternative labels.**

We are concerned that the label "premium" listing could too easily be transferred in the public's perception from the listing status to the company itself. The term "premium company" could be seen as implying a guarantee of financial standing whilst "standard" implies a lower quality. Terms such as "full" and "minimum" listing would be more reflective of the distinction between companies that have opted to comply with a set of additional rules, and those that have not.

**Q3: Do you consider that the proposed segmentation of the Listing Regime provides sufficient clarity?**

We think the defined terms "standard listing (commercial company)" and "premium listing (commercial company)" could be confusing, as a commercial company with a premium listing of shares could have a standard listing of its debt securities. It would be more transparent to use the terms "standard listing of equity securities and "premium listing of equity securities".

In the draft rules, the second sentence of LR 1.5.1G should read "Any listing of securities other than equity securities will be a standard listing", rather than "Any other listing will be a standard listing".

It would be more precise to add "of commercial companies" at the end of LR 1.5.1(5).

**Q4: Do you agree with the introduction of LR1.5.3R which will prohibit the misrepresentation of the type of listing a company has?**

The new LR1.5.3R does not address the issue that companies which simply describe themselves as "London listed" might be perceived as having a premium share listing when in fact they only have a standard share listing. However, it would perhaps be over-burdensome to prevent companies from using this kind of shorthand in all circumstances (eg when a finance director is in conversation with potential investors). It may therefore be better to focus on information which is published formally by the company via the RIS, in which case the existing rules which prohibit the publication of misleading information via an RIS would probably suffice.

If the rule is retained, since issuers may have both premium and standard listings (if they have both shares and debt securities listed) the draft rule would be better if the opening phrase read: "An issuer that does not have a premium listing must not …"

**Q5: Do you agree with the deletion of old LR9.8.7R and the introduction of the new LR9.8.7R?**

The corporate governance regime in the UK is more than the Combined Code: the operation of the Combined Code and the comply or explain regime is underpinned by company law, including the rights of shareholders to remove directors and the basic duties of directors. Correspondingly, an overseas company's corporate governance will depend not merely on rules or guidance equivalent to the Combined Code but also on the extent of the rights of shareholders and the nature of directors' duties. Therefore, to achieve what we think is its intended effect, LR9.8.7R would need to require a comparison between the company's home corporate governance regime in this wide sense, and corporate governance in the UK under both company law and the Combined Code. However, we would be reluctant to see a rule that encouraged lengthy descriptions of all relevant legal requirements, particularly given the international nature of investors in London-listed companies, which means that they would not all necessarily be familiar with the English legal system as a point of comparison. A different point of comparison that might be useful would be the Shareholder Rights Directive, which contains provisions designed to ensure that shareholders are able to exercise their voting rights at shareholder meetings.

**Q6: Do you agree with introduction of LR9.8.7BR?**

Yes.

**Q7: Do you agree with the deletion of LR9.3.12(4)R and the introduction of LR9.3.13R and LR9.8.7AR which require Primary Listed overseas companies to disclose in their annual report whether or not they offer pre-emption rights to their shareholders?**

Yes, but we think that if companies elect to comply with pre-emption rights without embedding them in their constitution (in which case shareholder approval would presumably be required for a change to the constitution), there should be some mechanism to prevent them unilaterally opting out. For example, a period of notice or shareholder approval should be a pre-condition to the Company electing no longer to observe pre-emption rights.

**Q8: Do you agree with the amendment to make the directive-minimum listing regime in LR 14 to UK companies?**

We agree the flexibility to seek a directive-minimum share listing should be available to UK companies.

It would be helpful if the attitude of institutional investors and the FTSE Indices Committee to such listings could be publicised.

**Q9: Do you agree that we should extend DTR7.2 to all Listed companies with the listing of equity securities and GDRs and the amendments to LR9 and LR14?**

Yes.

**Q10: Do you agree that the types of companies identified above should be able to migrate without a cancellation of their listing?**

Yes.

**Q11: Do you agree with the provisions of LR5.A and our approach for all companies migrating from one segment to another? Please state which part you do not agree with and suggest an alternative approach.**

We think that a movement from a full listing to a directive-minimum listing should require the sanction of shareholder approval, although this does not necessarily require a special, as opposed to an ordinary resolution. We agree that a change of status from an investment company to a commercial company should require a special resolution as this potentially involves a fundamental change in the nature of the business.

LR 5A.13G states that the FSA will not "generally" reassess eligibility requirements such as working capital on a migration. It would be helpful if guidance could be given on the circumstances in which it would expect to revisit these requirements, otherwise there will be unacceptable uncertainty as to when these requirements will be applied on a migration.

**Q12: Do you agree with the amendments to LR8 setting out the requirements for the appointment and obligations of a sponsor with respect to migration?**

Yes.

**Q13: Do you agree that we should also require prior shareholder approval for a commercial company that is wishing to migrate from a Premium to a Standard Listing?**

Yes (see answer to 11 above). Failing shareholder approval, we question whether a notice period of 20 days is sufficient - a middle way would be not to require shareholder approval but to require a longer notice period, say, 3 months.

**Q14: Do you consider that we should also require prior shareholder approval for a cancellation of securities and delete LR5.2.6R?**

Yes.

**Q15: Do you agree with our proposals for migration as we have set out in the above paragraphs?**

Yes.

## Additional drafting points

We have the following minor drafting comments on the proposed amendments to the Listing Rules set out in CP08/21:

- **Definition of "primary listed issuer"**: This definition should also be deleted from the glossary and Appendix 1 to the Listing Rules.
- **LR 1.5.1G(3)**: For consistency with the existing rules, the reference to "open-ended investment funds" should be changed to "open-ended investment companies".
- **LR 5.5.3G**: The references to "secondary listed issuer" need to be updated.
- **LR 5A.10R(1)**: The reference "*issuers name*" should be changed to "*issuer's name*".
- **LR 9.3.14G**: The reference to "annual report" should be changed to "annual report and accounts".
- **LR Appendix 1A**: Again, for consistency, the reference to "closed ended investment companies" in the Listing Roadmap should be changed to "closed ended investment funds". It may be helpful to explain in a note what types of securities are covered by "Misc Securities" in the Listings Roadmap.

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