The City of London Law Society

The Law Society

HM Treasury: Power to block listings on national security grounds: Economic Crime Plan – Action 19

24 August 2021

1. INTRODUCTION

1.1 The views set out in this response have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).

1.2 The CLLS represents approximately 17,000 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, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

1.3 The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

1.4 The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to equity capital markets.

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2. OVERVIEW

We are supportive of the Government's objective to help maintain the UK's status as a leading international destination for listings and understand the importance of the Government having appropriate powers to protect national security. Depending on the nature of the power in question, we would not be opposed to the Government enhancing its capabilities in this regard via the introduction of the proposed power to block listings on national security grounds. It is difficult, however, for the Committees to comment definitively on the proposed power at this stage in the absence of further detail, including in respect of the precise rationale for the power, though we appreciate that additional technical consultations will be forthcoming as the proposal regarding the power is developed. The responses below therefore remain subject to further clarity on the proposed power.

3. OVERARCHING COMMENTS

3.1 We believe it is important to note that this is not an unregulated area. In addition to the existing legislative tools which are targeted at safeguarding national security, including under the Sanctions and Anti-Money Laundering Act, significant review and verification procedures are already implemented by a range of entities and regulated advisers as part of the listing and admission process, including the FCA, sponsors and clearing houses. In our opinion, the current framework functions well and, in view of the existence of these safeguards, it is difficult to determine whether this proposed power can, in the circumstances envisaged, genuinely function as an effective trigger for governmental intervention. We note that the EN+ situation cited in the Consultation Paper did not, in practice, give rise to national security concerns and equally it is not clear that the illustrative example set out in 'Box 2' in the Consultation Paper would fall within the regime outlined in the paper.

3.2 Further, it is important that consideration be given to, and clarity provided on, how the proposed governmental power will interact with existing legislative and regulatory frameworks, including the National Security and Investment Act 2021 (the "NSIA"), and how the roles of HM Treasury, the

Investment and Security Unit and the FCA will be coordinated given the risk of overlap and conflicting outcomes with respect to the processes administered by these entities. Please see the response to question (VI) below for further detail.

3.3 Finally, if the introduction of this power is ultimately considered to be necessary, it is imperative that it does not produce a disproportionately burdensome regime for the large majority of companies for whom such concerns are not relevant. Whilst the Committees acknowledge that the power is intended to complement the recommendations of Lord Hill's UK Listings Review Report (the "Report"), it will be important to ensure that the introduction of an additional layer of regulation does not run contrary to the principles set out in the Report as to the attractiveness of London as an international listing venue. Please see the response to question (VI) below for further detail.

4. **QUESTIONS**

(I) What are your views on the Government's intended scope of the listings blocking power as outlined in point 3.6?

As set out at paragraph 2 above, the view of the Committees is that it is difficult to answer this question definitively at this stage without further detail on precisely what the proposed power is intended to achieve. Subject to this, however, we believe that, as a starting point, the proposed scope of the power, in terms of the types of securities, the forms of listing and admission processes and the UK markets which fall within it, is appropriate to address the perceived concerns.

(II) What are your views on the exclusion of debt securities from the scope of the blocking power?

As noted in our response to question (I) above, we are of the view that the proposed power should be introduced on the basis set forth in the Consultation Paper. Whilst some members of the Committees believe that, in order to be consistent with the underlying principle, thought should be given to including debt securities within the scope of the power if the intention is to prevent the facilities of the London markets being used as a channel for funds to be made available for purposes that are detrimental to national security (as suggested by the illustrative scenario), the view of the majority is that the scope should be kept as intended. The majority view is that it would be disproportionate and unduly detrimental to the UK's attractiveness as a venue for listing debt securities if the regime were to be extended to cover debt securities.

(III) Do you agree with the list of disclosures outlined? Do you have any other comment about the disclosures outlined?

Whilst we would expect the majority of the disclosures outlined to be included in an admission document/prospectus, such that they would not impose onerous disclosure obligations on prospective issuers, we would note the following:

(a) Timing: it would be helpful if further clarity were to be provided in respect of the point in time at which the disclosures are directed. Our assumption is that the intention is to describe the position as it is envisaged at the point of listing rather than describe the position at the time the disclosures are initially submitted, which may be substantially different. However, please see paragraph (c) below with respect to the approach to 'major shareholders'.

(b) The offer/use of proceeds: as drafted, it is not clear whether the disclosure requirement relating to the estimated net amount of the proceeds of the offer (broken into each principal intended use) is only intended to cover primary proceeds raised by the issuer or whether it is also intended to capture secondary sell down proceeds (i.e. proceeds received by existing shareholders who sell shares in the IPO). We assume that the intention is for this requirement to apply exclusively to primary proceeds, given that the use of proceeds in the context of a sell down is not typically disclosed and the issuer would not generally be in a

position to provide this information on behalf of selling shareholders (other than in respect of directors). It would, however, be helpful if clarity were to be provided on (i) whether it is intended that the use of proceeds disclosure requirement applies only to primary proceeds raised by the issuer (to the exclusion of any selling shareholders) and (ii) in the event that it is in fact intended to capture secondary sell down proceeds as well, what extent of diligence a company is expected to undertake to establish the use of proceeds of its selling shareholders, as this could potentially prove to be a burdensome exercise, depending on the issuer's shareholding structure, and the intended or actual use of any such proceeds could change without the company being aware of this.

(c) Major shareholders: it would be helpful if further clarity were to be provided as to the meaning of 'major shareholders'. We assume that this refers to shareholders in the company pre-listing (some of whom may, of course, continue to hold shares post-listing) rather than those that may become shareholders through the IPO process. We do not believe it would be practicable or proportionate for this to include those that become shareholders through the IPO as that information may not be known until very close to the time the listing occurs – possibly only the day before – and could change as a result of trading in the market immediately following the listing becoming effective. Further, as drafted, it is unclear which threshold applies in respect of the notifiable interest disclosure requirement. Whilst the Committees note that once a company's shares are admitted to trading on the Main Market or AIM, generally, interests of three per cent and above must be notified under chapter 5 of the FCA's Disclosure Guidance and Transparency Rules or Rule 17 of the AIM Rules for Companies, these rules do not apply to companies before they are listed. We would suggest that the relevant level of interest should be set by reference to the PSC regime under the Companies Act 2006 (25 per cent) in view of its application to unlisted companies and its alignment with the percentage threshold which triggers a mandatory notification under the NSIA. We would therefore welcome consistency and clarity in respect of the notifiable interest threshold. In the event that a lower percentage threshold were to be introduced, our concern is that this could potentially be unnecessarily burdensome for issuers.

In addition to the notifiable interest disclosure requirement, as drafted, an issuer must disclose, to the extent it knows such information (i) details of any official public incrimination and/or sanctions imposed by statutory or regulatory authorities involving persons who have a notifiable interest and (ii) whether the issuer is directly or indirectly owned or controlled and by whom, a description of the nature of such control and the measures put in place to ensure that such control is not abused. As set out at paragraph (b) above, further clarity is required on the extent of diligence a company is expected to undertake to satisfy these disclosure requirements. We would also welcome clarity on (i) the meaning of 'involving' in the context of the official public incrimination and/or sanctions disclosure requirement given the potentially overly-broad application of this requirement and (ii) what the requirement in respect of 'measures put in place to ensure that such control is not abused' is intended to catch.

(d) Liability: linked to the diligence issue outlined above, we would welcome further detail on the form of sanctions envisaged in the event of inaccurate or misleading disclosure and/or any proposed 'safe harbour' regime.

(IV) In your view, will the disclosures outlined in Chart 4.A add a material burden to the listing or admission process?

As noted above, the view of the Committees is that some of the disclosures have the potential to be burdensome, for example, the notifiable interest disclosure requirement, but we cannot comment definitively without further detail. The suggestions and requested clarifications that we have set out above are intended to ensure that the disclosures do not add a material burden and do not, as a result, detract unduly from the attractiveness of the UK as a listing venue.

(V) Where a prospectus is not produced, what burdens, if any, do you anticipate the disclosures outlined in Chart 4.A creating for prospective issuers and, in particular, SMEs?

Please see our responses to questions (III) and (IV) above. We do not believe that the proposed disclosures will impact prospective issuers in a materially different way depending on the issuer's listing venue.

(VI) At what stage in the listing process would you consider most appropriate for these disclosures to be submitted?

Depending on what form the review process ultimately takes, including the length of Government response times to the provision of information, the view of the Committees is that, subject to the availability of a facility to engage with Government to obtain early guidance via a pre-clearance process, in line with other regulatory processes (such as the CMA), the disclosures should be contained in the first submission draft of the public document, accompanied by a covering letter indicating where the requisite information is contained in the document. In our judgement, however, it will be imperative for investment banks acting on the listing, as well as issuers, that clearance be confirmed definitively (or for any period for Government intervention to have expired) prior to the commencement of any formal marketing of the issue in the same way that existing verification processes (such as KYC/AML) are completed satisfactorily by investment banks prior to any engagement with potential investors.

Further, our view is that it is critical that any review process is prescriptive, including with respect to the expected timeframe from submission of the information to clearance being given. It would be helpful in this regard if an indicative timetable were to be made available allowing issuers and their advisers to factor this additional process into the overall transaction timetable.

Whilst the Committees anticipate that, for the majority of prospective issuers, the proposed process will largely be a compliance process to be followed, in the cases where an issuer is concerned that the Government might use the power to block a listing on national security grounds, the issuer will likely want to engage with the Government before undertaking any significant work towards obtaining a listing. As noted above, we would therefore encourage the Government to introduce a facility that enables an issuer to obtain early guidance on whether the Government expects the power to be exercised and/or the steps the issuer would need to take to avoid the power being exercised.

As set out above, the Committees believe that it is important that consideration be given to the envisaged level of interaction between this review process and the eligibility review process such that the two processes are fully coordinated, particularly in view of the potential for conflicting outcomes on the part of the FCA, administering the eligibility review process, and HM Treasury, administering the disclosure process.

Ultimately, certainty is key for an issuer and the investment banks involved in the listing and, in the event that this review process lacks clarity once implemented or if governmental clearance is provided on insufficiently certain terms, our concern is that these factors, combined with the additional listing hurdle created by the review process, might result in issuers choosing to list in other jurisdictions, which is in opposition to the general ethos of the Report.

(VII) What are your views on the pre-clearance process proposed in point 4.5?

Please see our response to question (VI) above.

(VIII) What are your views on the likelihood of companies choosing a pre-clearance process when they would otherwise be able to make the disclosures outlined in Chart 4.A alongside the prospectus?

Please see our response to question (VI) above.