RESPONSE OF COMPANY LAW COMMITTEES OF THE CITY OF LONDON LAW SOCIETY AND THE LAW SOCIETY TO BEIS, HMRC AND HM TREASURY CONSULTATION ON "CORPORATE RE-DOMICILIATION"

7 January 2022

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Introduction

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 (the "**CLLS"**) and the Law Society of England and Wales (the "**Law Society**") (together the "**Committees**").

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, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

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.

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 company law and mergers and acquisitions.

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Summary

The Committees support the introduction of a UK corporate inward and outward re-domiciliation regime, as they consider that it will increase the attractiveness of the UK as a jurisdiction in which to incorporate a company and in which to invest. Given the number of jurisdictions that permit re-domiciliation already, the Committees believe that such a regime would help the UK to remain competitive. At the same time, the Committees see re-domiciliation as part of an overall “package” which aims to make the UK a more attractive place in which to do business. In this respect, the commercial, regulatory and tax environment in the UK, and the stability of that environment, will be key considerations in a company’s decision to re-domicile.

To ensure that the UK remains an attractive destination, the Committees believe that both inward and outward re-domiciliation should be permitted, as discussed further in response to Question 29 below. There is concern that some companies may not be prepared to re-domicile to the UK if they cannot subsequently leave if their circumstances change. In addition, where the UK needs to engage with other jurisdictions to ensure that re-domiciliation into the UK functions correctly, it may be in a better starting position if it is prepared to permit outward re-domiciliation to that jurisdiction. Finally, permitting only inbound re-domiciliation seems unnecessarily restrictive in a jurisdiction that is generally considered open to cross-border investment (both inwards and outwards). Other jurisdictions allow both inbound and outbound re-domiciliation and may be seen as being more attractive than the UK if the UK does not allow this. The Committees further consider that providing for the possibility of outward re-domiciliation may help to demonstrate confidence in the attractiveness of the UK as a group of jurisdictions in which companies should wish to be incorporated and more generally as a business-friendly environment.

The Committees have commented on the suggested criteria for inward re-domiciliation. As a general principle, the Committees believe that questions of shareholder, creditor and stakeholder protection are for the departing jurisdiction to consider and the UK should not purport to impose its own regime in these areas. This is because this could conflict with the requirements of the departing jurisdiction, causing problems and, even if not incompatible, could cause excessive friction on an inward re-domiciliation transaction. An inward re-domiciliation is in many ways analogous to a new incorporation, and given that there are relatively few hurdles to overcome to incorporate a new company in the UK, caution should be exercised in setting additional criteria for re-domiciliations.

The Committees note that the re-domiciliation regime proposed will require Companies House, and potentially other authorities, to play a key role in the process, in confirming satisfaction of the entry and/or exit criteria and in ensuring the process is properly co-ordinated. From a practical perspective, the Committees believe that a well-resourced team at Companies House, familiar with the re-domiciliation process and able to communicate its requirements and understand those of other relevant competent authorities, will be critical to the success and smooth operation of the new regime.

During the Committees’ discussions, a number of members raised the relationship between the proposed new corporate re-domiciliation regime and the European Union cross-border merger and Societas Europaea (SE) regimes that existed in the UK prior to Brexit. We have set out some further thoughts below on whether the Government ought to consider introducing effective domestic and cross-border mergers as additional tools for UK-incorporated companies.

The consultation is agnostic as to the kinds of entity that would be able to re-domicile into the UK. In formulating their response, the Committees have focused primarily on entities that, once re-domiciled into the UK, will be registered under the Companies Acts. For this reason, our response places emphasis on (for example) the role of Companies House in the re-domiciliation procedure. However, the Government will need to decide how widely any new regime should apply. For example, there may be value in applying a new regime from the outset, or extending the regime in due course, to entities looking to re-domicile into the UK as a limited liability partnership (LLP), limited partnership (LP), open-ended investment company (OEIC), protected cell company (PCC) or charitable incorporated organisation (CIO).

Our responses below relate to the questions set out in Chapters 1 - 4 of the Consultation Paper and not to those on tax issues set out in Chapter 5. However, a number of points raised in the two separate parts of the Consultation should not be considered in isolation (for example, points on economic substance requirements). In this regard, we have received some contributions to our response from the City of London Law Society Revenue Law Committee, which has also been considering the Consultation Paper.

We further note that we have had the opportunity to review both the City of London Law Society Revenue Law Committee's and the Law Society's responses to Chapter 5 of the Consultation Paper and generally agree with the comments set out therein.

In addition, we have had the opportunity to review the City of London Law Society Insolvency Law Committee's response to the Consultation Paper and generally agree with the comments set out therein, save that we are proposing a greater degree of flexibility in respect of inward re-domiciliations of insolvent companies (see further our response to Question 18 below).

Answers to Consultation questions

Rationale for re-domiciliation: Advantages for company

1. What do you see as the advantages of re-domiciliation compared to existing routes to relocate a company to the UK, and how material are they?

The current alternative routes to re-domiciliation in the UK are cumbersome and do not enable a company to retain the same legal identity.

In many cases, new UK holding company structures need to be put in place, which create additional unnecessary layers within corporate groups, increase costs and introduce administrative and regulatory inefficiencies. New holding companies are also more likely to trigger "change of control" clauses in corporate documents, such as contracts, leases and licences, which then require amendment or waiver. The Committees believe that, where there is a desire to move to the UK, the need to negotiate consents or amendments to corporate documents with counterparties, regulators and others may deter overseas companies from relocating.

Within corporate groups, certain features are normally appropriate at the level of the ultimate holding company only, including the composition of a "strategic" board of directors with a diversity of roles and experience (compared to more "administrative" boards at subsidiary level), parent company guarantees (including guarantees of corporate bonds) and the listing of shares. However, the current need to establish a new holding company in order to achieve a re-domiciliation means that these structures need to be transitioned within the group or duplicated at the new holding company level. A corporate re-domiciliation regime would avoid these obstacles and enable existing structures to remain in place. The Committees believe that this would be welcomed by companies, particularly listed companies, looking to transfer their incorporation to the UK.

The other current alternative route is to establish a new UK company and transfer the business of the existing overseas company to it. Prior to Brexit, UK and EEA companies could achieve this through the EU cross-border mergers regime. However, following Brexit, this option is no longer open to companies looking to move from the EEA to the UK, and it has never been available for companies looking to move from outside the EEA to the UK. As a result, companies would now need to pursue a traditional "business sale". However, this is normally complicated, time-consuming and expensive. In some cases, it may be impossible if consents are required to transfer assets and obligations but cannot be obtained. It is far more attractive to be able to move the company's place of incorporation to the UK, as this is more likely to preserve the company's existing relationships and may reduce or avoid the need to reapply for licences and regulatory approvals.

Rationale for re-domiciliation: Demand

2. From what types of companies, and from which sectors, is there likely to be the most demand for re-domiciliation to the UK, and why?

The Committees consider that demand for inward re-domiciliation is likely to arise for a number of reasons and from a number of sectors. These include the following:

- Companies may want to align their place of incorporation with their tax residency and/or the place where they are subject to tax. In recent years, a significant number of entities have chosen to be UK tax resident or have become subject to tax in the UK. This may have been driven, in some cases, by the competitive tax regime offered by the UK in certain areas (e.g. in the case of IP-rich and certain investment companies), or by changes to tax rules and in other cases by a desire to avoid tax residence in what is seen as a "tax haven". Where such UK tax-resident entities are not UK incorporated, allowing them to align their jurisdiction of incorporation with their tax residence may reduce administrative inconvenience and also, potentially, remove dual residence concerns. A desire to locate in the UK may increase in line with any changes to UK tax policies or international treaty arrangements which make the UK relatively more attractive for companies (as may be the case, for example, in the case of real estate investment trusts (REITs) and other asset management-focused entities). However, it is noted that, from a tax perspective, stamp duty on the transfer of shares (and related rights) currently remains a disincentive to the decision to incorporate a company in the UK.

- Regulated entities may want to achieve regulatory consolidation in the UK and change the lead regulator for the group to one in the UK.

- Companies operating within various sectors may want to re-domicile to the UK as they favour the broader legal framework of the UK over that of the jurisdiction in which they are currently incorporated, including aspects such as solvency law, dispute resolution and company law.

- Some companies may want to re-domicile to the UK from countries now "blacklisted" for tax or anti-money laundering or countering terrorist financing purposes or from countries experiencing political upheaval or threats to the stability of their legal system.

- Re-domiciliation to the UK would permit FTSE Index inclusion for some, where this is currently not practicable. For example, currently, for securities to be eligible for inclusion in the FTSE UK Index series, they must generally have a minimum free float of greater than 50% if the issuing company is not incorporated in the UK, but only 25% if it is UK-incorporated.

- Commercial companies with a branch or subsidiary in the UK that has become increasingly significant to the company's business over time may want to re-domicile to the UK to align the company's seat of incorporation with the place of most commercial significance to them.

- Special Purpose Acquisition Companies (SPACs) may want to re-domicile from the jurisdiction of their listing if they make an acquisition of a business with a significant UK nexus.

- Companies based overseas may want to re-domicile for commercial and operational reasons. This might include situations where businesses perceive there to be a benefit in using a UK incorporated company in order to bid for certain contracts under formal procurement processes.

- Historically, a number of pharmaceutical companies have taken advantage of re-domiciliation regimes overseas, so companies in that sector may look to re-domicile to the UK and align their place of incorporation with their business if such a regime is introduced here.

- Re-domiciliation might be desired in the financial services sector, for example, to offer consumers the greater protection of the UK FSCS scheme compared to the compensation scheme in a departing jurisdiction, or to take advantage of the UK's more sophisticated regulators (for example, Eastern European e-money providers looking to become full service banks).

- Banks subject to the Capital Requirements Regulation may look to re-domicile certain of their subsidiaries in the UK to avoid the need to include those entities in their group capital calculations.

- As the UK negotiates more bilateral treaties, companies may wish to move to the UK to take advantage of any favourable terms in those treaties.

- As the state aid regime diverges between the UK and the EU, some companies may look to move to the UK to access state aid and/or a better position for government contracts.

The Committees also consider that the availability of re-domiciliation as a tool to enable overseas companies to relocate to the UK supports the Government's review of the UK funds industry launched in early 2021. One of the purposes of that review was to consider reforms that could potentially enhance the UK's attractiveness as a location for asset management and for funds in particular, and the Committees do believe that the funds sector is one that will be particularly interested in re-domiciliation. However, under the current proposals, re-domiciliation would only be available to funds established as closed-ended investment companies. We would encourage BEIS, HMRC and HM Treasury to work with the FCA on enabling the establishment in the UK of a wider range of funds, including unregulated open-ended investment companies, umbrella funds, protected cell companies and incorporated limited partnerships.

3. What level of demand might the UK see from firms seeking to re-domicile?

While the Committees do not anticipate high numbers of applications to re-domicile to the UK, they consider that the UK is at a competitive disadvantage now in not having such a regime in place. It detracts from the image of the UK as having a company law regime that is flexible and facilitative of international business transactions, and as an attractive place to establish a business.

As a result, introducing corporate re-domiciliation here will be an important additional tool available to attract certain companies to the UK.

4. From what jurisdictions would companies be most likely to re-domicile to the UK?

The Committees anticipate that the bulk of re-domiciliations into the UK initially will be from common law jurisdictions that have a historic nexus with the UK and already permit re-domiciliation themselves. Examples are the Cayman Islands, the British Virgin Islands, Jersey Guernsey, the Isle of Man and perhaps Luxembourg (in light of policy and treaty changes which may be expected to impact the asset management and real estate investment sectors). Ireland, Cyprus, Gibraltar, Hong Kong, Delaware and Panama are examples of other jurisdictions from which companies may look to re-domicile. In each case, this will depend on whether the laws of the jurisdiction in which the overseas company is registered permit outward re-domiciliation to the UK.

Rationale for re-domiciliation: International precedents and trends

*5. **Are there aspects to other jurisdictions' re-domiciliation regimes which the UK should seek to replicate or avoid?***

As a general principle, the Committees believe that, in order for any corporate re-domiciliation regime to be used by businesses, it must be as simple as possible. Any conditions for qualification for a re-domiciliation must be objective, and businesses must be able to predict outcomes with a high degree of certainty.

This raises the question of what evidence the UK should require that the company wanting to come to the UK has met the requirements of the jurisdiction it is leaving. The most straightforward evidence would be a confirmation from the competent authority in the departing jurisdiction that the departing conditions have been satisfied, but some jurisdictions may not necessarily have a single authority (or any authority) that will certify this. Accordingly, the UK system will need to build in some flexibility to accommodate this (e.g. Companies House may need to get comfortable with a legal opinion/directors' certificate on compliance with the departing jurisdiction's requirements in the absence of confirmation from the competent authority).

Some regimes require a solvency certificate or statement in addition to a requirement that the company is not in any form of insolvency or restructuring proceedings. If this is to be a requirement under the UK's re-domiciliation regime, questions arise as to the content of the certificate or statement and who should sign it. See further the response to Question 18.

Evidence that the company has met (and will, when registered, meet) the requirements to be a company of the sort it wants to be in the UK should be provided. For example, if the company will be a public company, the Committees suggest this should include confirmation about the value of the company's net assets, as well as its authorised share capital, so that it meets the requirements both for incorporation of a public company and re-registration as a public company in the UK. There may be other, constitutional requirements for certain types of company, such as those that wish to operate as a charity, qualify as a certified B Corporation or act as a professional trustee although not all of these will fall to the relevant regulator to assess.

The Committees are aware that some countries require a confirmation that there are no civil or criminal proceedings pending against the company. However, this may be problematic for companies with significant operations. The Committees are concerned that introducing a requirement of this nature could present an unnecessary obstacle to proposed re-domiciliations due to outstanding litigation or vexatious claims by shareholders or creditors.

*6. **What evidence is there that supports the economic benefits of countries permitting re-domiciliation?***

While the Committees do not have evidence of these economic benefits, members of the Committees and their respective firms regularly advise companies interested in re-domiciliation. Often such companies are disappointed to learn that only more cumbersome alternative routes are available in the UK. The administrative, legal and regulatory hurdles that need to be overcome can deter some companies from relocating to the UK when other simpler re-domiciliation regimes exist elsewhere.

Rationale for re-domiciliation: Wider issues

*7. **Are there other administrative, financial, or other barriers that would still prevent a company re-domiciling to the UK even with a re-domiciliation regime being established?***

The Committees consider that inbound re-domiciliation will require the departing jurisdiction to recognise the re-domiciliation process and approve the company re-domiciling to the UK. The form of that approval is likely to vary depending on the regime that applies in the departing jurisdiction. It will be critical for any company seeking to re-domicile to the UK to know that it can do so smoothly. The process will therefore need to ensure that the processes of the authorities in both the departing jurisdiction and the UK can be co-ordinated so that the company is not de-registered before it is re-domiciled, nor that it remains registered in the departing jurisdiction once it has been registered in the UK. Unless the law of the departing jurisdiction explicitly recognises and permits outward re-domiciliation, the Committees would question whether it would be possible to achieve the necessary level of certainty and co-ordination required for a smooth move to the UK.

Given the role proposed for the Registrar and Companies House in the inward re-domiciliation process, Companies House will also need to be able to put in place effective and efficient communication channels (either directly with its counterpart in the departing jurisdiction or via the re-domiciling company). For example, we understand that the New Zealand regime requires the respective registries to liaise to ensure there is no lapse between registrations. The precise requirements and process for each departing jurisdiction are likely to vary, and protocols will develop on a case-by-case basis. Companies House will need to ensure consistency so that re-domiciliations from a given departing jurisdiction are handled in the same manner, and communicate those protocols where possible.

It is likely that the availability or transparency of filings or other records in respect of the period prior to a company's re-domiciliation into the UK will be different, and in many cases less extensive, than will be the case for companies which have always been incorporated in the UK. For example, filings disclosing changes to officers, auditors and share capital, or with respect to registered security interests and shareholders of the company from time to time, may not be available where they were not required under the laws of a company's departing jurisdiction or where the company's departing jurisdiction does not require retention or access to them following the outward re-domiciliation. The Committees suggest that it should be clarified what, if any, information about companies that have re-domiciled to the UK which relates to the period prior to their re-domiciliation will be made available to the public in the UK via Companies House, given the rigorous transparency standards that the UK public has come to expect of UK companies and to which companies incorporated in the UK are subject throughout their existence.

The wider policy and legal environment, encompassing tax, regulatory and corporate governance requirements etc., will have a more general impact on the UK's attractiveness as a group of jurisdictions in which companies may wish to be incorporated or headquartered. As noted in the response to Question 2 above, from a tax perspective, stamp duty on the transfer of shares currently remains a disincentive to the decision to incorporate a company in the UK.

8. What should the Government consider to ensure firms in regulated industries can re-domicile to the UK?

It will be important to ensure that a corporate re-domiciliation occurs at a defined point in time, once the regulator has given any necessary consents, so that all parties are clear as to when the entity becomes regulated by a new regulator. Existing regulatory regimes generally address the process for an entity becoming a regulated entity. As such, the re-domiciliation process should focus on the administrative process for relocating the company as a matter of corporate law. Where there is a need to obtain approval from a regulator in order to operate in the UK, this could be made an express condition to the re-domiciliation.

While the process for any regulatory requirements will need to work in tandem with the corporate re-domiciliation process, the Committees do not consider that the re-domiciliation regime itself needs to deal specifically with the additional requirements applicable to regulated businesses. So long as the company can liaise with Companies House over the date/time at which the re-domiciliation will occur, the company can liaise as necessary with the regulators (rather than Companies House needing to do this). The Committees suggest that a company applying to re-domicile should be able to advise the Registrar that it needs to co-ordinate the date of re-domiciliation with the other consents needed. In such cases, the Registrar should only determine the date of re-domiciliation once the company has met the requirements of Companies House and any requirements in the departing jurisdiction and has advised Companies House that the other consents are in place (or will be on the relevant date). A company should not find itself in a situation where the date of re-domiciliation is determined by the Registrar, with no regard to what the company needs.

9. Do you have any wider concerns about a re-domiciliation regime that the Government should be aware of?

As mentioned above, given the role proposed for the Registrar and Companies House in the re-domiciliation process, the Committees consider that establishing a specialist team at Companies House to support the Registrar, which is familiar with and fully understands the re-domiciliation process, will be critical.

Certain of the proposed entry requirements, particularly that concerning national security risks, will not be for the Registrar or a Companies House team to address. It is not clear from the Consultation who will be responsible for making the decision as to whether these requirements will be satisfied or what the procedure or timeline for doing so would be. We have set out further thoughts on this in the response to Question 16 below.

Companies undertaking a re-domiciliation will need to carry out a review of the impact the re-domiciliation will have on stakeholders. There will be, for example, a number of issues to address relating to contractual counterparties. For example, if an overseas company has creditors at the point it re-domiciles to the UK, those creditors will hold debt that becomes subject to rules governing creditors of UK-incorporated companies, but which was lent on the terms of documentation drafted to cater for the departing jurisdiction's corporate regime. There could also be concerns that choice of governing law clauses in contractual arrangements will become inappropriate on re-domiciliation. However, we do not consider these are the kinds of issues that the Government will need to (or indeed can) address through whatever regime it puts in place but will simply need to be considered by the re-domiciling company. In some cases, contracts already contain restrictions on re-domiciliation without the consent of the counterparty for these reasons, which the re-domiciling company will need to address if and when it considers a re-domiciliation.

There may also be a need to deal with outstanding statutory or constitutional arrangements or shareholder authorities that do not translate well, or which are not recognised, in the UK. The issues that might arise depend on the statutory framework governing the company and its governance structure. However, the following provide some illustrative, technical examples:

- A public company, or private company with more than one share class, cannot allot shares unless its directors have been given authority to do so under section 551 Companies Act 2006. That authority cannot exceed five years. Where a company has validly sought authority from its shareholders for a longer period under the laws of the departing jurisdiction, thought will need to be given to how this should carry through in the UK. Similar questions may arise in relation to disapplication of pre-emption rights, buy-back authorities and authority to make political donations.

- Where a UK company wishes to issue redeemable shares, it must specify the terms of redemption on allotment. In other words, it is not possible to convert non-redeemable shares into redeemable shares. Where a company has validly converted non-redeemable shares into redeemable shares under the laws of the departing jurisdiction, thought will need to be given to whether those shares should remain redeemable under UK law.

- As a general rule, where a UK public company proposes to allot shares for non-cash consideration, it must obtain an independent valuation. Where a company has validly allotted shares, or agreed to allot shares, for non-cash consideration without the need to obtain an independent valuation under the laws of the departing jurisdiction, but that consideration has not yet been rendered, thought will need to be given to whether a valuation should be required under UK law.

- Under UK law, where a company proposes to pay a dividend, it can do so only out of distributable profits ("profits available for the purpose") and must justify the dividend by reference to "relevant accounts". However, in some jurisdictions, a company can pay a dividend by reference to a solvency statement made by its directors. Where a company has so resolved to pay a dividend but has not yet paid it by the point of re-domiciliation, thought will need to be given to whether the company needs to re-justify the dividend by reference to relevant accounts.

This is only a selection of possible issues that have arisen in the experience of Committee members. The list will be open-ended but in most cases the Committees believe that companies proposing to re-domicile to the UK will be able to work through the issues with their advisers as part of, or in advance of, the re-domiciliation process. In cases of doubt over whether UK requirements have been met, a well-advised company that re-domiciles to the UK is likely to want to re-comply with the relevant UK requirements out of caution and the UK courts will, in some scenarios, have jurisdiction to clarify particular areas of uncertainty.

Entry criteria for re-domiciling companies

10. The Government's view is that an economic substance test is not necessary for re-domiciliation. Do you agree?

The Committees agree with this and believe that re-domiciliation should be analogous to a new company incorporation in the UK (where there is no economic substance test). Excessive legal and other costs and considerations in effecting a re-domiciliation are likely to deter companies from undertaking a re-domiciliation.

It should be noted that if an overseas company wishes to re-domicile and be registered as a public company in the UK, (regardless of whether or not it has been the equivalent of a private company where it is incorporated), the Committees assume that it would need to meet the authorised minimum share capital test prescribed in section 763 Companies Act 2006 and the net assets test (as set out in section 92 Companies Act 2006) required for re-registration of a private company.

There may be concerns that this approach could result in the UK being an attractive jurisdiction to set up shell/conduit companies. However, from a tax perspective, it is anticipated a level of substance would in practice be needed, for example, when claiming relief from dividend withholding tax under double tax treaties on cross-border dividend payments to the re-domiciled UK company, which should assist in addressing such concerns.

We note that the approach on this point could impact on the position taken as regards the UK corporate tax residence consequences on re-domiciliation. This is further discussed in the Law Society and CLLS Revenue Law Committee responses to Chapter 5 of the Consultation.

11. Are there factors that would influence your choice of place of incorporation within the UK?

The Committees believe that the choice of place of incorporation upon a re-domiciliation into the UK is likely to be driven by the same factors that drive that choice upon a new incorporation (i.e. the "centre of gravity" of the business and physical location of headquarters as the registered office).

12. Will the existing arrangements that do not allow companies to move between certain UK nations have a bearing on overseas companies' decisions whether to redomicile in the UK?

Overseas companies are likely to find it surprising, and unduly restrictive, if they cannot move between UK nations once re-domiciled in one of them. It also seems illogical to permit re-domiciliation from a multitude of overseas jurisdictions (with quite different legal systems) into the UK, but not to permit re-domiciliation between the different constituent nations of the UK (which adopt substantially the same company law framework). Furthermore, it is difficult to see what would stop them from re-domiciling from one UK nation to an overseas jurisdiction and then back to a different UK nation; or indeed using one of the existing methods for relocation such as the use of a new holding company and/or business transfer – thus achieving the same goal but via an unnecessarily cumbersome process.

The issue must clearly be considered in the context of the possibility, at some point in the future, that certain constituent nations within the UK gain a greater degree of legal autonomy within, or become independent of, the UK. The Committees believe that some overseas companies looking to re-domicile would consider this possibility and, accordingly, would want the freedom to move flexibly between those constituent (or independent) nations in future. Restricting this ability is likely to mean that the UK as a whole is seen as a less attractive destination by overseas companies; and/or that companies are discouraged from incorporating in, or re-domiciling to, particular constituent nations if their ability to move within the UK is constrained.

As a result, the Committees believe that a company incorporated in one part of the UK should be able to re-domicile to another part of the UK. This would ensure that there is complete flexibility and a level playing field (and would presumably mean that the equivalent Companies House teams in Scotland and Northern Ireland would require specialist re-domiciliation teams too).

Ensuring adequate checks and balances

13. Do you have any views on how the regime should best ensure departing country conditions are met? Is there anything else we should consider?

The Committees consider that, if the intention is to ensure that inward re-domiciliation provides the UK with a competitive advantage, the general approach should be to treat the re-domiciliation process as similar to a new corporate incorporation in the UK. As a result, the process should be clear and simple and the requirements should be as similar as possible to those required for a new incorporation of a corporate body in the UK. The process for ensuring departing jurisdiction conditions are met must be predominantly judged by the departing jurisdiction itself and resolved between the company concerned and the departing jurisdiction.

The Committees agree that a form of authorisation from the departing jurisdiction (or other evidence, such as a notarial certificate or legal opinion) should be required in the UK for inward re-domiciliations. This is in order to provide evidence that the company has met the outward re-domiciliation requirements of the departing jurisdiction, and to provide certainty that the company will cease to be registered in that jurisdiction as a result of re-domiciliation. It will be critical from the perspective of the re-domiciling company that there is continuation of its legal existence at all times.

In some jurisdictions, there may be more than one competent authority in relation to the departing company so the regime will need to cater for that situation.

Each jurisdiction is likely to have different requirements for removing a company from its register. The Committees therefore believe that the UK should not specify in detail the evidence that the authorities of the departing jurisdiction should require, but rather leave this to the law of the departing jurisdiction. For example, the requirements in civil law jurisdictions may be very different from those in common law jurisdictions.

Some jurisdictions may permit re-domiciliation but not have designated an authority to give the necessary confirmation that the relevant requirements have been met. In those cases, the Committees suggest introducing some flexibility by giving the Registrar the authority to determine what evidence it requires that the departing jurisdiction's conditions have been met. In those situations, the Committees would expect the Registrar to develop practices and requirements on a case-by-case basis for re-domiciliations from different departing jurisdictions and to make those practices known to the market. For example, it might require that the incoming company provide the Registrar with a legal opinion from counsel (or a notarial or other certificate) in the departing jurisdiction that effectively confirms that the company has met the departing jurisdiction's legal requirements in relation to the transfer of registration.

As the process of re-domiciliation may take some time, the Committees suggest including an obligation on the company re-domiciling to notify the Registrar if there is a change in any information already supplied to the Registrar. Examples include further changes to directors or its constitution, or if something occurs which means that the incoming company has ceased to meet the departing jurisdiction's legal requirements before the re-domiciliation in the UK takes effect.

If the company seeking re-domiciliation needs to be regulated in the UK, thought needs to be given as to how the processes of registration and regulation would dovetail. For example, will it be possible for Companies House to be given advance notice of a pending registration by the UK regulator, so that the company does not become a UK company until the regulatory process is complete? As a general point, the Committees believe that many companies (whether regulated or unregulated) will want to be able to be involved in determining the timing of their own re-domiciliation (rather than the re-domiciliation just "happening" whenever the respective competent authorities have completed their administrative processes). As a result, the Committees suggest that any regime include the ability for the applicant to discuss with Companies House the time at which the re-domiciliation will take effect (subject, of course, to the conditions for re-domiciliation having been satisfied, and remaining current, in both the departing jurisdiction and the UK). As stated in the response to Question 8, a company should not find itself in a situation where the date of re-domiciliation is determined solely by the Registrar as the incoming company will need certainty over the date and time at which it becomes a UK company. As with certificates of incorporation, the Committees suggest that on the date the necessary re-domiciliation certificate is issued by the Registrar, the company is deemed to have been a UK company from the start of that day. Equally, if the re-domiciliation is to be approved in principle but only take effect on a defined date, there will need to be rules requiring a certain degree of currency to the application documents so they do not become "stale".

The ideal position will be that the timing of registration in the UK and de-registration in the departing jurisdiction is exactly aligned (to avoid the possibility that the company is treated as either being in existence in two jurisdictions at once, or ceasing to be in existence in either). However, the Committees recognise that this might not always be possible. The company at least will want to provide certainty from an internal perspective as to the timing of effectiveness of its re-domiciliation, which may mean that the departing jurisdiction's registrar only removes the company from its register after the registration in the UK has become effective. This will be a focus for the company and its advisers in determining the exact procedure to be navigated. The Committees suggest that, if the de-registration in the departing jurisdiction and registration in the UK cannot be exactly aligned then: (a) it is critical to avoid a situation where the company is not entered in a register either in the departing jurisdiction or the UK for any period of time; and therefore (b) it is preferable that, at least as a matter of the law of the UK, the company should be entered in the register in the UK before it is removed from the register in the departing jurisdiction and that it is clear that it becomes a company incorporated in the UK from that point, even if it takes a little time to remove it from the register in the departing jurisdiction.

The Committees considered the idea of a court-sanctioned process for determining whether the departing jurisdiction's conditions have been met. It was felt that this would make the re-domiciliation process unattractive to overseas companies, as it would, among other things, increase the administrative and financial costs of re-domiciliation to the UK.

14. Do you have views on our proposed approach, which would allow all bodies corporate to re-domicile to the UK, subject to the relevant entry criteria?

The Committees agree the regime should not be limited to collective investment vehicles and should be open to a wide spectrum of overseas companies.

The Consultation Paper refers to all bodies corporate being able to re-domicile "to the extent that they are comparable with UK forms". The Committees are not confident that it would be possible to apply a test of "comparability", and certainly do not believe it would be workable to try to judge whether an overseas company is most similar to a private limited company, a public limited company or other kind of body corporate. Instead, the Committees believe that if, an overseas body corporate wants to re-domicile to the UK, it should be able to do this and choose whichever form of body corporate it prefers (whether that be a public company, private company, company limited by guarantee, unlimited company, LLP etc), provided it will meet the UK requirements for that particular form of body corporate at the time it re-domiciles. It will, of course, also have to meet any requirements in its departing jurisdiction, such as obtaining shareholder approval to make the necessary changes.

This approach would enable the equivalent of (for example) a private company overseas to re-domicile in the UK as a public company provided it will meet the necessary UK public company incorporation requirements when it re-domiciles. Companies House will be able to check that the necessary requirements have been met (or will be on re-domiciliation). It will also mean that, for example, if the departing jurisdiction permits corporate directors, as and when the restriction on corporate directors comes into effect in the UK, the incoming company will need to remove those corporate directors or replace them with individuals with effect from no later than when the company re-domiciles. A similar position would apply where the overseas company has directors who are less than 16 years old or who are (for whatever reason) disqualified or prevented from serving as a company director in the UK. In practice, there is nothing to stop a re-domiciling company changing a number of its characteristics on re-domiciliation (for example, its directors, constitution, company secretary, share structure, name, etc.), so long as this is made clear in the re-domiciliation paperwork and is approved by the company's members in accordance with the departing jurisdiction's requirements.

As mentioned in the response to Question 2, the Committees consider that investment companies such as open-ended investment companies (OEICS) are one example of a type of company that might be interested in re-domiciling to the UK. As a result, they suggest that HM Treasury undertakes a parallel consultation in relation to OEICS and PCCs to determine whether these entities should be able to re-domicile to the UK too. (In theory, entities might also seek to re-domicile as a society, although we see much less scope or demand for this.) In some cases, where entities will be registered with and regulated by a different authority, it may be that the role of Companies House would be much reduced or non-existent. For example, OEICS and PCCs are registered with and regulated by the Financial Conduct Authority and CIOs with and by the Charity Commission (in England and Wales).

Consideration should also be given as to whether an overseas entity could re-domicile in the UK in another form, such as a society under the Co-operative and Community Benefit Societies Act 2014.

Consideration will also need to be given to the tax implications of non-UK entities that have features of both bodies corporate and non-bodies corporate, such as partnerships "transitioning" to the available body corporate types available in the UK on an inward re-domiciliation. For example, a US LLC, which has member interests rather than share capital, is typically treated and taxed as a corporate entity for UK tax purposes (as per HMRC guidance at INTM180030). However, a US LLC has features (in particular its constitution being made up of member interests rather than shares) which could point towards it transitioning to becoming a UK LLP on re-domiciliation. While a UK LLP is a body corporate for corporate law purposes, it is treated as a transparent entity (rather than a corporate entity) for UK tax purposes. Consideration should be given to whether special rules are needed to deal with such transitions.

15. Should we preclude directors who do not have a good standing (i.e. pending court cases) from re-domiciling to the UK? If so, is confirmation from the departing jurisdiction's competent authority the best way of assessing this?

The Consultation Paper seems to be suggesting two criteria here.

The first criterion is that the directors are eligible in their jurisdiction of incorporation. Given the view of the Committees that the re-domiciliation process should be seen as analogous to new incorporations in the UK, the Committees believe that, provided the directors are eligible to be UK directors (noting the comments about corporate, underage and disqualified directors in Question 14 above), this should be sufficient.

As a result, the bar to being a director should be the same as/equivalent to the bar to being a director in the UK. The question is what process is needed to determine whether a director might be disqualified under Sections 5A or 6 of the Company Directors Disqualification Act 1986 (CDDA 1986) (which allow for disqualification for convictions abroad and conduct in relation to overseas companies). Obtaining information from the relevant company regulator might be necessary, but this will more likely be practicable if it is limited to offences related to company matters and does not extend to wider conduct claims, convictions or sanctions. In any event, the Committees believe that the primary source of information should be a self-declaration by the directors, with an offence being committed if the declaration is untrue.

The second criterion is that no legal or enforcement action is being taken against the directors. It is not clear whether this is referring only to legal or enforcement action by a regulator in the departing jurisdiction in relation to their position as directors (such as pending directors' disqualification proceedings), or whether it extends to *any* legal or enforcement action. The Committees are concerned that, if it is the latter, the re-domiciliation process could easily be frustrated by a vexatious shareholder or creditor in the departing jurisdiction who opposes the re-domiciliation. There could also be other claims (whether civil or criminal) against a director entirely unrelated to their standing or suitability to be a director of a UK company. It is worth noting in this context that the fact that a company re-domiciles does not mean its directors do so. Re-domiciliation will not, in itself, enable an individual director to escape claims in the departing jurisdiction (or in any other jurisdiction).

It is also not clear who would provide the necessary confirmation that there is no such action outstanding. If the declaration were limited to action being taken by a regulator, the Committees agree that this is a legitimate concern but is probably one that should be considered by the departing jurisdiction rather than the UK. The good standing of the directors is not something that is taken into account on incorporation of a company in the UK and, given a key purpose of the new regime is to increase the attractiveness of the UK as a place in which to do business, the Committees suggest that it should not be a requirement for re-domiciliation that the directors of an incoming company be of good standing. The criterion should simply be whether the director is legally prohibited from being appointed a director of a newly incorporated company in the UK.

16. Do you have any views on our good faith criteria?

While the Committees understand the sentiment behind the introduction of good faith criteria, we have concerns about how the criteria would work in practice and against what objectives they should be assessed. Even if it were possible to interrogate the purpose of a re-domiciliation (which would itself be administratively challenging), it would be difficult for a competent authority to judge whether such a purpose is suggestive of "good" or "bad" faith (for example, would a re-domicilation effected with the primary purpose of avoiding a regulatory or administrative burden be considered to be in "bad faith"?). In the Consultation Paper, no details are given as to what constitutes good faith in this context, and how any such criteria would operate. Indeed, the only reference to good faith in the Consultation Paper is in section 3.7 where it is placed in the same category as the entry criteria relating to public interest and national security risks. It is therefore difficult for us to form any detailed views. The Committees believe more thought is required in this respect. If the Government feels it necessary to incorporate a good faith requirement into any new regime, the Committees suggest that this be adopted as a "reserve power", such that, if the competent authority considers that the re-domiciliation is being conducted in bad faith, it would have the discretion to refuse the application, but it would not need actively to determine whether an application is being made in good faith.

In order to ensure that good faith criteria do not make the UK an unattractive jurisdiction for incoming companies, detailed guidance as to when the UK competent authority might exercise its discretion will be critical, so as to provide incoming companies with a high degree of certainty as to how the regime will operate.

It is also not clear who would make the necessary good faith assessment. It is difficult to see that the Registrar/Companies House would have the facility to do so. The Committees presume that the Secretary of State would need to make this assessment under a reserve power.

Section 3.7 of the Consultation Paper proposes that, to be effective, a re-domiciliation should not pose a national security risk or be contrary to the public interest. It is not immediately obvious why the jurisdiction of incorporation of a company *per se* would introduce a national security concern. Indeed, the power of the Secretary of State to "call in" an acquisition under the National Security and Investment Act 2021 (NSI Act) (which applies where there may be a UK national security concern in connection with the acquisition of certain kinds of entity or asset) is not concerned with the jurisdiction of incorporation of the target of the acquisition. As currently drafted, a change in the place of an entity's incorporation and the laws that govern it would not be a "trigger event" for the purposes of the NSI Act, nor seemingly a ground for intervention by the Secretary of State under the Enterprise Act 2002.

If the Government believes that a national security and/or public interest test is important to prevent a re-domiciliation where it would have an adverse impact on the UK's business reputation, the Committees suggest such a power also be treated as a reserve power of the Secretary of State in a similar manner to any good faith assessment. That reserve power would then need to be exercised once the application for re-domiciliation has been made but before the re-domiciliation becomes effective.

17. Should it be necessary for firms to have completed a reporting period to redomicile? What other reporting information should be provided to the Registrar or should it be able to request and is the audited accounts requirement sufficient and proportionate?

The Committees are concerned that the requirement to have completed a reporting period could prevent re-domiciliations by companies in sectors in which the Government may wish to encourage investment, particularly start-up and innovative businesses. Examples are high growth tech companies that might want to move to the UK within their first year of incorporation, or SPACs incorporated and listed outside the UK that make a major UK acquisition within the first year following incorporation.

The Committees note, however, that there is a legitimate concern that companies that have significant operations or trading histories may be able to re-domicile to the UK and carry on business without any financial information being available to persons dealing with them. As a result, as stated in the response to Question 7, the Committees suggest that it should be clarified what, if any, financial (and other) information about companies that have re-domiciled to the UK which relates to the period prior to their re-domiciliation will be made available to the public in the UK via Companies House.

There is an argument that, to the extent a re-domiciling company has completed a reporting period, it should be required to file its most recent accounts with Companies House, if those were publicly available in the departing jurisdiction, , even if those accounts have not been prepared under accounting standards permitted by the Companies Act 2006. This would at least provide persons dealing with the company with information about its financial standing and it would also be consistent with the requirements for overseas companies subject to Chapter 2 of Part 5 of the Overseas Companies Regulations 2009. When submitting a return following the opening of a UK establishment, an overseas company must deliver copies of its latest accounts (which will have been prepared under the law of the overseas jurisdiction in which the company is incorporated) to Companies House. It is worth noting that some companies choosing to re-domicile to the UK may already have a branch registered in the UK so will have been filing accounts and other information at Companies House prior to re-domiciliation, in which case there may be some ability to streamline the re-domiciliation procedure.

Where a company re-domiciles from a jurisdiction in which it did not have to make its accounts publicly available (or where it was not required to produce accounts), the Committees suggest the Government should consider whether that company should be required to file a set of accounts under accounting standards permitted by the Companies Act 2006 within a specified period after the re-domiciliation in the UK, for example, within 12 months. Again, this would provide information on its financial standing to those dealing with that company.

Whatever decision is taken in relation to financial information in the UK, the Committees believe that it should be stated on a company's file at Companies House that the company was originally incorporated overseas and has conducted a re-domiciliation. That file should also provide key information, such as the company's original name, registration number in the departing jurisdiction and registry in which it was registered in that jurisdiction, so that third parties can undertake searches in that registry, including for historic financial information (if available).

In practical terms, companies that re-domicile to the UK will need to consider carefully the extent to which financial statements are required before paying a dividend. Where the departing jurisdiction permits dividends to be paid based solely on a solvency test, or where the approach to determining realised profits and losses is different from that in the UK, the directors will need to confirm that, following re-domiciliation to the UK, dividends are paid out of distributable reserves. As a result, accountants and auditors will need to establish how to record and evidence those distributable reserves. Complex questions may arise here: for example, where a company has, in the past, done something that would have given rise to a realised profit if it had been a UK company (e.g. a reduction of capital) but did not do so under the law of its previous place of incorporation, or where, under the law of the previous jurisdiction, a realised profit or loss would be treated as having arisen but the position would have been different under UK law.

The Committees assume the accounting firms should be able to provide some guidance in this area, given their experience in advising companies that have re-domiciled from one jurisdiction to another.

This raises again (as mentioned in previous Committees' responses) questions as to whether the Government might want to undertake a more fundamental review of the UK's capital maintenance and distribution rules.

18. Are the proposed solvency requirements sufficient and proportionate? If not, what would you recommend?

The Committees have some concerns about the proposed solvency criteria, given that there are no similar requirements when incorporating a company in the UK. However, the Committees also accept that on incorporation, a company has no trading history and normally few assets or liabilities, and that stakeholders should be aware that they are dealing with a newly incorporated company. A newly incorporated company cannot be insolvent at the point of incorporation, whereas (theoretically) a re-domiciling company can be. Accordingly, there is a legitimate concern to address on re-domiciliation, where companies seeking to move to the UK could have significant assets and liabilities accumulated over many years of trading. This is particularly pertinent as companies could look to avail themselves of the UK's insolvency regime, which, as the Consultation Paper notes, is generally seen as more flexible than those in other jurisdictions.

The proposed solvency criteria give rise to two slightly distinct questions: creditor protection (i.e. the safeguards that should be put in place where re-domiciliation may have the effect of reducing creditors' rights); and the extent to which the UK ought to exercise some kind of filtering to ensure that (regardless of any creditor protection requirements imposed by a departing jurisdiction) the re-domiciliation does not allow the entry into the UK of companies that immediately give rise to solvency concerns (i.e. a kind of "gateway" question).

The Committees consider that the issue of creditor protection is essentially one for the departing jurisdiction to address. Creditors should rightly look to the jurisdiction of incorporation of a corporate debtor to determine how their interests are protected. Equally, if the UK decides to adopt outward re-domiciliation, it will be important to consider in detail what procedures should apply to provide appropriate creditor protection. (We address this in more detail in our response to Question 29 below.)

The "gateway" question is, however, a legitimate one for the UK to address on an inward re-domiciliation. Several views were expressed on this, with some members considering that inbound companies ought to be solvent in order to take advantage of the re-domiciliation process. However, a majority believed that the mere fact that a company is not solvent should not prevent it from re-domiciling into the UK (noting that companies which are insolvent may wish to benefit from the UK's well-regarded insolvency regime). The Committees would note that a company which does not meet UK solvency tests upon re-domiciliation would have to comply with UK solvency rules from the outset and that directors' duties to have regard to creditors' interests would also apply. In some cases, the company might need to cease trading. The UK laws should offer protection so that creditors dealing with the company ought not to be prejudiced unfairly by the company's insolvent status. To give additional comfort, there could be merit in requiring companies seeking an inward re-domiciliation to state whether or not, in the directors' opinion, which should be reasonably based, the company is solvent. If the directors cannot confirm the company's solvency, the company should still to be able to re-domicile provided it is noted in the public filings that the directors have not been able to give a solvency statement.

The Committees note that some re-domiciliation regimes, such as that in Singapore, require a company to confirm solvency, but provide a route allowing a company to re-domicile there (subject to meeting the other eligibility criteria) even if it intends to wind up within 12 months provided it confirms that it is able to pay its debts in full within the period of 12 months after the date of winding up. This would be consistent with the form of solvency statement that can be given in connection with a capital reduction by a private company, and the Committees consider that it is something that should be possible on a re-domiciliation to the UK if all other eligibility criteria are met.

The Committees generally agree that an overseas company that is insolvent and has commenced insolvency proceedings should not be able to re-domicile into the UK until it has dismissed insolvency proceedings in the departing jurisdiction, as there is too great a risk of confusion as to the position of creditors and disorderly conduct of insolvency proceedings.

If the Government is minded to apply a solvency test, a key question is what test should apply to determine whether a candidate company is solvent. Possibilities include requiring the company to confirm both balance sheet solvency and cash flow solvency for a forward-looking period of 12 months, or to adopt the test in section 123 Insolvency Act 1986 (with no specific forward-looking period). The proposed solvency test looks similar to that already provided for in Part 17 Chapter 10 Companies Act 2006 when a private company wishes to reduce its capital supported by a solvency statement.

The Committees expressed concerns over the need for the solvency statement to be independently "audited", and the Committees question whether auditors will be prepared to offer that level of comfort for the statement. As the statement is forward looking, at most any auditor's opinion should be limited to confirming that the auditor is not aware of anything to indicate that the opinion expressed by the directors in the solvency statement is unreasonable in all the circumstances (similar to the statement which may be given under section 714 Companies Act 2006). However, the inclusion of any requirement for a report by the company's auditors, even of this more limited nature, is likely to increase (perhaps significantly) the cost and burden of re-domiciling into the UK as it would require the specific engagement of the company's auditors and a review process to be carried out by the relevant accounting firm.

In this regard, it is worth noting that the courts have previously confirmed (in *BTI 2014 LLC v Sequana SA* and *LRH Services Ltd (in liquidation) v Trew and others*) that the directors of a company do not need to apply the technical test in section 123 Insolvency Act 1986 when forming their view as to the company's solvency. There is no need for such a statement to be audited.

The Government will also need to consider what should happen if the directors are subsequently found to have made a solvency statement without having reasonable grounds for the opinions expressed in it. In the context of a capital reduction supported by a solvency statement, the courts have confirmed (again, in *LRH Services*) that the capital reduction will be void. However, it would be much more difficult, if not impossible, and certainly undesirable, to render void and "unwind" a re-domiciliation that may have taken place years prior. The Committees assume that the validity of the re-domiciliation should not therefore be affected, but that the directors should be guilty of an offence under English law.

The Committees note that the solvency criteria refer to there being no "active creditor or shareholder petitions" against the inbound company. As with the good standing criteria, this would enable any creditor or shareholder unhappy about a proposed re-domiciliation, to prevent it proceeding by making a vexatious petition. This criterion seems unnecessary in light of the solvency statement requirement (but, once any petition becomes successful and the company commences a solvency process, the Committees agree that no re-domiciliation should be permitted).

19. The Government is not minded to prescribe a minimum turnover/size of companies that can re-domicile. Do you agree?

The Committees agree with this, given there is no corresponding requirement for new incorporations in the UK (save for the minimum authorised share capital requirement for public companies). The relative complexity of a re-domiciliation (compared to a new incorporation) will likely act as a natural disincentive for very small companies to utilise this route unless they have good reason.

20. Are there any other entry criteria we should consider?

The Consultation Paper includes a reference to the need for a report on the "wider impact criteria". The Committees believe that, again, this is a matter that should be left to the law of the departing jurisdiction. If this criterion is to be included, the Government should provide guidance as to exactly what the report should include. It is not clear for whose benefit the report would be prepared (for example, the company's shareholders, employees and/or other key stakeholders). It is also not clear who would determine whether a particular report explains the "full legal and economic impacts" of the transfer and the implications for creditors, shareholders and key stakeholders and how they would reach this conclusion. Might there be problems if the UK requirements conflict with those of the jurisdiction the company is leaving?

If it is to be required, consideration will need to be given to the level of detail required to be included in this wider impact report. In particular, it would need to be clarified if the "economic impacts" are expected to cover the tax implications for both the company and its shareholders as a result of the re-domiciliation, which would add to the complexity of producing this report. A requirement for a very detailed report could act as a barrier to companies seeking to make use of the UK re-domiciliation regime.

Insolvency issues arising

21. What measures ought to be adopted to ensure re-domiciliation is not used to harm creditors in other jurisdictions?

The Committees view issues around creditor protection as largely something for the departing jurisdiction to determine, as stated in our response to Question 18 above. To the extent there is a “gateway” question to address, this should be focussed on the policy points of (a) what sorts of companies are permitted to access the UK company law regime; and (b) avoiding uncertainty or confusion on any ongoing insolvency processes.

The Committees note and support the response to the Consultation from the CLLS Insolvency Law Committee, which suggests that permitting re-domiciliation is unlikely (of itself) to trigger attempts to use the UK’s insolvency regime. This is because overseas companies may already be brought into the UK insolvency regime through an assortment of insolvency procedures (administrations, schemes of arrangement, restructuring plans, liquidations etc.) without needing to be incorporated in the UK. Each of these procedures uses tests to determine whether it is appropriate to apply the particular regime, based either on the factual location of the company or the connections of the company to the UK (and a company’s place of incorporation is merely a factor in these tests and is not determinative). There is an extensive existing body of law which addresses how cross-border corporate solvency issues should be dealt with, which already allows certain UK solvency rules to apply to an overseas-incorporated company if its “centre of main interests” (“COMI”) shifts to the UK. The Committees understand that facilitating re-domiciliations should not require significant reconsideration of the existing insolvency rules.

22. Are there further safeguards required to prevent exploitation of UK rules, which may be more flexible and business friendly than some foreign regimes?

See our response to Question 18 above. The Committees would also point out that there is widespread judicial acceptance of “good forum shopping”, which generally benefits stakeholders, and, in other contexts, HM Treasury values the positive benefit to the UK economy of “importing” foreign insolvency cases.

23. The Ratings (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill makes provision for the disqualification of directors in companies that are dissolved without becoming insolvent. Is this measure sufficient for UK authorities to investigate directors of companies that have re-domiciled?

The Committees are not sure whether this question is asking: (i) whether the Bill (now in fact an Act) would apply to UK companies that are dissolved where the company had previously re-domiciled into the UK (which we think would be the case); or (ii) whether the directors of a company which undergoes a re-domiciliation should be capable of being disqualified in circumstances similar to those set out in the Act. If the latter, then it depends on the “direction” of the re-domiciliation.

An inward re-domiciliation effectively makes the company a UK company, so the normal directors’ disqualification rules would apply to directors of that company. As a result, the directors of the incoming company would be susceptible to disqualification for action arising after the re-domiciliation. However, under section 5A(1) CDDA 1986, past conduct overseas could be taken into account through the Secretary of State’s power to apply to the court if it appears that it is ‘expedient in the public interest’ to make a disqualification order against a director who has been convicted of a ‘relevant foreign offence’. The departing jurisdiction’s laws would also deal with the period prior to re-domiciliation.

It is worth noting that, while the Companies Act 2006 includes provisions (in Part 40) aimed at ensuring that those persons disqualified under a foreign regime comparable to that of CDDA 1986 are disqualified from being a director of a UK company, no regulations to give effect to Part 40 have ever been made.

If outward re-domiciliations from the UK are permitted, there is a legitimate concern as to whether persons who become directors of an overseas company following re-domiciliation should be liable to disqualification in the UK for acts taken prior to the re-domiciliation. It should be possible for a Director Disqualification Order to be made under the CDDA 1986 if a departing director is subsequently convicted of an indictable offence in the UK in connection with the promotion, formation, management or liquidation of a company, or with the receivership of the company's property.

24. Given investigations may be necessary what bilateral arrangements may be required with exporting jurisdictions?

As stated above, the Committees are of the view that the primary obligation for dialogue with the departing jurisdiction should fall on the company wanting to re-domicile, rather than the Registrar/Companies House. However, to the extent that Companies House needs to make enquiries of relevant authorities within the departing jurisdiction, we suggest Companies House considers specifically whether existing bilateral arrangements would be sufficient to allow this dialogue.

As noted above, it is important for a given re-domiciliation that the laws of the departing jurisdiction permit outward re-domiciliation to the UK. An overseas jurisdiction that does not have (as a minimum) “agnostic” outward re-domiciliation procedures that allow companies to re-domicile to anywhere in the world, will need to enact legislation to permit re-domiciliation to the UK.

25. Are there any other matters relating to insolvency that would have implications for a UK re-domiciliation regime?

The Committees defer to the CLLS Insolvency Law Committee’s response in relation to this Question.

Additional powers for the registrar

26. Do you agree that existing protections and sanctions against director misconduct provide sufficient protection for the UK’s re-domiciliation regime?

The Committees agree with this. The re-domiciliation regime should make the directors of the incoming company liable if they supply false or misleading information to the Registrar as part of the process.

As a general principle, the Committees believe that UK law regarding directors’ misconduct should apply in relation to acts taken during the period a person is a director of a UK-incorporated company. This would mean that acts taken prior to re-domiciliation from an overseas jurisdiction are primarily a matter for the law of that overseas jurisdiction, and that authorities in that jurisdiction would need to decide whether to take action against a director after re-domiciliation to the UK (although such acts could be taken into account if a Director Disqualification Order under the CDDA 1986 is being considered). Similarly, if a director engages in misconduct whilst a director of a UK-incorporated company that subsequently re-domiciles outside the UK (as described in Question 23 above), this should continue to be capable of enforcement under UK law. We suggest that the relevant protections and sanctions that are applicable to directors are reviewed to determine if any consequential changes are required to make this clear.

27. Do you have views, including evidence from other jurisdictions, to inform how the Registrar could seek assurance over the standing of the company before approving re-domiciliation, in order to safeguard the UK’s business environment?

The Committees are concerned that the Registrar/Companies House will not always be in a position to seek assurance on matters such as the standing of the inbound company. As stated above, the Committees believe that re-domiciliation applications should be treated by the

Registrar as similar to new incorporations in the UK. As a result, provided the necessary forms and other paperwork required are provided to and checked by Companies House, any compulsory identity verification of the directors and persons with significant control (PSCs) of the company re-domiciling is undertaken by Companies House (once those identity verification requirements are implemented) and the directors are liable for any false or misleading information provided, Companies House should not have to undertake further checks.

28. Do you agree that Companies House should have the ability to refuse an application or petition for the winding up of companies in the circumstances as set out above?

The Committees believe Companies House should have this ability where it has concerns about the inbound company and does not receive satisfactory answers to those concerns. Clearly, it will be preferable for an application for re-domiciliation to be refused at the time of request, rather than petitioning for winding up after a re-domiciliation has occurred; we would expect the latter course of action to be relevant only where inaccurate or fraudulent information is provided in connection with the application to re-domicile.

Outward re-domiciliation

29. Would you be in favour of the UK introducing an outward re-domiciliation regime?

29.1 <u>Overview</u>

As mentioned above, to ensure that the UK remains an attractive destination, the Committees believe that both inward and outward re-domiciliation should be permitted. There is concern that some companies may not be prepared to re-domicile to the UK if they cannot subsequently leave if their circumstances change. Permitting only inbound re-domiciliation seems unnecessarily restrictive in a jurisdiction that is generally considered open to cross-border investment (both inwards and outwards). Other jurisdictions allow both inward and outward re-domiciliation and may be seen as being more attractive than the UK if the UK does not allow this. The Committees further consider that providing for the possibility of outward re-domiciliation may help to demonstrate confidence in the attractiveness of the UK as a group of jurisdictions in which companies should wish to be incorporated and more generally as a business-friendly environment.

The Committees have been considering requirements for outward re-domiciliation and consider creditor and shareholder protections to be key. A re-domiciliation could involve significant changes to share rights and potentially prejudice members as a result; equally, the destination jurisdiction may give a different set of protections to creditors of a company and/or impose different hurdles that a creditor must overcome to enforce its claim against a company.

The Committees note that two existing UK structures involve examining the impact of significant corporate changes upon creditors and shareholders, namely those governing schemes of arrangement and reductions of capital under the Companies Act 2006. Whilst schemes of arrangement always involve a court process, reductions of capital can be conducted either through a court process or (for private companies only) a non-court process involving the directors giving a solvency statement. The Committees suggest that these regimes can be used as a model for two alternative routes to conduct an outward re-domiciliation – a court-based re-domiciliation process and a non-court solvency statement re-domiciliation process.

The Committees consider that all companies wanting to re-domicile out of the UK (whether public or private) should be able to select the option of either a solvency statement route or a court-approved route.

For those companies (whatever their legal form) that are solvent, the Committees believe that a choice of route is appropriate. In simpler circumstances, where the directors are prepared to accept the necessary legal liability surrounding a solvency statement, the Committees consider a straightforward process, not involving court approval, should be available. However, in situations where directors are not prepared to accept the liability associated with a solvency statement (for example, because of a more complex position surrounding creditors), the company should be able to choose a court-approved route for the re-domiciliation. The Committees expect that a court-based route would be attractive also where there are more complex issues around shareholder and creditor rights to consider, and so we suggest that (as for schemes of arrangement) the court is given a reasonably wide discretion to consider such matters.

29.2 Requirements applying to both the solvency statement and court-approved routes

The Committees suggest that the following requirements should apply, whether the solvency statement option or court-approved option is chosen by the company wanting to leave the UK. (Different requirements would need to be considered for other kinds of entity that might wish to leave the UK, such as LLPs, OEICs and PCCs.)

- A special resolution of shareholders should be required to approve the re-domiciliation. If the company re-domiciling is a limited liability company that proposes to become an unlimited liability entity in the new jurisdiction, all shareholders should be required to assent (similar to the procedure in section 102(1) Companies Act 2006).

- If the re-domiciliation will constitute a variation of class rights under the company's constitution, a special resolution of the relevant class (or a written class consent) should be required too. (The Committees do not consider that any special rules are required to recognise this in the context of a re-domiciliation.)

- Where a company is controlled by a single shareholder or group acting in concert, consideration should be given as to whether the controlling shareholder group ought to be required to abstain from voting on the matter (or some other mechanism introduced to ensure that a qualified majority of non-controlling shareholders approves the re-domiciliation). This could be determined in a manner similar to the settling of share class composition for the purposes of schemes of arrangement. The Committees note that, under the FCA's Listing Rules, if a listed company has a controlling shareholder, the election of independent directors must be approved by resolution of the independent shareholders. The FCA may want to consider whether such a listed company proposing to re-domicile from the UK should be required to have the re-domiciliation approved by the independent shareholders in that company.

- In order to ensure that members are properly informed before they vote on the re-domiciliation proposal, there should be a list of matters which the required explanatory circular to be provided to them should cover. The Committees suggest this should include: an explanation of any differences between members' rights as members of a UK company and the rights they would have as members of a company in the jurisdiction to which the company is proposing to move; an explanation of the wider impact of the re-domiciliation on stakeholders, including employees; an explanation of any new governance and constitutional arrangements; any tax implications; and an indication of the new financial and non-financial reporting arrangements to which the company would be subject so that members can understand what future information they will receive. Thought also needs to be given what statutory liability (if any) directors should incur if they are negligent in preparing this report/explanation.

- The company should be required to be up-to-date with its filings at Companies House.

- The company should be required to publicise its proposed re-domiciliation, including by filing a form at Companies House and on the company's website, at least 21 days before any resolution to approve the re-domiciliation is passed.

29.3 Suggested additional features of court-approved route

Where the court-approved route is followed, the Committees consider that, as with schemes of arrangement, creditors and shareholders who can show, on reasonable grounds, that the re-domiciliation out of the UK may prejudice their rights should be entitled to object to the re-domiciliation. The court would then need to decide whether or not to grant approval.

The UK courts, in approving reductions of capital and schemes under the Companies Act 2006, already have considerable experience in considering solvency issues. Where court approval is sought, therefore, the question, for example, of whether or not the re-domiciling company should be required to provide security for its creditors is one the Committees believe the courts should determine on the facts of the particular case. The re-domiciliation legislation would need to provide the courts with the appropriate jurisdiction to make these determinations.

29.4 Suggested additional features of solvency statement route

If the outbound company chooses the solvency statement option, the Committees suggest that, a solvency statement similar to that required under section 643 Companies Act 2006 should be required, together with a compliance statement. A compliance statement is required essentially to address the considerations (other than solvency considerations) which the court would address on the court-approved route. There would need to be requirements as to the currency of the solvency statement and compliance statement in relation to the time of effectiveness of the re-domiciliation.

The solvency statement would require the directors to have reasonable grounds for the opinions they are proposing to express in the solvency statement and they would be expected to exercise reasonable care, skill and diligence in forming those opinions. The directors would have to form a reasonable opinion on:

- whether the company can pay or discharge its debts at the date of the statement; and
- whether the company will be able to pay or discharge its debts as they fall due for one year after the date of the statement or, if the company will be wound up in that period, in full within twelve months of commencing the winding up.

This will require them to use information which enables them to identify the company's existing debts and debts to be discharged over the next twelve months and the resources available to the company (or reasonably expected to be available to it) to enable it to meet those debts. If there are any uncertainties, both as regards contingent and prospective liabilities or as regards the resources available to meet the debts, the directors should consider these uncertainties and satisfy themselves that there is a reasonable basis for their conclusions.

As noted above, thought needs to be given as to whether that statement should be subject to some kind of audit process or whether any auditor's opinion, if required, should be limited to confirming that the auditor is not aware of anything to indicate that the opinion expressed by the directors in the solvency statement is unreasonable in all the circumstances. This would be similar to the statement auditors provide under section 714 Companies Act 2006. See further the Committees' response to Question 18.

The solvency statement should be circulated to shareholders prior to the vote to approve the re-domiciliation and the Committees suggest that directors who make a solvency statement without having reasonable grounds for the opinions expressed in it should be guilty of an offence in line with the liability regime under section 643(5) Companies Act 2006.

The Committees also consider that a separate statement of compliance should be signed by the directors and provided to the Registrar after shareholder approval for the re-domiciliation has been obtained. This would provide certain confirmations aimed at protecting shareholders and creditors in the departing company (similar to that required by section 644(5) Companies Act 2006 in the context of a reduction of capital) – in effect covering the matters (other than solvency matters) which the court would consider on the court-approved route. The statement could include, for example, confirmation that all class consents necessary have been obtained and that the explanatory circular sent to shareholders contained the required information. There could also be some form of advertising/notice requirement, similar to that in the striking off process, which would enable objections to the re-domiciliation to be made within a specified time-frame and the directors should confirm that this requirement has been met. The directors making the statement should be guilty of an offence if that statement is incorrect or misleading (in line with the liability regime under section 644(9) Companies Act 2006). The Committees believe it is reasonable to have a more onerous liability regime applied to the solvency statement than the compliance statement, which is consistent with the approach taken in the equivalent regime for reductions of capital.

In order to protect shareholders who do not vote in favour of the resolution to approve the re-domiciliation and creditors who have concerns about the solvency statement, the Committees suggest that consideration is given to providing a right for a shareholder who has not voted in favour of the re-domiciliation or a creditor who can show on reasonable grounds that the re-domiciliation may prejudice their rights, to be able to apply to court within a short period after the resolution to approve the re-domiciliation is passed. The court should be able to make such order as it thinks fits, which could include an order for the company to buy the shares of the dissenting shareholder (or arrange for a third party to do this) or, potentially, for the re-domiciliation not to proceed.

Ongoing legal processes

The Committees do not consider that a company undergoing an outward re-domiciliation should be required to dispose of any ongoing legal processes on the basis that causes of action that are already proceeding against the company will be able to continue, notwithstanding the re-domiciliation.

The Committees did discuss the position of aggrieved potential claimants against the company who are unhappy about a re-domiciliation out of the UK. While the company's assets may still remain in the UK, if that potential claimant wanted to pursue a claim against the re-domiciled company, they may need to seek permission to serve the company out of the jurisdiction, which could involve legal and administrative costs for the claimant. As a result, the Committees suggest that the Government consider requiring a company leaving the UK to retain a UK address for service of proceedings in the UK for a period of time (for example, two years) following an outward re-domiciliation. (A similar requirement exists under the Delaware regime.)

30. What do you see as the economic or other benefits to the UK of allowing outward re-domiciliation?

Please see our response to Question 29. The Committees are strongly of the view that, if the Government wants companies to re-domicile to the UK, it must be prepared to provide the flexibility for companies to leave the UK. If outward re-domiciliation is not permitted, other jurisdictions that provide both inward and outward re-domiciliation might be seen as more attractive destinations than the UK. Also, companies which explore the possibility of re-domiciliation into the UK are (by virtue of having already embarked upon that course) inevitably going to consider the possibility of conducting a further re-domiciliation in future, so we believe that making the process "one-way" will act as a disincentive to the very companies that the UK is seeking to attract.

31. What is your view of the economic or other risks to the UK of allowing outward re-domiciliation?

Please see our responses to Questions 29 and 30.

In terms of addressing the risk of companies re-domiciling out of the UK with UK tax amounts owing, HMRC can look to the existing procedural requirements for companies ceasing to be UK tax resident (set out in ss 109B-109F TMA 1970). These requirements include that the company must give notice to HMRC of its intention to cease to be resident in the UK. This notice alerts HMRC that a company intends to cease to be UK tax resident and requests HMRC to approve arrangements by the company for the payment of any outstanding tax liabilities. A detailed statement of all tax liabilities that are or will be due for periods commencing before the date of migration is also required, along with the company's proposals for securing the payment of tax liabilities. In these circumstances, HMRC also usually requires a guarantee against possible liabilities from a bank or a UK group company that is financially sound and which HMRC is satisfied has the requisite corporate powers to provide such a guarantee.

If a company ceases to be resident without giving notice or making the arrangements as described above, it is liable to a penalty of up to 100% of any tax which is unpaid as at the date the company ceases to be UK tax resident. This penalty is backed up by secondary liability provisions.

32. In your view, is there a demand for outward re-domiciliation from current UK-incorporated firms? If so, which jurisdictions would they likely seek to redomicile to, and why?

While the Committees do not think there will be a huge demand for outward re-domiciliation, certain US states such as Delaware may be of interest to some, particularly those companies with a US listing. For the same reasons as given above, if there is an increase in SPAC listings in the UK, there could be an increase in situations where companies are initially incorporated in the UK but subsequently seek an outward re-domiciliation to marry the jurisdiction of incorporation with the location of the business acquired in the de-SPAC transaction. Permitting outward re-domiciliation in this context would be seen as supportive to the broader aim of encouraging SPAC listings in the UK.

There will be additional reasons why companies currently incorporated in the UK may wish to explore an outward re-domiciliation. This would include companies wanting to re-domicile to avail themselves of statutory merger legislation in a jurisdiction in which they wish to merge with another company as part of an acquisition or restructuring. This would be a two-step process – initially a re-domiciliation of a group company to an overseas jurisdiction, and then a merger between that company and an acquisition target (for acquisitions) or a merger between that company and the buyer (for disposals).

In this light, some members of the Committees have suggested the possibility of a wider consultation on the possible introduction of a statutory merger regime in the UK, both for domestic and cross-border mergers. The Committees note that, while UK domestic mergers can, in theory, be accomplished under section 900 Companies Act 2006, this facility is unused except in limited circumstances in the UK as a result of the decision of the House of Lords in *Nokes v Doncaster Amalgamated Colleries Ltd* [1940] AC 1014 (which is considered to substantially restrict the court's powers under section 900). Any new cross-border merger regime would need to address many of the same considerations as a corporate re-domiciliation, but, in addition, the existing statutory merger regimes would need to be amended to address the limitations created by the *Nokes* decision.

33. What types of companies, and in what sectors, is there likely to be the most demand for re-domiciliation out of the UK, and why?

The Committees consider that the decision to re-domicile out of the UK will depend on the particular circumstances of individual companies, including the views of their shareholders, rather than on their sector or type of company. Many of the scenarios noted in our response to Question 2 will apply for both inward and outward re-domiciliations.

34. Are there other administrative, financial, or other barriers that would still prevent a company re-domiciling out of the UK even with an outward re-domiciliation regime being established?

An outward re-domiciliation of an operating company is not likely to be a straight-foward process, and a due diligence exercise will be needed in any case to determine the impact of the re-domiciliation on members' rights, creditors, regulatory/licencing arrangements, employees, tax authorities and contractual counterparties among others. Furthermore, the requirements of the destination jurisdiction will need to be dealt with. It is for these reasons that the Committees consider that re-domiciliation will remain a relatively niche corporate process.

35. What is your view on these potential conditions for outward re-domiciliation? Are there other conditions you think that the Government should require to minimise the economic risks to the UK?

See the Committees response to Question 29.

Once the UK requirements are satisfied, it will be helpful for Companies House to have a process under which it can certify this to the registrar in the jurisdiction to which the company wants to move. The company will need to meet the requirements of that jurisdiction and the Registrar will need evidence that these requirements have been met (either from the relevant authority or other evidence satisfactory to the Registrar, such as a notarial certificate or legal opinion). Once the Registrar has received evidence that the company has re-domiciled to the new jurisdiction, it should confirm clearly the date and time at which the company ceases to be incorporated in the UK and remove it from the UK register. As there may need to be a short overlap period when the company has been registered in its new jurisdiction and has not been removed from the UK register, the UK legislation should make it clear at what time the re-domiciliation takes place. If it is not possible to agree with the destination jurisdiction a specified time for the effectiveness of the re-domiciliation, the Committees suggest that the effective time should be the time at which the registrar in the destination jurisdiction enters the company in its registry. We suggest that the UK registry should show that the company has re-domiciled to another jurisdiction and provide information on its new name, legal form, registration number and the registry where it is registered. We also suggest that there should be a power for the Registrar to provide information to any authority in the destination jurisdiction in connection with the proposed re-domiciliation.

The Committees did discuss the fact that, if a UK company wants to re-domicile out of the UK, certain countries may look to Companies House to produce more than the certificate of good standing that it currently produces on request. This is something the Government may want to consider as part of the review being undertaken of existing Companies House policies and processes.

As far as the proposed exit fee is concerned, the Committees assume that this would be set at a level to cover the administrative costs of putting in place and running the necessary team at Companies House to deal with outward re-domiciliation applications.

Where there are concerns that an outward re-domiciliation is being proposed as a means of evading criminal liability or is an abuse of the process, the Committees suggest the Government might want to consider reserving a residual power to prevent the re-domiciliation from proceeding. This would be the flip side of the good faith criteria that it is proposed should apply on an inward re-domiciliation.

36. If the Government were to place a time limit on being domiciled outside of the UK before being allowed to return what would be the positives and negatives in your view? If appropriate to set a time limit, how long should this be for?

The Committees understand the concern to avoid companies re-domiciling constantly between different jurisdictions in order to take advantage of some short-term flexibility or other benefit that may exist in another jurisdiction, and then return to its natural "home" jurisdiction. The Committees agree some form of time limit is appropriate, and would suggest this applies both to inward re-domiciliations (after a company has previously re-domiciled out of the UK); and outward re-domiciliations (after a company has previously re-domiciled into the UK).

The Committees considered that a time limit which is analogous to the limitations on extending an accounting reference date under the Companies Act 2006, might be appropriate. Subject to exceptions, companies cannot extend their accounting reference date more than once every five years, so a similar timeframe could be imposed as a time limit for being re-domiciled outside the UK before returning. The Committees would suggest that exemptions are available if a company wishing to re-domicile can show a good reason why it should be permitted to return within that period due to a material change in its circumstances. This could be confirmed by a directors' statement, and any concerns about abuse could dealt with by the Secretary of State, using the reserve power referred to in Question 16.

As noted above, we do not think time limits should apply for an inward re-domiciliation after a new incorporation outside of the UK. Similarly, the Committees consider that newly incorporated companies in the UK should be able to re-domicile out of the UK when they choose and should not be subject to time limits.