City of London Law Society and Law Society response to FCA CP 23/10: Primary Markets Effectiveness Review – Feedback to DP22/2 and proposed equity listing rule reforms

28 June 2023

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**).

The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

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 equity capital markets.

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QUESTIONS

Q1: Do you agree with the proposal to remove specific financial information eligibility requirements for a single ESCC category? If not, please explain why and any alternative preferred approach.

Yes – we agree with the proposal.

Q2: Do you agree with a proposal to explore a modified approach to the independence of business and control of business provisions for a single ESCC category, with a view to enhancing flexibility, alongside ensuring clear categories for funds and other investment vehicles?

In general, we support the move towards a more permissive, disclosure-based approach to the independence of business and control of business provisions which would clarify that a wider range of business models and companies are in principle eligible for the ESCC category, provided they can comply with the FCA's listing, disclosure and transparency requirements on an ongoing basis, though we would of course like to review the exact proposed amendments in due course. However, we consider that the criteria in LR 6.4 and LR 6.6 play an important role in setting the boundaries of which companies are eligible for the premium segment currently (as set out in paragraph 4.6 of CP 23/10) and, hence, the proposed ESCC category, and that they help to preserve investor confidence and market integrity; they should therefore not be abandoned wholesale.

Whilst we are generally supportive of the disclosure-based approach set out in CP 23/10, which allows investors to exercise their own judgement on the basis of adequate disclosure, in relation to companies that make minority investments in other entities but which are not diversified fund vehicles (as referenced in paragraphs 4.8 and 4.10(c) of CP 23/10), some members questioned whether disclosure of the structure, business model, risks etc. in the IPO prospectus and/or in the annual report/other ongoing disclosures would mitigate sufficiently against the potential risks to investors in the given company as well as the wider risks to market reputation and integrity. This is particularly because, unlike mineral companies, for example, that commonly operate via joint ventures, the "minority stakes" model may not be familiar to most UK-focused investors (although we appreciate that more internationally-focused investors will have greater familiarity with such structures and attendant risks). We see the key risks here as lack of clarity about ownership and governance, scope for influence by parties whose identity and connections are unclear, inability for shareholders to hold to account those responsible for setting and delivering the company's strategy and business model and inadequate disclosure by the company and its significant shareholders – which may occur because information is not available and/or because the parent company cannot compel its investee companies to supply all the information necessary to comply with the listing regime. Further, we do not think the proposed SPAC segment is appropriate for companies that make minority investments in other entities. We also do not think there is likely to be a large enough number of such companies applying for listing to justify creating a segment specifically for them.

Nevertheless, we can see that there is value in making clear on the face of the rules that such companies (as well as companies with a franchise-type business model, amongst others) can in principle be accommodated by the ESCC category. Predominantly, the modified approach should prevent such companies and/or their advisers simply excluding London at the outset as a potential listing venue, and instead encourage them to explore with a sponsor and the FCA whether and how they could satisfy the relevant requirements.

We would stress that, for all such companies, a case-by-case analysis will be needed to determine whether the corporate structure, governance arrangements and business model are compatible with the ESCC category; there will inevitably be company-specific variations and borderline cases. As a practical point, we consider it to be important that the FCA is willing to discuss eligibility at the outset of the listing process, as opposed to the end of the prospectus approval process.

If LR 6.4 and 6.6 are modified, we believe that appropriate guidance should be provided in respect of the assessment as to whether a prospective applicant complies with the modified provisions – for instance, by way of negative example, to demonstrate the harm the provisions are seeking to prevent. Currently, we think that there is potential for uncertainty in the application of the modified provisions as the parameters of the proposal are rather vague, thereby running contrary to a key policy objective. There is also a concern that the potential for uncertainty which is inherent in a less prescriptive approach could increase the burden on sponsors in determining eligibility, as acknowledged in CP 23/10 (at paragraph 6.20, for example).

We do not believe that sponsors should be required to provide additional assurance in certain cases in the interests of greater investor protection, for example, in relation to companies that make minority investments in other entities. Rather, sponsors should undertake the same process for all applicants - although in practice this may be likely to be effected more rigorously where there are any concerns about the company's ability to comply with the rules on an ongoing basis. As at present, we would expect the company, its major shareholders, lawyers, accountants and other advisers to assist the sponsor in this process, and for any issues to be discussed with the FCA at an early stage.

Q3: Do you have views on what rule or guidance changes may be helpful, and whether certain disclosures could also be enhanced to support investors and market integrity, or any alternative approaches we should consider?

Please see our response to question 2 above.

Q4: Do you agree with our proposed approach to dual class share structures for the single ESCC category and the proposed parameters? If you disagree, please explain why and provide any alternative proposals.

We welcome the additional flexibility offered by the proposed approach which represents a liberalisation of the targeted form of dual class share structure (DCSS) currently permitted on the premium listing segment. We agree that relaxing the DCSS rules should enable London to compete more effectively with other jurisdictions (the US and Amsterdam in particular) where a more permissive approach is adopted. DCSS is an important consideration for IPO candidates, particularly for technology and founder-led companies and, as noted in CP 23/10, it is a key factor in bolstering the attractiveness of London as a listing venue. In line with this, we believe that the proposal to limit the enhanced voting rights shares to directors of the company is unduly restrictive and we would suggest that the new rules should stipulate that the enhanced voting rights shares must be held by either (i) a founder. provided they continue to hold a specified percentage of the ordinary shares; or (ii) a director.

Some members of the joint working group consider that greater flexibility is required and that there should not be any restrictions on the form of permitted DCSS, as per the current regime for the standard listing segment. A disclosure-based approach should be adopted instead, in line with the broader approach of the FCA reflected in CP 23/10. In this way, market dynamics would determine the acceptable parameters of a DCSS framework (subject to the limitation outlined in our response to question 17 below).

Separately, it will be important to determine when the holder of enhanced voting rights shares will be categorised as a 'controlling shareholder'. We understand this will be one of the matters the FCA consults on in the autumn.

Q5: Do you agree with our proposed approach to the controlling shareholder regime for a single ESCC category? Do you have any views on the suitability of alternative approaches to the one proposed?

We have combined our responses to questions 5 and 6.

Member firms have mixed views about the proposed approach to the controlling shareholder regime. Those in support of the FCA's proposals on the controlling shareholder regime as outlined in CP 23/10 see them as consistent with the overall approach of the FCA in CP 23/10 to reframe some of the existing Listing Rule obligations to become disclosure obligations (in this case, if the issuer decides not to put in place a relationship agreement). They were also mindful of the position of current standard listed companies as they do not have in place relationship agreements, and making them mandatory would require such companies to negotiate such an agreement with a controlling shareholder post-IPO when issuers will have less leverage over the controlling shareholder to put an agreement in place. In addition, they noted that relationship agreements are not mandatory on other major international stock exchanges and that even under the modified approach, controlling shareholders would still be required to obtain a fair and reasonable opinion from a sponsor on any related party transaction of size, and see that as the primary protection for shareholders from any abuse by a controlling shareholder.

There were also a number of member firms in favour of retaining mandatory relationship agreements (and enhanced related party transaction oversight where no relationship agreement is in place), which highlighted the situations involving some London listed companies with controlling shareholders that preceded FCA PS 14/8: Response to CP13/15 – Enhancing the effectiveness of the Listing Regime. These members expressed a preference to maintain the requirement for a mandatory relationship agreement as it is a legally enforceable contract by the issuer against the controlling shareholder that seeks to provide protections for minority shareholders There was a concern that the proposed approach would increase the risk of minority shareholders' interests being overridden by controlling shareholders, which could in turn damage the integrity of the market as a whole.

The members in favour of retaining the controlling shareholder regime also noted the importance of a relationship agreement as a shareholder management tool. They consider that it gives the board, particularly the independent directors, some leverage when navigating transactions with a controlling shareholder or its associates and, if this is removed, their tools for ensuring equal treatment and integrity would be far more limited. This is particularly pertinent to companies with controlling shareholders that are already listed as investors do not have the option to simply not invest. These members were concerned that the absence of a relationship agreement and/or shareholder vote for large related party transactions with a controlling shareholder may result in undue pressure being placed on independent directors in certain circumstances, and that UK listed companies may struggle to recruit and/or retain quality independent directors as a result of the perceived reputational risks that would exist in a more deregulated regime. Similarly, under the revised regime, the market may make assumptions about controlling shareholder influence in all companies with controlling shareholders that decide not to put in place a relationship agreement, as they would be entitled to do, resulting in their shares trading at a discount, and this may not be warranted in every case.

The members in favour of retaining the controlling shareholder regime recognised that the interaction between the more permissive rules on DCSS and the controlling shareholder regime would need to be carefully worked through (as above), to ensure founder-led companies are still encouraged to list in London.

In relation to the three specific points on which feedback was sought in CP 23/10:

- We generally support the proposed retention of an equivalent provision to LR 6.5.3(1)G (granting of security) as a ground for refusing a listing. However, we think that consumer protection could be equally achieved by including controlling shareholder security arrangements in some guidance to the "investor detriment test" in order to streamline the number of rules. In this regard, we think that some examples of "investor detriment" as non-exhaustive guidance would be welcome.

- Reporting details of controlling shareholder agreements in annual reports: if the FCA implements its proposals we would support modification of the provisions currently contained in LR 9.8.4R(14) (a) and (b) regarding a failure to enter into a controlling shareholder agreement i.e. to state instead that the issuer has not entered into a controlling shareholder agreement, a brief description of the background to and the reasons for not entering into a controlling shareholder agreement and detailed disclosures on how the board believes that the company can operate independently of its controlling shareholder and equal treatment of shareholders is secured (both on listing and on an annual basis in the company's annual report).

- Views on how the FCA should approach the factors in LR 6.5.3G (2) to (4) (factors suggesting an issuer cannot carry on a business independent from its controlling shareholder): given that the FCA is proposing to allow companies to list on the ESCC which have non-controlling positions in subsidiaries, we think that LR 6.5.3G(2) could be deleted (material holdings in subsidiaries), the "improper influence" limb (3) could form part of any guidance to the investor detriment test, and limb (4) (access to financing) could be dropped in favour of some guidance to the investor detriment test to the effect that financing from a controlling shareholder that is not on arms' length or commercial terms would be an adverse factor in the investor detriment test. The above approach is less likely to have a negative impact on standard listed companies which obtain finance from a controlling shareholder.

Q6: Do you agree that our proposals as regards controlling shareholders align with our need to act, as far as is reasonably possible, in a way which is compatible with our strategic objective of ensuring markets work well and advances our market integrity and consumer protection objectives? If you don't agree, how do you believe these should be balanced differently?

Please see our response to question 5 above.

Q7: Do you agree with the proposed approach to significant transactions for a single ESCC category? If not, please explain why and any alternative proposals.

We are broadly in favour of the proposed approach to significant transactions. We consider that the removal of the requirement for a shareholder vote for class 1 transactions will assist UK listed companies to be more competitive in relation to M&A processes, where the current requirement to obtain shareholder approval can put them at a significant disadvantage to other companies (resulting in UK listed companies potentially having to pay more for the asset, agree break fees etc., and nevertheless finding that their proposals are still not considered as attractive as those of other companies). We agree that it is difficult to know the full extent of this issue, but certainly our view is that there are companies that do shy away from some class 1 transactions because of the existing requirements.

In addition to the proposed approach, some members of the working group were in favour of removing:

- the proposed requirement to make a class 2 style announcement upon a UK listed company entering into a class 1 transaction and relying instead on the existing UK MAR disclosure obligation. Others, however, were of the view that the class 2 notification requirements support a consistent approach to disclosure, providing a helpful guide to listed companies as to the type of information that should be disclosed. Those in favour of moving to a UK MAR-based disclosure regime considered that it would be more consistent to rely on UK MAR to determine the necessary disclosure obligation, rather than introducing or maintaining disclosure obligations that apply alongside UK MAR, particularly where the impact of a revised class 1 transaction is solely to require an announcement. It was also noted in relation to ordinary course transactions, as referenced in paragraph 5.17 of CP 23/10, that UK MAR does not have a carve-out for ordinary course transactions and it would seem unnecessary to include an additional level of complexity when the disclosure regime can be simplified under this approach; and

- the aggregation regime for class 1 transactions (except in respect of the calculation threshold for reverse takeovers) on the basis that it seems unnecessary when the envisaged consequence of a transaction being a class 1 transaction is, as set out in CP 23/10 (and if the view above is not accepted), that a class 2 style announcement is required. It was noted that UK MAR will apply in any event and it seems unlikely that the malice that the aggregation rules are designed to address (i.e. the circumvention of the existing requirement for a shareholder circular and shareholder approval as a result of carrying out a number of connected transactions, each of which is individually below the class 1 threshold) will be as much of a concern going forward when the requirement to produce a shareholder circular and obtain shareholder approval no longer applies.

These additional changes would also have the advantage of minimising the incremental obligations that would apply to companies which currently have standard listings.

Separately, we assume the FCA will set out its approach to the provisions in LR 10.2.4R to 10.2.7R on indemnities, guarantees and break fees and in LR 10.8.9G on joint venture exit arrangements in its autumn consultation.

Q8: Do you consider that additional disclosure could be considered to further support transparency to shareholders on significant transactions and, if so, what (e.g., considering current circulars)?

No. We consider that the existing UK MAR disclosure obligation, together with post-hoc disclosure of information about the relevant transaction in the company's next financial statements, should be sufficient.

In the context of a class 1 acquisition, we would view as unwelcome any disclosure obligation which required the publication of target financial information in a form which is consistent with the accounting policies of the listed company, in circumstances where this would require the target's accounts to be restated or reconciled. Again, this potentially puts UK listed companies at a competitive disadvantage.

Q9: Should we consider further mechanisms prior to a significant transaction being formally completed (for example, a mandatory period of delay between exchange and completion) to support shareholder engagement with listed commercial company equity issuers in place of shareholder approval? What should those mechanisms be and why?

No, we would not support any such mechanisms as we consider these would risk making UK listed companies less competitive when participating in M&A processes compared to other potential purchasers. In some situations, an extended duration between signing and closing could also lead to an increase in transaction risk and/or transaction costs.

However, we would recommend that DTR 2.5.7G is updated to clarify that an issuer contemplating a major transaction (whether or not it requires shareholder approval) may selectively disclose details of the proposed transaction to major shareholders. In our view, a listed company should be able to engage with shareholders regarding a proposed transaction to try to assess the level of shareholder support for it, whether or not shareholder approval is required.

Q10: Should the sponsor’s advisory role in assessing whether a potentially significant transaction meets the proposed disclosure threshold be mandatory or optional, and what are your reasons? Do you agree with our proposal that sponsors have more discretion to modify the class tests, including substituting the tests with alternative measures, without seeking formal FCA agreement to the modifications? If you disagree, please provide your reasons and alternative proposals.

The general consensus was that the sponsor's advisory role should be mandatory. In line with the current approach, it is sensible for a listed company to be obligated (as opposed to merely having the option) to obtain the guidance of a sponsor in any case where a proposed transaction may be a class 1 transaction.

The view was put forward, however, that retaining mandatory sponsor appointments for class testing at or around 25 per cent appears inconsistent with the more limited disclosure obligations being proposed for issuers together with the proposal that the sponsor would not be required to sign-off the announcement or provide any declarations to the FCA.

In terms of the proposal for sponsors to have more discretion to modify the class tests without seeking formal FCA agreement, there is some concern as to how this would be implemented in practice, given that resulting classifications following the application of certain modifications could be the difference between a transaction being classified as a reverse takeover (where a prospectus would be required) or not (where an announcement would be required), for instance. It is unclear whether sponsors would be willing to make such decisions in isolation, without formal FCA input. We would therefore expect sponsors to continue to consult with the FCA under the proposed modified approach.

In respect of whether the sponsor's advisory role should be mandatory or not and whether sponsors should be provided with greater discretion in modifying the class tests without seeking formal FCA agreement to any such modifications, we would support the same approach being adopted for significant transactions as for related party transactions in the interests of consistency and simplicity.

We agree with the proposal to remove the profits test on the basis that it often produces anomalous results.

Q11: Should we consider expanding the sponsor's role further on any aspects of significant transactions?

No. We do not believe that the sponsor's role should be expanded further on any aspects of significant transactions.

Q12: Do you agree with the proposed approach to RPTs for a single ESCC category, which is based on a mandatory announcement at and above the 5% threshold, supported by the 'fair and reasonable' assurance model which includes the sponsor's confirmation as described above? If not, please explain why and any alternative proposals in the context of a single ESCC category.

We agree with the proposed approach in principle and think that the right balance is struck between protecting against potential conflict of interest risk, through the disclosure and sponsor assurance model, and removing the frictions created by the related party regime requirements to obtain shareholder approval and publish an FCA-approved circular. However, we look forward to reviewing detailed rules and guidance around the Listing Principles and the standard of disclosure in the FCA's follow-up consultation in the autumn, which will be important in ensuring shareholders are not unduly exposed as a result of the removal of previously established protections.

In relation to the 'fair and reasonable' opinion, a number of firms were of the view that this could be delivered by any financial adviser with suitable expertise (rather than exclusively by a sponsor).

Some members highlighted that while they would generally support the removal of the requirement for a shareholder vote and an FCA-approved circular for related party transactions, they would query whether the more permissive, disclosure-based approach to the controlling shareholder regime should be automatically extended to related party transactions with a controlling shareholder or one of its associates.

More broadly, however, we think it would be unhelpful to maintain the separate related party disclosure regime under DTR 7.3, which is different in scope to the Listing Rule regime, as proposed in CP 23/10. We appreciate that CP 23/10 confirms that compliance with the listing regime requirements would be deemed sufficient to comply with the DTR 7.3 requirements where a potential related party transaction falls within the parameters of both the DTR and the proposed ESCC requirements at and above the 5 per cent threshold. However, this does not assist in the event that the proposed transaction is only subject to DTR 7.3. As a result, issuers must apply and monitor their compliance with two different regimes governing related party transactions. We think that maintaining both overlapping regimes is confusing and burdensome for companies and unnecessary from a shareholder protection perspective.

Q13: Do you consider that additional disclosure requirements could be considered to further support transparency to shareholders on RPTs, and should we consider requiring certain mechanisms prior to a deal being completed (for example, a mandatory period of delay between exchange and completion) to support shareholder engagement with listed companies to replace the requirement for independent shareholder approval?

No, but please see our comments on DTR 2.5.7G in our response to question 9 above.

Q14: Should it be mandatory for a listed company in the single ESCC category to obtain guidance from a sponsor on the application of the LR, DTR and MAR whenever it is proposing to enter into a related party transaction (irrespective of the size of the transaction), or should it be at the company's discretion?

Please see our response to question 10 above.

Q15: Should it be mandatory for the sponsor to consult with the FCA and agree any modifications to the class tests and classification of a proposed RPT, or should the sponsor have more discretion? Please explain your reasons.

Please see our response to question 10 above.

Q16: Are there any broader, alternative mechanisms that existing shareholders or prospective investors would want to see in place of, or made use of, in order to strengthen shareholder protection in relation to RPTs in the event that these changes are made to our LR? If so, would these be matters for inclusion in our LR or are they found, for example, in legislation or market practice?

No. We do not believe any new mechanisms in relation to RPTs are necessary.

Q17: Do you agree with the proposed approach to cancellation of listing for the single ESCC category, and do you have any views on other possible changes to the existing cancellation process?

We agree with the proposal to retain the requirement for an FCA-approved circular, a shareholder vote with a 75 per cent majority and a 20 business day notice period for cancellation of listing, subject to the proviso that we do not believe that a shareholder with enhanced voting rights resulting from a DCSS should be able to exercise enhanced voting rights in such an instance (please see our response to question 4 above). Otherwise, other shareholders will be exposed to the risk referred to in paragraph 5.43 of CP 23/10.

Q18: Do you think that the notice period proposed for the single ESCC category for de-listing should be extended (taking the approach of other jurisdictions) and if so to what? What would the benefits be?

As set out in our response to question 17 above, we do not consider that any enhancements are required in respect of the current notice period on the basis that the shareholder vote is the key investor protection measure in this context.

Q19: Do you consider the policy for cancellation of listing by the FCA after a long suspension should be revisited? If so, how?

We think that it would be appropriate to retain discretion in relation to the cancellation of listing following a long suspension and do not see why a delisting should be forced. We would be happy to review any proposed modifications to the policy in due course**.**

Q20: Do you agree with retaining shareholder approval provisions on discounted share issuance and on share buy-backs, as currently required by the premium LR, as part of a single ESCC category, or would these be problematic for certain issuers?

Yes, we agree with retaining shareholder approval provisions on discounted share issuances and on share buy-backs. We think that the wording on discounted share issuances in LR 9.5.10R should be updated to allow for on-screen intra-day prices to be used without reference to the FCA and to cater for placings with a backstop price (i.e. whether setting the backstop price also counts as a point of testing the placing price in addition to the time of agreeing the final placing price).

In respect of the proposal to apply the existing premium listing continuing obligations concerning pre-emption rights to all issuers in the new single ESCC category (as per LR 9.3.11R to LR 9.3.12R) (at paragraph 5.50 of CP 23/10), whilst we note that the principle of pre-emption is considered to be an important feature of UK capital markets, as highlighted in both the UK Listing Regime Review and the UK Secondary Capital Raising Review, we also recognise the desire to encourage companies from jurisdictions where pre-emption rights do not apply to list in London. We think that the extension of this requirement to all issuers in the new single ESCC category, including overseas issuers, could create a significant barrier to listing for companies that do not have pre-emption rights, for example, US companies, thereby undermining the policy objective of the proposed reforms.

Q21: Do you agree with our proposed approach to reporting against the UK Corporate Governance Code for companies listed in the single ESCC category, and are there any other mechanisms the FCA could consider to promote corporate governance standards?

Yes, we agree with this approach and think that the 'comply or explain' framework of the UK Corporate Governance Code works well in this context. In this regard, we note the FRC's Corporate Governance Code Consultation.

Q22: Do you have any views on the proposed application of reporting requirements under LR 9.8 (i.e., premium LR requirements) as the basis for the single ESCC category?

We have no objections to the proposed application of reporting requirements under LR 9.8 as the basis for the ESCC category, appreciating that there is already a lighter set of requirements for overseas companies.

Q23: Do you agree with our proposed changes to the LR principles? If not, please explain why and provide details of any alternative suggested approach.

We broadly agree with the proposals, subject to the final form of the combined set of principles, appreciating that further detail on the application of the combined set of principles, including modifications and exceptions, will be provided in the FCA's follow-up consultation.

However, in respect of the FCA's intention to clarify the role that the board can play in relation to ensuring a listed company meets its regulatory obligations, and its consideration of how its proposals interact with UK company law and directors' fiduciary duties, while we have no objection in principle to the FCA exploring this in the autumn consultation, we think it is important that any proposed rule changes reflect the proper role and legal duties of directors. In particular, the board's role is primarily to provide strategic leadership and high-level oversight, and at least half the board (excluding the Chair) will usually be independent non-executives and not full-time employees. The duties and roles of directors are regulated by the Companies Act 2006, case law, the UK Corporate Governance Code and related guidance, all of which have been developed over many years. We do not think the FCA should seek to change the existing duties and roles of directors, though there may be scope to explain more clearly what boards are required to do in the context of an issuer's compliance with the Listing Principles.

Q24: We are considering applying the principles as eligibility criteria, to clarify expected standards and reflect the fact that in practice these requirements need to be complied with at the point of listing. Please provide details if you foresee any issues with this approach.

As per our response to question 23 above, we will await the final form of the combined set of principles before commenting on this proposal in any detail.

Q25: Do you agree with our proposed changes to strengthen cooperation and information gathering provisions as outlined in this section? If not, please explain why and any alternative suggested approach to addressing the issue identified.

Whilst we understand the desire to strengthen provisions around co-operation and information gathering in light of the proposed changes to eligibility requirements to permit a more diverse range of companies to list on the ESCC, we query whether the proposed rules are too prescriptive. Issuers already have similar responsibilities and obligations under, among other provisions, LR 1.3.1R, Listing Principles 1 and 2, LR 9.2.11R and LR 9.2.13A.

We believe it is sensible that, prior to listing, an issuer is required to explain its record keeping arrangements to the FCA. However, we would highlight that any new record keeping requirements for issuers need to be carefully considered to ensure that they are not disproportionate and do not impose an excessive administrative burden and a potential disincentive to listing in London. This reflects the approach of the FCA to the sponsor record keeping regime in paragraph 6.28 of CP 23/10: "we are keen to ensure that the regime is proportionate and strikes the right balance between safeguarding our ability to consider a sponsor's actions ex post and preventing the creation of a huge administrative burden for sponsors". This is a particular concern for issuers, because (unlike sponsors) their continuing obligations are not limited to matters involving sponsor services.

We also support in principle the requirement for a company to provide a confirmation to the FCA of its ability to comply with its continuing obligations as a sensible means of increasing the likelihood that the appropriate systems and controls are in place both at IPO and going forward. However, we think the proposed confirmation should be based on the existing requirement that the sponsor comes to a reasonable opinion that the directors have established procedures which enable the issuer to comply with its continuing obligations on an ongoing basis (see LR 8.4.2R(3)). An obligation to establish procedures along these lines would make clear the concrete steps which an issuer must take – and which the sponsor can verify – prior to admission. Requiring a broad confirmation that the issuer is able to comply with its continuing obligations would not give the issuer (or the sponsor) sufficient clarity as to what steps it must take. It could also be misinterpreted as a guarantee that the issuer will never breach its continuing obligations. As an eligibility requirement, the purpose of the new rule should be to make clear what the issuer is expected to do before admission. The existing rules already require issuers to comply with their continuing obligations after admission. If they do not, then enforcement action can be taken for the breach in the usual way.

Q26: In relation to our proposal to ask issuers to provide contact details of their key persons, do you think this should include details of the CEO, CFO and COO? Do you have any other suggestions as to other key roles that we should consider? Also, are there circumstances where it would be appropriate for an issuer to nominate a third party (such as an FCA authorised advisor), as a key person and, if so, why?

If the FCA has found that having the contact details of one individual at the issuer has been insufficient in the past, we have no objections to amending LR 9.2.11R to increase that number. However, we do not think the new rules should identify the roles of the individuals whose contact details are shared, but should instead require a company to provide details of two or three people within its senior management team. This should provide flexibility for the issuer and certainty for the FCA that it will be able to reach an individual of sufficient authority at the company at short notice.

We agree with the requirement that issuers provide details of the arrangements in place for service of documents and accepting service of process.

Q27: Are there specific considerations we need to take into account for different issuer or security types, in relation to our proposals in this section, that we should take into account as we develop our proposals further?

N/A.

Q28: Do respondents have any concerns about the availability of sponsor services as a result of the proposed changes to the listing regime and the sponsor role?

N/A.

Q29: We welcome views from sponsors on whether they would be able to adapt or willing to provide services to a potentially wider and more diverse range of issuers? We particularly welcome any information or data on the implementation and ongoing costs sponsors may incur as a result of our proposals.

N/A.

Q30: Do sponsors have any concerns about performing the sponsor role and providing sponsor assurances within the model proposed? Please provide details.

We note the statements at paragraphs 6.18 and 6.20 of CP 23/10 regarding the envisaged role of the sponsor in assessing eligibility under the proposed model, given that sponsors will have additional discretion to assess suitability for listing (and potentially in relation to a wider universe of companies) as opposed to applying a bright-line test, as is currently the case. In this respect, we think it is important that there is sufficient guidance on the criteria to be applied by sponsors to determine whether companies meet the relevant requirements.

Q31: Do you have any concerns that sponsors will be able to demonstrate continued competence under our proposed approach? What matters should the FCA take into account when assessing sponsor competence?

Granted that it may prove to be more difficult for sponsors to maintain competence on the basis of the current rules which require sponsors to have submitted a sponsor declaration to the FCA within the previous 3-year period (amongst other things), we support the proposed clarification that the FCA will likely consider transactions on which a sponsor has advised which have not required a sponsor declaration.

Q32: We welcome views on proposed restructure of the listing regime set out above. In particular, do you agree with our preliminary proposals for dealing with issuers that are not issuers of equity share in commercial companies?

We agree that care is needed to ensure that the proposed approach for standard listing categories is not perceived as a re-branded standard listing segment.

We consider that a secondary listing category for companies listed overseas should be available and that failure to provide for this would see a number of existing standard listed overseas companies delist, and dissuade some overseas listed companies from listing in the future. If a secondary listing category is not available, then we consider that additional changes would be needed to the ESCC category.

In this context, consideration could also be given to the situation where a UK company has its main listing overseas and wishes to seek an additional listing in the UK, recognising that this is relatively unlikely. We would suggest that such a company should be eligible for the secondary listing category, in principle, provided that the overseas listing is on markets that have sufficiently rigorous requirements (to avoid a company seeking a technical listing overseas in order to access the UK secondary listing regime). We consider it unlikely that a UK company would seek to list on, for example, a regulated EU market or NASDAQ or the NYSE solely to facilitate access to the secondary listing category in the UK.

We also agree that there needs to be a transitional ability for existing standard listed companies that are unwilling or unable to be part of the ESCC category to continue to be subject to a regime that is equivalent to the standard listing regime.

As a minor point, CP 23/10 notes (at paragraph 7.19) that "depositary receipts provide an important mechanism by which issuers admitted to an overseas market can seek additional investment via UK listed securities markets". Our understanding is that generally an issuer is not required to be admitted to an overseas market in order for depositary receipts representing its securities to be eligible for listing (noting that there are special requirements in relation to investment entities in LR 18.2.10A).

In the context of developing a specific category that applies to SPACs and cash shells, we would suggest that further consideration is given to the regime that should apply to such entities. For example, we believe a good case can be made that, as is the case for commercial companies, the suspension regime should not apply to cash shells, provided they are in compliance with UK MAR. Further, we would not be in favour of a position where, as a result of the changes, more onerous requirements would apply to cash shells that have, to date, listed under LR 14 without complying with the requirements in LR 5.6.18AG (for example, vehicles such as J2 Acquisition).

We are also aware of situations where the FCA has had eligibility concerns regarding an applicant for listing under LR 14 on the grounds that the applicant had some features which the FCA considered were similar to an investment entity (notwithstanding that it was not an entity whose primary object was investing and managing its assets with a view to spreading or otherwise managing investment risk), but equally had eligibility concerns that the applicant was not necessarily an investment entity for the purposes of LR 15. It would be helpful to ensure that these sorts of scenarios are avoided to the extent possible under the new categorisation system.

We would be in favour of retaining a category in relation to sovereign controlled commercial companies, unless the final ESCC category offers as much flexibility as that which exists under LR 21.

Q33: Have we identified the impacts on different issuer types and sufficiently delineated between them? If you have alternative suggestions that we should consider, please provide details.

N/A.

Q34: We welcome views and suggestions on our proposed approach as outlined above and in Annex 4, for updating the LR sourcebook.

We welcome the simplified approach for updating the LR sourcebook, though we think it would make sense if the proposed new Chapter 10 (Contents of circulars) appeared immediately after Chapter 8 (Dealings in own securities and treasury shares), such that all of the rules relating to the ESCC category are grouped together.

Q35: If you have views on what transitional arrangements maybe required, please provide details.

Our view is that it is very important, from a practical and messaging perspective, to provide sufficient guidance for issuers ahead of the implementation of the proposed rule changes so there is some clarity around how and the extent to which the changes will impact issuers, both existing and prospective. It could be clarified, for example, that a more lenient timescale will be applied to existing standard listed issuers of equity shares that are commercial companies transferring to the new ESCC listing category given that they will be more impacted by the proposals than existing premium listed commercial company issuers. This is consistent with the approach adopted for the application of the climate-related disclosure requirements to issuers of standard listed shares and Global Depositary Receipts under LR 14.3.27R, with the rule applying one year after its equivalent was implemented for premium listed issuers.

In relation to class 1 transactions, to assist existing premium listed companies and their advisers, giving them the maximum time to plan (for auction processes in particular) in the event that the FCA proceeds to remove the requirement for a class 1 circular and shareholder approval, it would be helpful if the FCA could signal as soon as possible the date after which these requirements would no longer apply and to confirm that any transactions signed after that date would not be subject to those rules. This would help clarify that transactions signed before that date would still be subject to shareholder approval (rather than indefinitely postponing a shareholder vote).