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Primary Market Policy
Financial Conduct Authority
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By email: cp13-15@fca.org.uk

Dear Sirs,

GC100 response to FCA consultation paper CP13/15

I am writing on behalf of the GC100 in response to the above consultation paper. As you may be aware, GC100 is the association for the general counsel and company secretaries of companies in the FTSE 100. There are currently 128 members of the group, representing more than 82 companies. Please note, as a matter of formality, that the views expressed in this response do not necessarily reflect those of all individual members or their employing companies.

As discussed previously when you kindly met the GC100, we very much welcome the opportunity to be involved in this consultation (and its predecessors). We have found our meetings very constructive and we appreciate the consideration that the FCA has shown to a number of the suggestions that we made in our response to CP 12/25.

In line with the approach adopted in relation to our previous response, although the consultation covers a wide variety of issues, we have concentrated on addressing those questions on which the GC100, as a group, feels are of most relevance to its constituents and therefore where it is best placed to contribute. Individual members may have views on some of the questions we do not cover and we therefore expect them to contact you separately with those views.

1. **Summary**

Overall, we welcome the FCA's revised package of measures presented in this consultation paper and developed since CP12/2 and CP12/25. In general, the proposed approach to matters such as relationship agreements and the initial and ongoing eligibility criteria for premium listed applicants and companies appear to us to provide a sensible balance between the different interests and priorities of the different market participants. We are broadly supportive of many of the settled positions taken by the FCA and therefore have limited comments on the current proposals. These are set out below.

2. **Detailed comments**

2.1 Definition of a controlling shareholder

Q1: Do you agree with our proposed definition of a "controlling shareholder" as described above?

We have some concerns about the inclusion of "acting in concert" in the definition of controlling shareholder without either defining that term or confirming that it will be construed in accordance

with the City Code on Takeovers and Mergers. We note the comment on page 23 of the CP that "*We are not proposing to provide a definition or detailed interpretative guidance at this stage. However, we will consider providing further guidance if necessary.*" However, as this is a term of art which is used in the Takeover Code and is well understood in that context, we do not think it will be helpful for there to be uncertainty about a potentially differing interpretation in the "controlling shareholder" Listing Rules context. It would therefore be helpful if the FCA could provide guidance as to how it will interpret these provisions. Where appropriate, close alignment to the Takeover Code definitions (and Panel interpretation) seem to provide good benchmarks, albeit certain adaptations may be required.

We note new LR6.1.4C G which states that "*a new applicant will not be required to enter into a separate agreement with each controlling shareholder if a controlling shareholder can* ***with reasonable certainty*** *(our emphasis) procure the compliance of another controlling shareholder with the terms of the relevant agreement*". Although this Listing Rule is not part of the consultation, we think it would be useful to have some guidance as to what the phrase "with reasonable certainty" means in this context. Our concern is that it may be difficult for the new applicant to form the view that the test has been satisfied even after carefully investigating the arrangements between the controlling shareholders. Other than in the most straightforward of cases, such as wholly owned group structures, the new applicant is therefore likely to err on the side of caution and require more than one relationship agreement as it may be reluctant to judge what the FCA requires in the absence of guidance. This will add extra complexity and cost to the company's future governance arrangements as well as involving additional work on the IPO work stream which may well be avoidable if the FCA can provide more clarity as to what is meant by this phrase.

2.2 Independent directors

Circulars in relation to election of independent directors

Q11. Do you agree that our proposals in this area should be limited to commercial companies with a controlling shareholder or should they be applied to all premium listed commercial companies or all premium listed companies (regardless of whether there is a controlling shareholder or not)?

We agree that the FCA’s proposals in this area should be limited to commercial companies with a controlling shareholder, and should not be applied where there is no controlling shareholder.

To extend these proposals either to all premium listed commercial companies or to all premium listed companies would bring additional and unnecessary complexity to an area which is already covered by the UK Corporate Governance Code (**"Code"**) and which works well and is well understood by the market. Our members are not aware of specific concerns being raised by shareholders in this area. Code Provision B.1.1 requires that "*The board should identify in the annual report each non-executive director it considers to be independent. The board should determine whether the director is independent in character and judgement and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgement*". The paragraph then lists a series of non-exclusive matters for the board to consider when considering independence, such as whether the director has been an employee of the company in the last five years. In addition, Code Provision B.7.2 requires the board to set out "*to shareholders in the papers accompanying a resolution to elect a non-executive director why they believe an individual should be elected*" and Code Provision B 2.4 sets out what is required by way of a summary of the nomination committee's work including the process it has used in relation to

board appointments. As we mentioned in our previous response to CP12/25 we would prefer that matters that are within the remit of the Code's "comply or explain" regime are not duplicatively "hard wired" into the Listing Rules.

In relation to the proposal itself, the proposed LR13.8.17(R) would require a circular to shareholders relating to the election (or re-election – see comment below) of an independent director to include new information in two areas, broadly (1) details of relationships and agreements with the listed company and its directors or confirmation that there are none and (2) descriptions of why the issuer thinks the director would be effective, how the listed company has determined that he is independent, and the process followed for his selection. Unlike the Code, proposed LR13.8.17(R)(1) has no time limit or materiality qualification and we are concerned that this could lead to many extensive disclosures being made which in reality are not helpful information for shareholders and will increase disclosure “clutter”. For example (although admittedly a “reductio ad absurdum” to illustrate the point), if a premium listed supermarket company had a controlling shareholder and was proposing to elect an independent director who was accustomed to doing his weekly grocery shopping at his local branch of that supermarket, LR13.8.17(R) as drafted would require this to be disclosed in the circular, as the acceptance of payment for the weekly shop constitutes the conclusion of a contractual agreement between the proposed director and the listed company; and arguably each week’s shopping is a separate agreement. We suggest therefore some materiality qualification and time limit is included in the proposed Listing Rule.

In addition, the Code requirement is for information to be included in the annual report whereas the proposed Listing Rule refers to the circular. If the FCA decides to proceed with this proposal, we suggest that the Rule be amended so that the circular be permitted to cross-refer to the corresponding section in the annual report if it accompanies the circular, in order to avoid duplication.

As a general point, we note that proposed LR13.8.17(R) refers to "election". We assume that the proposals are also intended to cover re-election of directors in order to meet the stated policy aims (given that a director might cease to be independent during the course of a year even though he was independent on election). This would be consistent with, for example, the new LRs 9.2.2 C-E. Our comments are based on this understanding.

Q12. Do you agree with our proposal in this area to include specific disclosure requirements as described above (LR13.8.17R(1) and (2))? Are there other requirements we should consider?

If the FCA does adopt these further requirements, we suggest as noted above that the details set out in draft LR13.8.17R(1) are limited in time and have a materiality threshold applied; as currently drafted they are extremely wide ranging.

2.3 Transitional period

Q13. Do you agree with our proposal for the transitional provisions as set out in draft sections 2 and 3 of LR TR11 and LR 9.2.2BR(2)?

We think the transitional period here should match the transitional period for the amendment to LR 9.8.4CR. If the rules come into force just before the AGM Notice is sent out, there will be insufficient time to include the relevant information.

2.4 Shares in public hands

Specific criteria for modification of the free float requirement

Q14. Do you support our proposal to delete LR6.1.20G and replace it with LR6.1.20AG as described above?

We welcome the proposal and the general theme of this part of the CP. We think that new LR6.1.20B.G is sensible in disaggregating the holdings of fund managers within a group where independent investment decisions are made. We also think it is sensible to remove the reference to 20 per cent as originally proposed. We agree that corporate governance issues should not be addressed indirectly via free float requirements. These requirements are designed to achieve a liquid market and in this context flexibility is needed to respond to differing situations, making a fixed threshold unnecessary.

2.5 Continuing obligations

Transitional provisions for voting on matters relevant to premium listing

Q16 Do you agree with our proposal to allow existing premium listed companies two years to bring themselves into compliance with LR9.2.22R?

We think that a two year transitional period should be sufficient. We note that you have not included guidance on how this rule would operate in the case of dual listed companies and your observation in the feedback statement that you do not think that this is necessary and that you "*have no wish to hamper the way that existing DLCs operate currently*". We find this sentiment reassuring as, on its face, the new rule could have this effect. Our view however is that some guidance would be helpful for DLCs to make clear that the arrangements that allow the separate constituents of DLC structures to vote as one entity do not offend against this rule.

2.6 Transitional provisions relating to annual report disclosure

Q17 Do you agree with the transitional provisions set out above?

We agree that the proposed transitional period should be sufficient. We appreciate your adoption of our suggestion of a cross reference table and welcome this.

Smaller related party transactions

Q19 Do you agree with our proposals for the treatment of smaller related party transactions as set out above?

We do not have any objections to the proposed disclosure obligations or for sponsor comfort to be addressed to the listed issuer rather than the FCA as neither suggestion should add materially to

the administrative burden or cost for listed issuers.

The Listing Principles
Consequential changes to LR7 and DEPP 6

Q20 Do you agree that the consequential changes described above are appropriate?

Yes, we agree that these changes are appropriate.

2.7 Cancellation of listing

Q21 Do you agree with Option 1 or Option 2?

There is a divergence of views among members on this proposal.

Those in favour of retaining the existing position (Option 2) consider that the existing disclosure requirements (which will be enhanced if certain of the other consultation proposals are adopted) mean that those investing in companies which have a controlling shareholder should have a sufficient understanding of the risks associated with such companies, including those arising from the current 75% threshold for delisting.

A controlling shareholder with 75% of the vote can exercise de facto control of a company for many Companies Act purposes so it seems appropriate for the Listing Rules test to also be set at this threshold. Likewise, in a takeover scenario where the offeror is interested in over 50%, members felt it could be disproportionate to apply a second requirement in respect of the shares held by independent shareholders in addition to the existing 75% test. The other potential issues outlined in paragraph 11.24 of the consultation regarding Option 1 also resonated with those members in favour of Option 2.

GC100 members in favour of introducing an additional requirement for independent shareholder approval (Option 1) felt that the preservation of a company's listed status was a right of minority shareholders that could justifiably require protection from potential abuse by a controlling shareholder. One such situation of potential abuse would be if a controlling shareholder only requires a relatively small percentage to reach the 75% threshold and could therefore potentially launch a tender offer to buy out the minority at a relatively low offer price with a commitment to delist if a 75% holding was reached. In the face of holding an unlisted security, minority shareholders could feel compelled to accept the offer.

We would welcome the opportunity to discuss these points with you in greater detail.

Yours sincerely,

Hilary Owens
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