Primary Markets Policy Team
Financial Conduct Authority
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By email: cp23-31@fca.org.uk

27 March 2024

Dear Primary Markets Policy Team

BVCA response to FCA CP 23/31, Primary Market Effectiveness Review: Feedback to CP 23/10 and detailed proposals for listing rules reforms (FCA CP 23/31)

The BVCA is the industry body and public policy advocate for the private equity and venture capital (private capital) industry in the UK. With a membership of over 630 firms, we represent the vast majority of all UK-based private capital firms, as well as their professional advisers and investors. In 2022, £27.5bn was invested by private capital into UK businesses in sectors across the UK economy, ranging from consumer products to emerging technology. There are over 12,000 UK companies backed by private capital which currently employ over 2.2 million people in the UK. Over 55% of the businesses backed are outside of London and 90% of the businesses receiving investment are small and medium-sized enterprises (SMEs).

The BVCA welcomes efforts by the Financial Conduct Authority (the "FCA") and others to promote the UK as a more flexible and attractive place to do business and in particular to make the London Stock Exchange ("LSE") a more accessible listing venue. The FCA listing review process is an important step towards improving the competitiveness of the UK market from a regulatory perspective and should have the dual benefit of making the UK a more attractive listing destination and improving the competitiveness of UK listed companies in international M&A processes.

However, as we stated in our previous letter in June 2023, changing the listing rules can only be one part of making the UK's capital markets work better and there needs to be a sustained commitment to improve aspects such as the depth of liquidity, perceptions on valuation gaps, the extent and quality of research coverage, the approach to executive remuneration and consistency of investor appetite for IPOs in the UK (especially from UK investors). These will also need to be addressed if the UK is to materially improve its competitive position, in addition to the ongoing UK prospectus regime review and secondary capital raisings review.

We support the proposals in FCA CP 23/31 and welcome the movement by the FCA in a number of areas in response to market feedback. We believe that the proposals strike the right balance between promoting the competitiveness of the London market and better positioning it as a listing venue for a more diverse range of issuers, including innovative high growth and pre-revenue companies, while maintaining adequate safeguards to preserve market integrity and high standards of governance, transparency and investor protection and supporting investors' decision-making.

We have responded to the specific questions set out in CP 23/31 below, focussing on the questions which are of most interest to our members. Where we consider that proposals could add disproportionate costs or burdens or potentially contribute to delays, we have sought to highlight these and propose suggestions for solutions (see our responses to Q8 and Q9, for example). Equally, we aim to share constructive suggestions where we can, such as in our answer to Q27.

With regard to implementation of the new listing framework, covered at the end of our response, we note the proposal for a two week implementation period following publication of the final rules. While we agree with the proposed treatment of in-flight applications and mid-flight transactions we would welcome more visibility on expected timing to allow the market sufficient time to adapt to the new rules, in particular for premium listed issuers involved in a mid-flight transaction at the time of implementation.

More generally, we wanted to welcome the recent announcement by FTSE Russell that it anticipates that the Equity Shares (Commercial Companies) and the Closed Ended Investment Fund categories will become the eligible index universe for the FTSE UK Index Series, replacing the Premium Segment, shortly after the introduction of the new listing regime, if the proposals contained in FCA CP 23/31 are adopted. In particular we welcome the confirmation by FTSE Russell that it does not intend to introduce any additional inclusion requirements relating to the regulatory obligations which would replicate any Premium Listing requirements. This would represent an important step towards an agile and streamlined commercial companies listing category.

Please do not hesitate to get in touch if you have any questions or if you would like to discuss any of the above in more detail (please contact Ciaran Harris, charris@bvca.co.uk).

Yours sincerely,

Sarah Adams and Isobel Clarke

Directors of Policy, BVCA

BVCA RESPONSE TO SELECTED QUESTIONS IN FCA CP 23/31

Q1: Based on our overall proposals for commercial companies, and taking into account the broader UK regulatory, legal and corporate governance environment, do you believe that we have struck the right balance in designing a proposed regime that enables the conditions for a stronger, more effective and competitive listed market with appropriate measures in place to support market integrity and investor protection. If not, what changes should be made?

We broadly agree with the proposals in FCA CP 23/31 and believe that they strike the right balance between promoting the competitiveness of the London market and better positioning it as a listing venue for a more diverse range of issuers, including innovative high growth and pre-revenue companies, while maintaining adequate safeguards to preserve market integrity and high standards of governance, transparency and investor protection and supporting investors' decision-making.

Q2: Do you agree with our proposed approach to structuring the UKLR Sourcebook chapters?

We agree with the proposed approach.

Q3: Do you agree with our proposed approach to eligibility requirements for commercial companies and the proposed draft provisions in UKLR 5 in Appendix 1?

We agree with the proposed removal of the financial information eligibility requirements for the commercial companies category. A disclosure-based approach will provide greater accessibility for a more diverse range of issuers while providing investors with the information they need to decide for themselves whether to invest based on their own risk appetite. The proposed removal of the eligibility requirements for a three-year revenue earning track record and historical financial information covering at least 75% of the business should make it easier for highly acquisitive, innovative high growth and pre-revenue companies to join the commercial companies category. However, as indicated in our response in June last year, we would not want to see the removal of the current financial information or clean working capital eligibility criteria result in increased disclosure requirements in a revised prospectus regime. We would suggest that any perceived information gaps should be adequately covered by the prospectus 'necessary information' test and that any proposals to enhance the current historical financial information disclosure requirements should take into account the potential consequences from a global market perspective.

Please also see our response to Q27 below in relation to the eligibility of closed-ended investment funds.

Q4: Do you agree with our proposed approach to independence and control of business for the commercial companies category eligibility and continuing obligations? If not, please explain why and any alternative approach.

We agree with the proposed approach to remove the eligibility criteria relating to independent business and operational control of the main business and to rely on a disclosure-based approach - this should open up the commercial companies category to certain strategic investment companies (see also our response to Q27 below in relation to the eligibility of closed-ended investment funds).

Q5: Do you agree with our proposed approach to requirements relating to controlling shareholders for the commercial companies category eligibility and continuing obligations? If not, please explain why and provide any alternative approach.

We agree with the proposed approach. The proposal to retain the requirement for a controlling shareholder to enter into a relationship agreement is a proportionate response to a more permissive dual class share structure regime and related party transactions no longer being subject to shareholder approval. A relationship agreement can provide reassurance to minority shareholders and is an appropriate means for an issuer to demonstrate that it carries on business independently from its controlling shareholder. It is not unusual for relationship agreements entered into at IPO to include additional provisions beyond those mandated by proposed UKLR 5.3.4R that can be beneficial to both parties.

Q6: Do you agree with our proposals for allowing DCSS for companies listing shares in the commercial companies category and our approach to matters on which enhanced voting rights can be used? If you disagree, please explain or suggest alternative approaches?

We welcome the proposal for a more permissive DCSS regime for companies listing in the commercial companies category and view this as critical to increasing the competitiveness of the London market vis-à-vis other leading global markets.

The option to have a DCSS can be an important factor for innovative high-growth companies when deciding on a listing venue as it affords the founders the opportunity to focus on their vision and long-term strategy. Investors will be in a position to decide at IPO, based on their risk appetite, whether they have any concerns from a governance perspective. We agree that market sentiment and early engagement with potential investors may result in time-based sunset arrangements on a case-by-case basis. We note that in the US, while there is no mandatory sunset provision for DCSS, an increasing proportion of issuers with weighted voting structures build in time-based sunset provisions to these arrangements in response to investor preferences.

We agree with the proposal that enhanced voting rights will not be permitted on matters that might potentially be damaging to minority shareholders.

Q7: Do you agree with our proposed approach towards a significant transactions regime for the commercial companies category? Please provide any alternative views.

We agree with the proposed approach to remove the requirements for shareholder approval and a FCA-approved shareholder circular for significant transactions in the commercial companies category. This eliminates what can often be a significant obstacle and competitive disadvantage for premium listed companies in the context of transactions involving an auction process.

Q8: Do you agree with our proposed enhanced disclosures regime for significant transactions? If you disagree, what changes do you consider we should make and why?

We agree with the concept of increased disclosure to investors for the purposes of increasing transparency and evidencing a board's robust assessment of the terms of a transaction in the absence of a shareholder circular. However, the proposed content requirements and timing for

the notification would seem to run counter to the overriding aim of the proposed amendments to the significant transactions regime, namely to streamline the process and ensure that issuers in the commercial companies category do not find themselves at a disadvantage relative to unlisted potential counterparties or those listed outside the UK in a competitive auction scenario. The proposed level of disclosure, including target financial information, would add significant cost and potential delay to the preparation of the notification with the risk that an issuer would be unable to comply with its obligation to notify a RIS within the timeframe required by proposed UKLR 7.3.1R and its overriding disclosure obligation under UK MAR.

We would propose a split notification process with core details, perhaps along the lines of the existing class 2 notification requirements, when terms are agreed with an obligation to publish a more detailed notification at a later date but without the potential to otherwise delay a competitive transaction process. In addition, while we support a requirement to prepare high quality disclosure for investors we would question whether the proposed contents requirements go beyond what investors would reasonably require. We note the likely onerous process for boards to obtain suitable comfort on the accuracy of information contained in the notification given potential liability concerns, including under section 90A FSMA, and the absence of a mandatory third party adviser in the process. We welcome the proposal that the notification will not be required to contain a working capital statement or to restate the target's historical financial information in accordance with the issuer's accounting standards.

Q9: Do you agree with changes we are proposing to clarify the scope of significant transactions and simplify our requirements, including our proposed 'ordinary course of business' guidance and revised aggregation rules? If not, please explain the areas you disagree with.

We agree with the proposal to provide more guidance in relation to which types of transactions will be treated as falling within the 'ordinary course of business' for the purposes of both the significant transaction and related party transaction regimes. However, we believe that more detailed guidance in the form of a technical note with examples of the types of transactions expected to fall within and outside the definition of ordinary course of business would provide more clarity to issuers.

We question the proposed change to the aggregation rules for significant transactions, in particular given that if the requirement to prepare a shareholder circular and obtain shareholder approval no longer apply the concern about undertaking a series of related transactions to avoid the application of the rules should be significantly reduced. Under the current LR 10.2.10R where aggregated transactions during the 12 months before the date of the latest transaction result in a requirement for shareholder approval, shareholder approval is required only for the latest transaction. Under the proposed UKLR 7.2.12R and 7.3.8R where the aggregated transactions exceed the 25% threshold, the enhanced disclosures regime would apply to the aggregated transactions as a whole and not only the latest transaction that results in the 25% threshold being crossed. Proposed UKLR 7.3.9G requires the notification to explain the overall impact of the transactions as a whole, taking a look-through approach to the information that is required to be included in the notification. In paragraph 6.72 of FCA CP 23/31 the commentary refers to 'amendments to the existing aggregation requirements to

support transparency but in a proportionate manner with clear rules'. However, this proposed change would seem to impose a disproportionate burden on issuers and potentially result in an additional delay to preparing the required notification. If there is a concern about investors having insufficient context with a notification relating only to the latest transaction perhaps a more workable solution would be to require core details about the previous transactions and the reason for aggregation but for the rest of the notification to relate only to the latest transaction.

We welcome the proposed removal of the profits test given the frequent anomalous results it produces and we agree with the proposal to take break fees outside of the significant transactions regime other than from a disclosure perspective.

Q11: Do you agree with our proposed approach to when companies should be required to appoint a sponsor on significant transactions (ie, limited to where issuers apply to the FCA to seek individual guidance, waivers or modifications)?

We agree with the proposed approach.

Q13: Do you agree with our proposed approach to reverse takeovers in the commercial companies category, including requiring a sponsor and FCA approval of a circular? If not, please explain what you disagree with and why, if relevant.

We agree with the proposed approach relating to the appointment of a sponsor, a FCA-approved shareholder circular and shareholder approval.

Q14: Do you agree with our proposed changes to the information to be included in the reverse takeover shareholder circular? Please explain your views and suggest an alternative approach if you disagree.

We agree with the proposed approach. However, we would suggest that it would be helpful to avoid too much duplication between the notification required under proposed UKLR 7.5.1R(1) and the reverse takeover circular.

Q15: Do you agree with our proposed approach towards a related party transactions regime for the commercial companies category and the specific disclosure proposals for notifications? Please provide any alternative views as relevant.

We agree with the proposed approach. In particular we agree with raising the threshold for a substantial shareholder to 20% of the voting rights in the company as the current 10% threshold can also catch passive shareholders without sufficient influence. Please see our response to Q9 in relation to guidance on 'ordinary course business'.

We welcome confirmation that issuers listed in the commercial companies category will not be required to comply with the overlapping related party transaction rules contained in DTR 7.3.

Q16: Do you agree with how we have framed the sponsor role for related party transactions in the commercial companies category?

We agree with the proposed approach.

Q17: Do you agree with the other clarifications, ancillary changes and consequential amendments we are proposing for the related party transaction requirements in the UKLR (compared with current premium listing)? If not, please explain any areas you disagree with.

We agree with the proposed approach.

Q25: Would formal guidance clarifying the use of 'explain' when reporting against the UK CGC be necessary?

We would be interested to see formal guidance clarifying the use of 'explain' in the context of UK CGC reporting given the importance of compliance.

Q27: Do you agree to our proposed approach for the closed- ended investment funds category as part of the new UKLR? If not, please explain why.

We agree with the proposed approach for the closed-ended investment funds (CEIF) category and the focus on transactions outside the scope of the investment policy as the determining factor for whether shareholder approval is required for significant transactions and related party transactions with a percentage ratio of 5% or more (subject to stated exemptions). However, we would suggest that it would be helpful to avoid too much duplication between the notification required under proposed UKLR 11.5.2R(2) and the shareholder circular.

We would like to flag one point in relation to eligibility for listing for CEIFs. The definition of *equity shares (commercial companies)* refers to a listing of shares other than those of a CEIF or certain other types of companies. In its commentary in FCA CP 23/31 the FCA states that the commercial categories category is *open to issuers who are able to meet the commercial companies eligibility requirements and continuing obligations and are not a type of issuer for which there exists a separate listing category (for example a shell company or a CEIF)*. In view of the proposed relaxation of the current premium listing eligibility requirements it is possible that an issuer may satisfy the eligibility requirements for both the commercial companies and the CEIF categories. We feel that an issuer should be able to choose which category to list in in this scenario. It will be important for issuers to have the ability to discuss eligibility with the FCA at an early stage in the process.

Q28: Do you agree with our proposals for the transition category? If not, please explain why.

We agree with the proposed approach which ensures that existing standard listed companies will not be forced to delist or move their listing to another jurisdiction if they are unable to satisfy the requirements of the commercial companies category.

Q29: Do you agree to our proposals for a secondary listing category and the related requirements, including basing rules on current LR 14 with certain additional elements, and the maintained application of DTR 7.2? If not, please explain which aspects you disagree with and why.

We agree with the proposed approach. However, we question whether the secondary listing category should also be open to what is likely to be a small number of UK companies with their main listing overseas provided that listing is on a suitable market and subject to any additional requirements thought appropriate for UK companies, for example, reporting against the UK CGC.

Q35: Do you agree that the current Premium Listing Principles 3 and 4 should be reframed as rules for the commercial companies category and the closed ended investment funds category? If not, explain why.

We agree that current Premium Listing Principles 3 and 4 are drafted more as rules and therefore are suitable to be reframed as eligibility criteria for the commercial companies and closed ended investment funds categories.

Q36: Do you agree with our proposed single set of Listing Principles and supporting guidance, which would be applicable to all listing categories? If not, please explain why.

We agree with the proposed approach.

Q39: Do you agree with our proposed board confirmation that the applicant has appropriate systems and controls in place to ensure it can comply with its ongoing listing obligations and Listing Principles once admitted? If not, please explain what you disagree with and why.

We understand the FCA's view that the board should be best placed to provide this confirmation and note that a similar board confirmation is already typically required by a sponsor in connection with its sponsor declaration to the FCA.

Q41: Do you agree with our detailed proposals for all applicants and issuers to notify the FCA, and keep up to date, the contact details of 2 executive directors? If not, please explain what you disagree with and why.

If the FCA feels that having the details of one nominated contact only is insufficient we have no concerns with the proposal for the issuer to notify the contact details of two executive directors. However, it would be helpful for proposed UKLR 1.3.5R to reflect the fact that the nominated person referred to in proposed UKLR 6.2.21R should generally be the first point of contact with the FCA.

Q42: Do you agree with our detailed proposals for all applicants and issuers to provide the FCA, and to keep up to date, a nominated contact and address for service of relevant documents? If not, please explain what you disagree with and why.

Please see our response to Q41 above. We agree with the proposed approach for service of notices.

Q44: Do you agree with our proposed approach for dealing with in-flight transfers between listing categories at the time the UKLR is implemented? If not, please explain why.

Q46: Do you agree with our proposed transitional arrangements and specific transitional provisions for 'mapped' existing issuers and conversion of 'in-flight' applications at the time the UKLR is implemented? If not, please explain why.

Q47: Do you agree with our proposed transitional provisions to allow existing issuers and 'in-flight' applicants sufficient time to prepare for implementation of the proposed provisions that would impact all issuers?

Q48: Do you agree with these impacts at implementation day and our approach to transitional arrangements for post IPO mid-flight transactions (when commenced in premium listing) and related sponsor services?

Q49: Is the proposed period of 2 weeks between publication of the final UKLR instrument and those UKLR coming into force reasonable, assuming we proceed broadly as proposed?

In answer to the above questions, we have some general comments.

With regard to implementation of the new listing framework we note the proposal for a two week implementation period following publication of the final rules. While we agree with the proposed treatment of in-flight applications and mid-flight transactions we would welcome more visibility on expected timing to allow the market sufficient time to adapt to the new rules, in particular for premium listed issuers involved in a mid-flight transaction at the time of implementation.