

CP09/28 - Consultation on changes to the listing categories
Comments of a working party of the Company Law Committee on

This memorandum sets out the comments of a working party of the Company Law Committee of the City of London Law Society on CP09/28.

1. Eligibility of non-voting shares for Premium listing

We do not agree with the position taken in the consultation paper that preference shares and non-voting equity shares should not be eligible for Premium listing and are therefore eligible only for Standard listing.

While non-voting securities would not benefit from those provisions of the Premium listing regime that require shareholder approval, that is not a sufficient justification for them to be excluded from Premium listing. Provisions which would apply to non-voting shares just as much as to voting shares include the requirement for a sponsor on a new issue of shares requiring a prospectus; the information and disclosure requirements of chapters 9, 10 and 11; and the obligations in chapter 12. In addition, the general requirements of Chapter 13 could be relevant (eg if there is a need to obtain approval of the relevant class of shares). If the issuer also has voting shares listed in the Premium category, it is true that the holders of other securities listed in other categories will benefit indirectly from many of the additional obligations that come with a Premium listing (eg as to information to be published) but we do not see why holders of such securities should not benefit from those obligations directly. Any concern about confusion could be easily resolved by requiring non-voting (or limited voting) shares with a Premium listing to be expressly designated as such (this was required by the Listing Rules until 2000).

We are particularly concerned about the position of existing non-voting shares that will find the scope of protection under the listing rules (and in particular their entitlement to information) dramatically curtailed by this change.

We are also concerned that excluding non-voting shares from premium listing may have an effect on FTSE weightings (since the indices generally only give weighting to the primary listed securities). This is clearly a matter for the FTSE indices committees but it is important that the implications are fully considered. Where non-voting shares are listed, investors may be surprised to find that what appears to be the same economic investment (i.e., in a non-voting or voting share) has a different effect on the relative weight of their holding against an index they may be attempting to track. If non-voting shares were to be removed from the index weighting because they were no longer be Premium listed this could force index-tracking investors to sell securities to reflect the reduced weighting and could have an adverse affect on issuers and those investors who are not index-tracking investors.

If non-voting shares are excluded from Premium listing, issuers may be expected to seek ways round the exclusion (that will depend on the definition of when a share is "non-voting" but might include shares with very low voting rights (say, one tenth of the rights of the voting ordinary shares) or with rights to vote only on a limited range of resolutions (e.g. to wind up the

company). We suggest that this would be likely to lead to greater confusion than allowing clearly designated non-voting shares to be Premium listed.

If it is decided to retain the approach of making non-voting equity shares ineligible for premium listing there are some drafting issues that need to be addressed:

- the definitions of "equity share capital", "shares" and "preference shares" do not refer to voting rights so, as the draft rules currently stand, ordinary shares or other shares with any uncapped dividend or capital distribution rights (this may include some types of preference shares) are "equity shares" and apparently eligible for Premium listing, whatever their voting rights. If non-voting shares are to be excluded, the rules should include an express provision to that effect.
- It follows that it will be necessary for the rules to define "voting shares" and therefore to deal with shares with limited voting rights or rights to vote in certain circumstances (such as preference shares with votes if their dividend is in arrears). A definition of "voting shares" should not exclude shares which are subject to a temporary restriction on voting (eg under sanctions imposed for non-compliance with notices served under section 793 of the Companies Act 2006).

2. Pre-emption rights

We note that the requirement for pre-emptive rights in LR 9.3.11 applies only to issues of "equity shares" and would therefore not cover issues of convertible securities. The pre-emption rights provided by the Companies Act 2006 apply to convertible securities and we think it is potentially confusing to investors to allow non-UK incorporated issuers to have the flexibility to issue such securities non-pre-emptively. That flexibility could represent a significant loophole for such issuers to avoid the pre-emption rights of equity shareholders.

3. Other comments

The position of convertible preference shares could be made clearer - we think they must be "shares" (although it would be helpful if paragraph 3(c) of the definition of "share" referred to the listing rules as well as to chapters 4, 5, 6 and 7 of DTR) but they do not fall within the definition of "preference share".

We note that no change has been proposed to LR 12.4.7 to 12.4.9 but it is not clear whether these rules would only apply to convertible securities that have a premium listing (which may theoretically exist but must be very rare in practice) or these rules are intended to benefit convertible securities with a standard listing. The reference to LR 13 in LR12.4.9 suggests the former but we can see sense in the latter approach.

We wonder whether the reference to preference shares that has been retained in LR12.3.1 is appropriate?