Analysis, Company Law and Corporate Transparency Team
Department for Business, Energy and Industrial Strategy and Companies House

By email: transparencyandtrust@beis.gov.uk

3 February 2021

Dear Sir/Madam,

Re: Corporate Transparency and Register Reform: Implementing the ban on corporate directors

We are writing on behalf of the British Private Equity and Venture Capital Association ("BVCA"), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2015 and 2019, BVCA members invested over £43bn into nearly 3,230 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 972,000 people in the UK and the majority of the businesses our members invest in are small and medium-sized businesses.

We are delighted to have had the opportunity to be involved in the Expert Panel in relation to Corporate Transparency and Register Reform and to respond to this Consultation. Our response focuses on those questions which we believe have direct relevance to our member firms.

Consultation questions

Q1: In your view, will the proposed 'principles'-based exception deliver a pragmatic balance between improving corporate transparency and providing companies adequate scope to realise the legitimate benefits of the use of corporate directors?

Subject to the suggestions and comments made in this response, we agree with the proposed approach as it would appear to accommodate the legitimate uses of corporate directors (such as allowing a parent company to manage how its subsidiaries are run) without scheduling a limited and exhaustive number of exceptions within which businesses would have to fall in order to qualify. We are hopeful this would provide a clear and manageable framework which businesses are able to understand and with which they can be clear on how to comply.

Q2: Bearing in mind the transparency objective, is the scope of the exception proportionate and reasonable?

The scope of the exceptions seems broadly reasonable and provides sufficient clarity and flexibility for companies, especially when compared with the 2014 exemption-based proposal.

There are clear compliance costs for companies associated with the introduction of the new regime. For example, the familiarisation with the new rules, analysis of its current group structure, replacement of a corporate director where applicable, appointment of natural persons if required and ongoing compliance will all place significant administrative burden on companies and their staff and resultant costs and expenditure. In light of the pressure businesses are currently under due to the

coronavirus pandemic, we consider such costs to be considerable and worth taking into account, notwithstanding the justifiable over-arching goal of deterring and reducing illicit financial flows facilitated by corporate opacity this proposal is intended to achieve.

Additionally, given the complexity involved, a longer period for companies to make the necessary changes would be helpful and result in a more thorough and considered approach to the changes, ensuring the right natural persons are used where necessary. For example, the companies would be well placed to implement the proposed reforms as part of an annual review or other governance review process.

Q3: Assuming that ID verification will form a fundamental element of the corporate director regime, what do you see as the arguments for and against allowing LPs and LLPs be appointed as corporate directors? If they are to be allowed, how should the principle of natural person directors apply within these partnership models?

Should the current regime apply to all overseas entities, LPs and LLPs should be allowed to be appointed as corporate directors. If LPs and LLPs were to be prohibited from corporate directorship, we believe this is likely to create inconsistencies in the regime given not all jurisdictions maintain the same standard characteristics for particular entity types – what is required to be a company in the UK may not be required of a company in another jurisdiction (e.g., an LP in England does not maintain separate legal personality but would in the U.S. State of Delaware or indeed Scotland).

If the Government seeks to exempt certain entities, the proposal should instead seek to identify specify characteristics of qualifying entities rather than merely name entity types. Characteristics such as separate legal personality and reporting obligations will provide clarity and guidance when navigating different treatment of partnership structures across jurisdictions.

If an LLP is allowed to be appointed as a corporate director, the principle of natural person directors should apply to the designated members or the members responsible for the management of such LLP.

In our view it would be highly unusual for an LP to be appointed as a corporate director. If such a scenario were to occur, due to the LP's lack of separate legal personality, we would suggest looking to the general partner of such LP to identify the effective corporate director. The natural person principle should then apply to the members of such general partner.

Q4: Do these reporting requirements appear proportionate and reasonable?

Due consideration needs to be given to what it means for Company C to take "all reasonable steps" to assure itself that Company D has no corporate directors. The concept introduces subjectivity into interpretation of the scope and extent of Company C's obligations. Company C's course of action could range widely - from checking publicly available company records to requests to Company D that its filings are in order. This raises additional questions of whether there should be a matched obligation on Company D's directors to confirm compliance (both at the time of appointment and on an ongoing basis). This would be consistent with the approach taken with the PSC regime, where there are twin obligations on a company to identify PSCs and the PSC to declare itself. Clear guidance also taking into account overseas entities that may act as corporate directors should be provided as to what "all reasonable steps" entails. This guidance will need to encompass details of what is required to discharge this obligation both at the point of appointment and on an ongoing basis (for the purposes of the CS01).

Q5: Does the Impact Assessment provide a reasonable assessment of the costs and benefits of the prohibition and possible exceptions? In particular:

- Do you have any evidence as to why companies have reduced their use of corporate directors since the primary legislation was passed?

- Do you have any evidence on what might be the costs to companies from the proposed restrictions on corporate directors?

We do not maintain any formal evidence on why companies have reduced their use of corporate directors. However, we believe businesses may have begun to take steps to harmonise their approach with other jurisdictions that do not permit corporate directorships, such as the USA, Germany and Jersey. Additionally, it is only prudent for businesses to prepare themselves for upcoming legislative changes like these, especially given they have been proposed now for some time. In addition, there is also an increased focus on the director training, compliance with the directors' duties and conscious selection of individuals with specific skillsets, each of which may also have driven a trend towards natural individuals as directors.

We do not have any evidence as to the costs to companies resulting from the proposals but there will clearly be reasonable administrative costs to the companies resulting from the implementation and maintenance of the regime.

Q6. What are your views on applying the proposed Corporate Director principles more broadly to a) LLPs, and b) LPs, and how would you envisage ID verification operating in those contexts?

There are currently significant differences between corporate members of LLPs and company directors which make a compelling case against extending the proposed prohibition to LLPs.

Firstly, as a matter of law, members of LLPs do not owe the same statutory duties to the LLP as a director owes to a company. Their rights and obligations are governed by the LLP Act and are further supplemented by an LLP Agreement, not the Companies Act 2006. Although certain parts of the Companies Act 2006 have been applied to LLP members, these are provisions which would otherwise apply to shareholders. In many cases, corporate members are more equivalent to a company's shareholders, rather than its directors. If the LLP's governing documents do not impose any fiduciary relationship between an LLP member and the LLP, such LLP member's relationship is purely of shareholder nature and extending the prohibition to LLPs would be equivalent to preventing corporate ownership in a company. Secondly, there are certain additional statutory duties imposed on the designated members which would, in the company context, be fulfilled by a company secretary. The proposal by the Government does not contemplate extending the natural persons rule to company secretaries. Thirdly, the LLP Act affords sufficient flexibility for an LLP to allocate director-like responsibilities to non-members.

As there are significant differences between the nature of a director's relationship with a company and an LLP member with an LLP, extending the prohibition of corporate directors to LLP members would not sit well within the legislative framework and would require a major overhaul of the primary legislation.

We would be very keen to discuss the contents of this letter with you and look forward to hearing from you in order to establish whether a meeting of this sort is possible.

Yours faithfully,

Amy Mahon
Chair, BVCA Legal & Accounting Committee