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27 April 2020

### By email

Financial Conduct Authority  
12 Endeavour Square  
London  
E20 1JN

**Your ref**  
**Our ref**

SJB/2625.4

For the intention of the Market Integrity Unit  
(and by email to [primary.market.integrity@fca.org.uk](mailto:primary.market.integrity@fca.org.uk))

Dear Sirs/Madams

### **Proposed claim for judicial review against the Financial Conduct Authority (“FCA”) by Sir Stelios Haji-Ioannou and easyGroup Holdings Limited - URGENT**

1. As you are aware, we act for Sir Stelios Haji-Ioannou (“**SHI**”), and easyGroup Holdings Limited (together “**our clients**”). SHI is the founder of easyJet PLC (“**easyJet**”), and the chairman of easyGroup, which represents approximately 34% of the shares in the Company. The shares are held through various nominees including UBS Private Banking Nominees Limited and Vidacos Nominees Limited. easyGroup and members of SHI's family together are by some distance the largest single shareholder block in easyJet.
2. Our clients consider that easyJet is failing to comply with the Listing Rules and that the interests of the shareholders of easyJet risk being irreparably prejudiced as a result. In particular, the shareholders will be denied their right, under the Listing Rules, to receive information about and decide whether or not to approve an important transaction. The delay of the FCA in taking any appropriate regulatory steps to protect the interests of easyJet's shareholders in compliance with the Listing Rules is unlawful.
3. This is a judicial review letter before claim sent in accordance with the Pre-Action Protocol for Judicial Review. **It requires your urgent attention.**
4. A copy of this letter is being sent to easyJet as a potentially interested party.
5. All communications in relation to this matter, including service of any court documents, should be sent to us at the address at the top of the page marked with the reference “SJB/2625.4”. A copy of any correspondence should also be sent by email to [simon.bushell@signaturelitigation.com](mailto:simon.bushell@signaturelitigation.com).

### **Background facts**

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6. easyJet plc is a major European low-cost airline. It operates a fleet of 337 Airbus aircraft. Its ordinary shares enjoy a premium listing on the London Stock Exchange and easyJet is a constituent of the FTSE 100 index.
7. As a result of the coronavirus pandemic, easyJet has grounded its entire fleet. In addition to its grave human cost, the pandemic also threatens the survival of many businesses, large and small. Airlines are particularly seriously affected.
8. easyJet is no exception. Its current revenues are negligible. Many of its customers have sought (and are entitled to) refunds on tickets already paid for. easyJet has large outstanding orders with Airbus for new aircraft. The length of the grounding of the fleet is unknown. Nor is it clear whether and when customers will be willing to return to flying or what social distancing rules and guidance will be in place. Airlines have very high fixed and capital costs. easyJet is therefore at great risk of insolvency.
9. On 9 April 2020, easyJet announced that it had “reached agreement with Airbus for the net deferral of 24 aircraft deliveries from Financial Years 2020, 2021 and 2022”. It has since become clear that this agreement contemplates the continued delivery of further aircraft (and consequential capital expenditure) this financial year. No aircraft deliveries have been cancelled. No discount has been obtained on future deliveries.
10. SHI considers that the deferral agreement with Airbus is a thoroughly poor deal and is likely to endanger the future of the company. Other airlines have been in urgent negotiations with manufacturers and have been reported as having secured better arrangements. As the Financial Times reported on 20 April 2020:

*“At the end of March, just days before Boeing was set to hand over a new 787 Dreamliner to one of its most valued customers in the Middle East, the airline’s head of procurement picked up the phone to the US aircraft maker. The deal was off, unless Boeing was willing to increase the 55 per cent discount it had already agreed on the \$338m list price.*

*In normal times, an airline would hesitate before threatening to cancel an order at such a late stage. Cancellation would normally mean heavy penalties and forfeiting the downpayments, which for Boeing’s state of the art twin-aisle model amounted to close to \$100m of the agreed \$150m price tag.*

*But these are not normal times. Boeing caved in and cut the price by a further 15 per cent, according to people involved in the deal. The US aircraft maker — which declined to comment on the contract details — saw more value in getting the jet out of the hangar than haggling for a few million dollars more.*

*Despite supplying more than 90 per cent of the world’s commercial aircraft, Boeing and its European rival Airbus do not have much leverage when nearly all their airline customers are fighting for survival.” (How coronavirus brought aerospace down to earth, FT 20 April 2020).*
11. The directors of easyJet disagree with SHI’s analysis.
12. easyJet announced the deferral agreement with Airbus without calling a shareholder vote on the proposed transaction, or producing a circular explaining the transaction. This was a grave breach of the Listing Rules. The transaction amply meets the prescriptive financial criteria for shareholder approval in the Listing Rules. The purpose of the Listing Rules is to ensure that shareholder approval is sought for transactions of momentous importance to a company with a UK premium listing, like easyJet.
13. The Listing Rules ensure that a company with a premium listing cannot make such decisions without the assent of a majority of the shareholders.
14. If a shareholder vote is held, our clients would be minded to vote against the deferral transaction. They expect that there would be majority support for that view. In any event, the production of a circular (which is subject to approval by a corporate finance sponsor firm and separately by the FCA, and is accompanied by obligations of accuracy and completeness) would greatly enhance the ability of shareholders to understand easyJet’s financial position and the value and prospects of the company.

*2013 contract with Airbus*

15. The easyJet fleet is entirely comprised of the Airbus A320 family of aircraft. EasyJet has entered into two long-term agreements with Airbus for the supply of aircraft. The first agreement dates from 2003, during SHI's tenure as Chief Executive. The second agreement dates from 2013, after his departure.
16. The second agreement has three elements:
  - a) The exercise of an option to purchase 35 additional A320 aircraft under the first agreement.
  - b) A firm purchase order for 100 A320neo aircraft ('new engine option' – an upgraded and more fuel-efficient model).
  - c) An option to purchase up to 100 further A320neo aircraft.

The agreement was therefore a firm order for an additional 135 aircraft, with an option to purchase additional aircraft.

17. The size and importance of the second agreement was such that it required shareholder approval under the Listing Rules. A detailed circular was produced by easyJet and distributed to shareholders. Following a vote, shareholder approval was granted. Our clients voted against. They considered that the size of the purchase was most unwise and the commercial terms appeared unattractive.
18. The circular sets out the delivery schedule. It provides that 11 new aircraft will be delivered in the 2020 financial year. That schedule could be altered if the options were exercised. Further, easyJet was entitled to "*modify the timing of a proportion of aircraft deliveries*" (Circular, §2.2).
19. The actual price payable was not disclosed in the circular. The aircraft "*list price*" was instead given. This is a published price given by Airbus, who for commercial reasons are not keen to disclose the actual price their customers pay for aircraft. In practice, airlines negotiate large discounts from the list price. As the 2013 circular explains, "*Airbus has granted very substantial price concessions... greater than the discounts, in percentage terms relative to the relevant list price, granted under the Existing Airbus Contract*". The discounts are in the form of "*credit memoranda towards the purchase of goods and services from Airbus or towards payments in respect of the purchase of the New Generation A320neo aircraft*" (Circular, §2.3).
20. The list price of the aircraft at January 2012 prices was between US\$82.8m and US\$110m depending on the model selected. Those prices were "*subject to price escalation by applying a formula reflecting increases in the published relevant labour and material indices between the time the list price was set and the delivery of such aircraft*".
21. The actual 'discount' from the list price given by Airbus to easyJet is unknown. But as a result of recent improvements to International Financial Reporting Standard 15, Airbus has recently been required to disclose the current net value of its order book after discounts, rather than reporting at inflated list prices. This has had the effect of approximately halving the value of its order book, reflecting an average discount from list price of 50%. This was, as Reuters put it, "*one of the aircraft industry's worst-kept secrets... the rule of thumb is that aircraft sell for about half their advertised catalogue price*".<sup>1</sup>
22. Since 2013, easyJet has exercised its options to purchase a very substantial number of additional aircraft from Airbus.

*easyJet's response to COVID-19*

23. easyJet's first statement to the market about COVID-19 was issued on 28 February 2020. It said:

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<sup>1</sup> <https://uk.reuters.com/article/uk-airbus-results-prices/how-much-is-a-jet-worth-half-price-airbus-figures-show-idUKKCN1Q30Q9>

*“Following the increased incidence of COVID-19 cases in Northern Italy, we have seen a significant softening of demand and load factors into and out of our Northern Italian bases. Further, we are also seeing some slower demand across our other European markets. As a result we will be making decisions to cancel some flights, particularly those into and out of Italy, while continuing to monitor the situation and adapting our flying programme to support demand.*

*While it is too early to determine what the impact of the COVID-19 outbreak will be on current year outlook and guidance for both the Airline and Holidays business, we continue to monitor the situation carefully and will update the market in due course.”*

24. By 16 March 2020, the position had substantially worsened. easyJet’s next market announcement indicated that it might have to ground most of its fleet. The Company indicated that its survival might well depend on its ability to secure continued liquidity:

*“Due to the unprecedented level of travel restrictions being imposed by governments in response to the Coronavirus pandemic and significantly reduced levels of customer demand, easyJet has undertaken further significant cancellations. These actions will continue on a rolling basis for the foreseeable future and could result in the grounding of the majority of the easyJet fleet.*

*easyJet will continue to operate rescue flights for short periods where we can, in order to repatriate customers.*

*To help mitigate the impact from COVID-19 we are taking every action to remove cost and non-critical expenditure from the business at every level. Aircraft groundings will remove significant levels of variable costs.*

*easyJet maintains a strong balance sheet including a £1.6bn cash balance, an undrawn \$500m Revolving Credit Facility, unencumbered aircraft worth in excess of £4bn and a large and valuable slot portfolio. easyJet has no debt re-financings due until 2022 and is in ongoing discussions with liquidity providers who recognise our strength of balance sheet and business model.*

*European aviation faces a precarious future and there is no guarantee that the European airlines, along with all the benefits it brings for people, the economy and business, will survive what could be a long-term travel freeze and the risks of a slow recovery. Whether it does or not will depend significantly on European airlines maintaining access to liquidity, including that enabled by governments across Europe.”*

25. The financial markets had anticipated such problems. By mid-March 2020, easyJet’s share price had dropped from over 1400p in the previous month to under 500p.

26. On 30 March 2020, easyJet announced the grounding of its entire fleet and that it was placing its cabin crew into the government’s furlough scheme:

*“As a result of the unprecedented travel restrictions imposed by governments in response to the coronavirus pandemic and the implementation of national lockdowns across many European countries, easyJet has, today, fully grounded its entire fleet of aircraft...”*

*At this stage there can be no certainty of the date for restarting commercial flights. We will continuously evaluate the situation based on regulations and demand, and will update the market when we have a view.*

*We continue to take every action to remove cost and non-critical expenditure from the business at every level in order to help mitigate the impact from the coronavirus. The grounding of aircraft removes significant cost.*

*easyJet maintains a strong balance sheet, with no debt re-financings due until 2022. We are in ongoing discussions with liquidity providers who recognise our strength of balance sheet and business model.*

*easyJet and Unite the union have collaboratively reached an agreement on furlough arrangements for its cabin crew. The agreement will be effective from 1 April 2020 for a*

*period of two months and means that crew will be paid 80% of their average pay through the Government job retention scheme.”*

27. Our clients were and remain troubled by the timing of these announcements and the lack of urgency in taking decisive steps to protect the continued existence of the business. On 2 April 2020 our clients requisitioned a General Meeting and proposed a motion to remove certain directors (the requisition was re-issued on 8 April 2020 to correct an error in drafting).

28. On 6 April 2020, easyJet announced that it was taking steps to draw down a revolving credit facility by \$500m and had issued £600m of new commercial paper which had been bought by the Bank of England under its Covid Corporate Financing Facility. It also furloughed its pilots:

*“easyJet continues to focus on maximising liquidity in the event of an extended grounding period. To that effect easyJet has been successful in its issuance of £600m of Commercial Paper through the Covid Corporate Financing Facility (CCFF).*

*easyJet has also issued today a utilisation request to fully draw down on its \$500m Revolving Credit Facility, secured against aircraft assets.*

*As a result of this, by April 9, easyJet is expected to have access to cash reserves of c.£2.3bn.*

*Given the possibility of a prolonged grounding easyJet will continue to consider further liquidity and funding options.*

*easyJet and BALPA have collaboratively reached an agreement on furlough arrangements for its pilots. The agreement will be effective from 1 April 2020. Last week easyJet announced it had reached an agreement on furlough arrangements for its cabin crew and training instructors. That agreement was also effective from 1 April 2020.*

*Following the FCA's recent update on reporting guidelines, easyJet will release a trading update in the second half of April and a half year results announcement on 30 June 2020.”*

29. On 9 April 2020, in an “Aircraft Delivery Update”, easyJet announced the deferral agreement with Airbus, and provided some limited information about its terms:

*“easyJet continues to focus on maximising liquidity in the event of an extended grounding period and to ensure the business is ready to react to reduced demand as the European airspace begin to reopen. To that effect easyJet has reached agreement with Airbus for the net deferral of 24 aircraft deliveries from Financial Years 2020, 2021, and 2022.*

*This will mean that versus our previously disclosed fleet plan the following aircraft deliveries will be deferred*

*- 10 aircraft deliveries in FY20;*

*- 12 aircraft deliveries in FY21; and*

*- 2 aircraft deliveries in FY22*

*As a result, in FY21 the airline will take no aircraft deliveries and retains the option to defer a further 5 deliveries in FY22. Exact dates of future deliveries of the deferred aircraft are to be agreed in response to the demand environment.*

*Within the next 16 months easyJet also has 24 operating leases due for renewal providing the airline with further flexibility, which could include deferment and cancellation.*

*As a result of these actions the fleet has the flexibility to be substantial lower than our previous plan whilst also retaining the flexibility to respond to future demand environments. It will also deliver significant reductions in capex spend over the next three years and we will provide more information regarding our future fleet plan at our trading update on Thursday 16 April.*

**Johan Lundgren, easyJet CEO said:**

*"Our industry is facing unprecedented challenges which require unprecedented action. As we have consistently said, we remain completely focused on improving short term liquidity and reducing expenditure across the business. Today I am pleased to announce that we have agreed with Airbus to amend our delivery schedule by deferring the purchase of 24 aircraft, providing a significant boost to our cash flow and a vast reduction to our near-term capex programme.*

*"In addition, we have 24 leases up for renewal over the next 16 months, which gives us another level of flexibility to respond to future demand."*

30. Notably, the 9 April 2020 announcement was silent as to:

- a. the number of aircraft that would be delivered in 2020 (which is likely to be the critical year for easyJet's cashflow, assuming a return to flying later this year); and
- b. what sums easyJet will pay to Airbus in 2020 (or indeed in any year).

31. On 14 April 2020, we sent a letter to the FCA on behalf of our clients noting that:

- a. the deferral agreement with Airbus required shareholder approval under the Listing Rules, which had not been obtained; and
- b. the 9 April 2020 announcement was incomplete and omitted key information.

32. On 16 April 2020, easyJet issued a trading update:

- a. It disclosed some limited additional information about future aircraft purchases. It revealed that it would be receiving a further 6 aircraft from Airbus before the end of the 2020 financial year.
- b. easyJet indicated that it anticipated "*gross capital cashflows*" (i.e. capital expenditure) in 2020 of circa £900m. The majority of this sum will presumably be paid to Airbus.
- c. Airbus also took out further loans of approximately £400m secured against aircraft, giving it cash of around £3.3 billion.
- d. The trading update included a "*scenario analysis*" suggesting that during a 6 month grounding, easyJet would spend around £2.2 billion. The analysis assumes that the same ratio of customers continue to accept vouchers for cancelled flights rather than a cash refund and that after this period, normal operations are resumed. SHI has grave concerns about the viability of the business on the basis of such a scenario and the optimistic assumptions on which it is based.
- e. Of the £2.2 billion spent in this scenario, it appears that most comprises capital costs. The update explained that "*operating costs burn... in the region of £30-40 million per week, whilst the fleet is grounded*". Over 6 months (assuming the higher level of £40 million per week), that is approximately £1bn. Most of the rest of easyJet's outgoings in the next 6 months will be to Airbus. In the meantime, easyJet has no revenues.

33. easyJet also explained why its Directors had decided not to cancel the 2013 agreement with Airbus:

*"Regarding this deal with Airbus, it is important to note that:*

- *easyJet has no ability to terminate the contract by reason of force majeure. This is standard in aircraft purchase contracts.*
- *Notwithstanding this if easyJet were to attempt to terminate the purchase agreement with Airbus:*

*o The level of direct OEM support for the operation of our existing fleet would increase in cost significantly, as easyJet would then have to purchase requisite software licences, training and onsite supports directly from a single source supplier, as well as losing access to warranties and guarantees which underwrite the long term performance of the aircraft;*

*o easyJet would be liable for significant compensation related to the discounts received on the 45 aircraft we have had delivered to date under the 2013 contract;*

*o easyJet would be liable for any future losses that the OEM could demonstrate as a result of the termination of the contract.”*

34. On the same day (16 April 2020) the FCA wrote to us “*not[ing] that the Company has released further information on the subject matter of your complaint, the deferral of aircraft purchases from Airbus, in its trading update released this morning*”. In the meantime, the FCA was “*reviewing the issues that you have brought to our attention with a view to determining whether it is appropriate for us to exercise any of our statutory powers*”. The FCA’s reply did not deal with point that the deferral agreement required shareholder approval under the Listing Rules.
35. On 20 April 2020 we replied to the FCA indicating the urgency of the issues and inviting the FCA to take urgent action to ensure that shareholder approval was sought for the deferral agreement. easyJet was sent a letter from this firm in similar terms.
36. On 21 April 2020 easyJet replied. It declined to provide any explanation as to its position on shareholder approval. easyJet simply said that “*the FCA is reviewing the issues raised in your original complaint. If the FCA have any questions in relation to your client’s complaint, we shall of course liaise with them*”. easyJet continue to refuse to express a view as to whether they believe they have complied with the Listing Rules.
37. On 22 April 2020, the FCA replied to the letter of 20 April 2020 explaining that it was “*undertaking this review with the urgency that you request but our review is confidential and we are therefore not in a position to confirm whether we agree or disagree with your client’s assessment of whether the deferral amounts to a Class 1 transaction under the Listing Rules.*”
38. On 27 April 2020 the board of easyJet finally called the general meeting to consider the motion to remove certain directors which had been requisitioned by our clients at the start of April (see paragraph 27 above). That general meeting is to be held on 22 May 2020.

## **The legal framework**

### *Financial Services and Markets Act 2000*

39. Sections 73A and 96 of the Financial Services and Markets Act 2000 (“**FSMA**”) give the FCA power to make listing rules:
  - a. Section 73A(1) of FSMA provides that the “*FCA may make rules (“Part 6 rules”)*”. Section 73A(2) provides that “*Part 6 rules expressed to relate to the official list are referred to in this Part as “listing rules”*”.
  - b. The official list is defined in section 103 as “*the list maintained by the FCA as that list has effect for the time being*”.
  - c. easyJet’s ordinary shares are listed on the FCA’s official list, in the premium listing category.
  - d. Section 96(1) of FSMA provides that listing rules may impose requirements and obligations on issuers of listed securities:
    - “(1) Listing rules may-
      - (a) *specify requirements to be complied with by issuers of listed securities; and*
      - (b) *make provision with respect to the action that may be taken by the FCA in the event of non-compliance*”.
40. Section 88 of FSMA also permits listing rules to “*require a person to make arrangements with a sponsor for the performance by the sponsor of such services in relation to him as may be specified in the rules*”.

41. If an issuer breaches the Listing Rules, the FCA may impose a financial penalty (section 91 FSMA). In addition, the Listing Rules make provision (under section 88 of FSMA) for the FCA to require the appointment of a sponsor.

*Listing Rules: Significant transactions by companies with a premium listing*

42. Chapter 10 of the Listing Rules applies to a company that has a premium listing (LR 10.1.1 R). The purpose of Chapter 10 *“is to ensure that shareholders of companies... are notified of certain transactions... and... have the opportunity to vote on larger proposed transactions”* (LR 10.1.2 G). This regime for shareholder approval of larger transactions is a fundamental feature of the UK listing arrangements. These Rules protect the interests of shareholders, encourage shareholder participation in the affairs of companies, control the conduct of directors and therefore are a significant factor in the attractiveness of a UK premium listing for investors.

43. Transactions are defined in LR 10.1.3 R as including *“all agreements (including amendments to agreements) entered in to by the listed company or its subsidiary undertakings”*. Transactions exclude *“a transaction in the ordinary course of business”*.

44. Each transaction is then classified as being class 1, class 2 or unclassified. This is done by *“assessing its size relative to that of the listed company proposing to make it... using the percentage ratios resulting from applying the class test calculations to a transaction”* (LR 10.2.1 G):

- a. a class 1 transaction is one where any percentage ratio is 25% or more; and
- b. a class 2 transaction is one where any percentage ratio is 5% or more but each is less than 25% (LR 10.2.2 R).

45. For a class 1 transaction, the company must send a circular to the shareholders, obtain shareholder approval in a general meeting and ensure that any agreement effecting the transaction is conditional on shareholder approval. In addition, the company must comply with the class 2 requirements. LR 10.5.1 R provides:

*“A listed company must, in relation to a class 1 transaction:*

- (1) comply with the requirements of LR 10.4 (Class 2 requirements) for the transaction;*
- (2) send an explanatory circular to its shareholders and obtain their prior approval in a general meeting for the transaction; and*
- (3) ensure that any agreement effecting the transaction is conditional on that approval being obtained.”*

46. A class 2 transaction must be formally notified to the market but does not require prior shareholder approval. The notification must include prescribed information, in particular the consideration for the transaction and the value of the gross assets that are the subject of the transaction (LR 10.4.1 R):

*“(2) The notification must include:*

- (a) details of the transaction, including the name of the other party to the transaction;*
- (b) a description of the business carried on by, or using, the net assets the subject of the transaction;*
- (c) the consideration, and how it is being satisfied (including the terms of any arrangements for deferred consideration);*
- (d) the value of the gross assets the subject of the transaction;*
- (e) the profits attributable to the assets the subject of the transaction;*
- (f) the effect of the transaction on the listed company including any benefits which are expected to accrue to the company as a result of the transaction...”*

47. Annex 1 to LR 10 sets out the class tests. Paragraph 5R describes the *“consideration test”*. It involves assessing the value of the consideration for the transaction as a percentage of the market capitalisation of the company:



- a. Consideration is “*calculated by taking the consideration for the transaction as a percentage of the aggregative market value of all the ordinary shares (excluding treasury shares) of the listed company.*”
- b. The consideration is the amount paid to the contracting party and it includes all future or deferred consideration that may be payable (“*if deferred consideration is or may be payable... by the listed company in the future, the consideration is the maximum total consideration payable or receivable under the agreement*” – paragraph 5R(2)(c)).
- c. Market capitalisation “*is the aggregate market value of all the ordinary shares (excluding treasury shares) of the listed company at the close of business on the last business day before the announcement.*”

#### *Listing Rules: Sponsors*

48. Chapter 8 of the Listing Rules deals with the role of sponsors. A company must appoint a sponsor if it is engaging in a class 1 transaction, or if directed to do so by the FCA because there is or may have been a breach of the listing rules:
  - a. A company with a premium listing must appoint a sponsor on each occasion that it is required to submit to the FCA a class 1 circular for approval (LR 8.2.1(2)R).
  - b. Alternatively, a sponsor must be appointed if the FCA requires the company to do so “*because it appears to the FCA that there is, or there may be, a breach of the listing rules... by the listed company*” (LR 8.2.1(5)R)).
49. Further, a company with a premium listing (such as easyJet) must appoint a sponsor if it proposes to enter into a transaction which could amount to a class 1 transaction. The purpose of this Rule is to ensure there is independent and expert review and oversight and to remove the risk of a transaction taking place in breach of the Listing Rules. LR 8.2.2 R provides:

*“If a company with a premium listing is proposing to enter into a transaction which due to its size or nature could amount to a class 1 transaction or a reverse takeover it must obtain the guidance of a sponsor to assess the application of the listing rules, the disclosure requirements and the transparency rules.”*
50. The duty of a sponsor is to “*provide assurance to the FCA when required that the responsibilities of the company... under the listing rules have been met*” and “*guide the company with... a premium listing of its securities in understanding and meeting its responsibilities under the listing rules*” (LR 8.3.1R).
51. The sponsor must act with due care and skill and take “*reasonable steps to satisfy itself that the director or directors of the listed company understand their responsibilities and obligations under the listing rules*” (LR 8.3.3-4R).
52. If a sponsor becomes aware of a failure to comply with the Listing Rules, it “*must promptly notify the FCA*” (LR 8.3.5A R).
53. In the case of a class 1 transaction, the sponsor must not submit a circular to the FCA for approval unless it has come to a reasonable opinion, after due and careful enquiry that “*the listed company has satisfied all requirements of the listing rules relevant to the production of a class 1 circular*” (LR 8.4.12 R).

#### *Listing Rules: Circulars*

54. Chapter 13 of the Listing Rules requires prior approval by the FCA of all class 1 circulars (LR 13.2.1 R). An application for approval must be accompanied by the appropriate sponsor’s declaration under Chapter 8 of the Listing Rules.
55. The circular must contain prescribed information to allow shareholders to properly assess the merits and the risks of the proposed transaction. In particular, it must contain a declaration that the directors accept responsibility for the accuracy of the circular and details of the effect of the transaction on earnings, assets and liabilities (LR 13.4.1 R).

### **Class 1 Transaction**

56. The deferral agreement between easyJet and Airbus is a class 1 transaction:

- a. It is a “*transaction*” because it is an amendment to the 2013 agreement for supply of aircraft.
- b. It does not fall within the “*ordinary course of business*” exemption. The deferral agreement was (and was announced as) an emergency measure designed to respond to the grounding of the entire easyJet fleet in consequence of a global pandemic in circumstances of urgent financial crisis. Even ignoring the pandemic, in 2013 easyJet recognised that aircraft purchase transactions were of sufficient importance that they were not in the ordinary course of business. As LR 10.1.4-5 G puts it, the transaction is one which “*may change the [shareholder’s] economic interest in the company’s assets or liabilities*”. It is not in the ordinary course of business because “*similar transactions which the company has entered into*” were treated as a class 1 transaction in the past (i.e. the 2013 agreement), and the transaction is outside the ordinary course of business “*because of its size or incidence*”.
- c. The relevant market capitalisation under the consideration test is £2.565 billion:
  - i. The closing price of the ordinary shares in the Company on 8 April 2020 (the business day before the announcement of the agreement) was 646p. This is a very large drop from historical prices, reflecting the effect of the pandemic on the market value of easyJet.
  - ii. 397.21 million shares were outstanding on that date.
  - iii. easyJet holds no shares in treasury.
  - iv. Accordingly, 645 pence x 397.21m = £2.565 billion
- d. The consideration for the transaction includes deferred consideration that may be payable in the future. The deferred cost of the aircraft is therefore part of the consideration.
- e. The list price for A320neo aircraft was US\$ 92.3 million at January 2012 prices. easyJet has also ordered a number of larger and more expensive A321neo aircraft. easyJet has not publicly stated the models of the aircraft it has deferred. In easyJet’s favour, it is assumed all the aircraft deferred are the smaller and cheaper A320neo model.
- f. The list price of US\$92.3 is now out of date. It is increased under a price escalation formula based on “*published relevant labour and material indices*”. There have no doubt been substantial increases since January 2012, but the figures are not currently known. In easyJet’s favour, the price escalation formula as applied over the last 8 years is ignored.
- g. The list price consideration per aircraft is therefore £72.61 million at current exchange rates.
- h. Multiplied by 24, the total consideration is therefore £1.742 billion at list price.
- i. On a list price basis, the percentage test is amply met. The consideration under the deferral agreement is 67.9% of the market capitalisation. The class 1 threshold is 25%.
- j. Accordingly, even ignoring the inflation formula on list prices over 8 years and assuming only smaller aircraft, the class 1 test is met on any discount of up to 63% from list price. Such a discount would be unprecedented.

57. Further, and in any event, the transaction is a class 2 transaction.

58. easyJet has therefore committed extensive breaches of the Listing Rules. In particular, it has announced a class 1 transaction without producing a circular, seeking approval for the circular from the FCA or obtaining approval at a general meeting from its shareholders.

59. It is also unclear whether easyJet has complied with its obligations to appoint a sponsor and to ensure that any transaction is conditional on shareholder approval being given.

#### **Grounds for judicial review**

*Ground 1: failure of FCA to take a decision as to whether to appoint a sponsor or take other regulatory action within a reasonable period*

60. Section 1L of FSMA 2000 provides that the FCA must “*maintain arrangements designed to enable it to determine whether persons other than authorised persons are complying... with requirements imposed on them by or under this Act, in cases where the FCA is the appropriate regulator for the purposes of Part 14*”. The Listing Rules are requirements imposed under Part 6 of FSMA. The FCA is the appropriate regulator pursuant to section 204A(6) FSMA 2000.
61. Accordingly, the FCA’s statutory duty is to maintain arrangements designed to enable it to determine whether easyJet is complying with the Listing Rules. Such arrangements must be given effect within a reasonable period, reflecting the urgency of the potential breach of the regulatory obligation and the effect on the proper operation of the relevant market, and the consequences for third parties.
62. Any statutory duty must be exercised within a reasonable period. See Fordham *Judicial Review Handbook* §46.1.5 and §57.3.5. Failure to do so will lead to the Court making a mandatory order for compliance, with a time limit if necessary. See, for example *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at p. 1296 (mandamus would be proper remedy to deal with delay) and *R v Brent LBC, ex p Miyanger* (1997) 29 HLR 628 (mandatory order to carry out statutory duty to make a decision on a housing issue, to be complied with within 28 days).
63. What is a reasonable period of time will depend on the context and the consequences of action or inaction. In the present circumstances, the reasonable period in which the statutory duty must be fulfilled is very brief:
  - a. There has been a failure to identify and provide a circular and shareholder vote for a class 1 transaction in relation to a FTSE 100 company with a premium listing. The transaction is of enormous importance to the company. The basis on which easyJet secured a premium listing (which enhances its ability to raise capital) was that it would comply with the safeguards for shareholders in the Listing Rules.
  - b. If such a failure goes unremedied, the important shareholder rights accompanying a premium listing will in practice become nugatory, giving rise to significant harm to the effectiveness and reputation of the UK financial markets. easyJet is a FTSE 100 company.
  - c. Without very prompt action, the duty to obtain shareholder approval may become ineffective in practice. The transaction (which must under the Listing Rules be conditional until shareholder approval is obtained) may become increasingly difficult to unwind and risks becoming a *fait accompli*.
  - d. Regulatory steps are available that will allow the FCA to ensure compliance with the Listing Rules whilst it seeks to complete its investigation. In particular, a company is under a duty to appoint a sponsor whenever a transaction *could* be within class 1 (LR 8.2.2 R). The duty of the sponsor is to analyse this issue and report to the FCA. If easyJet has not or will not appoint a sponsor the FCA may direct the appointment of a sponsor itself, ensuring that there are immediate steps to secure compliance with the Listing Rules. That power may need to be exercised very quickly to be effective. It does not require proof that there has been a breach of the Listing Rules, merely that “*there may be, a breach of the listing rules... by the listed company*” (LR 8.2.1(5) R).
64. The FCA has not yet decided what, if any, action to take against easyJet. The FCA needs to make that decision promptly. If it fails to do so, the Court can and should require the FCA promptly to decide what (if any) action it should take and reach a decision on that issue.

*Proposed declaration that the deferral transaction is a class 1 transaction*

65. It is unclear whether either the FCA or easyJet dispute that the deferral agreement is a class 1 transaction:
  - a. easyJet has refused to state its position as to whether the deferral agreement is a class 1 transaction. It is not obvious why easyJet refuses to be drawn on this issue. Logically, easyJet’s position must be that the transaction is not in class 1, or easyJet accepts that it has breached the Listing Rules and ought to promptly remedy the position.

- b. The FCA has indicated that it does not ordinarily comment on complaints made to it as a matter of policy. Whilst that policy will be appropriate in many cases, it has no application to a case where the relevant regulatory obligation involves a binary public approval process by shareholders. A circular is necessarily public and the issue for the FCA to consider is whether the Rules require a circular and a shareholder vote. The outcome of the investigation will therefore inevitably become known. If no circular is issued, that can only be because the FCA has concluded that it does not consider that the transaction is in class 1.
66. In the event that there is a dispute as to whether the transaction is a class 1 transaction, our clients intend to seek declarations from the Court that:
- a. the deferral agreement is a class 1 transaction (alternatively a class 2 transaction); further or alternatively
  - b. due to its size or nature the deferral agreement *could* amount to a class 1 transaction within the meaning of LR 8.2.2 R and therefore that a sponsor must be appointed.
67. There is a very strong public interest in early certainty on this question both to enable the FCA to decide what enforcement action to take and to enable both easyJet to comply with its legal obligations. It is unlikely there will be any relevant dispute over the facts relevant to the application of the Listing Rules. Any dispute as to the correct interpretation or approach to those rules should be resolved by the Court in the public interest. See *Transport for London v Uber London Limited* [2015] EWHC 2918 (Admin) at [48] per Ouseley J.
68. In any event, it is plain that the deferral agreement “*could amount to a class 1 transaction*” and therefore under LR 8.2.2 R easyJet is required to appoint and obtain the guidance of a sponsor to assess the application of the listing rules. The “could” test requires no more than there be a reasonably arguable case that the transaction is a class 1 transaction. Such more limited declaratory relief would assist in ensuring that the law is complied with pending the completion of the FCA’s investigation.

**The details of the action that the defendant is expected to take**

69. Unless the FCA takes urgent regulatory action to ensure that easyJet complies with the Listing Rules, the interests of the shareholders of easyJet risks being irreparably prejudiced. They will be denied their right, under the Listing Rules, to receive information about and decide whether or not to approve an important transaction.
70. The FCA must therefore urgently:
- a. Consider whether it ought to exercise its power to appoint a sponsor to secure immediate compliance with the Listing Rules and protect the interests of shareholders during its ongoing investigation and therefore prevent any further breaches. Such action needs to be taken quickly if it is to have any effect. A failure to take a decision has the same practical effect as decision not to act.
  - b. Confirm to our clients the outcome of that decision.
  - c. Confirm to our clients whether it accepts that the transaction is a class 1 transaction.

**Any documents that are considered relevant and necessary**

71. We reserve the right to request such documents as may be necessary and appropriate, and in the interests of the overriding objective, as and when it becomes clear that you have such relevant documents.

**ADR proposals**

72. Whilst our clients are open, in principle, open to resolving disputes through ADR, we do not consider that this dispute is currently amenable to ADR.

**Proposed reply date**

73. Due to the urgency of this matter we expect a reply promptly and in any event no later than **2pm on Friday 1 May 2020**. Should we not have received a substantive reply by this time our clients intend to issue proceedings for judicial review without further notice to you.

Yours faithfully

**Signature Litigation LLP**

*cc (by email): John Barton  
Johan Lundgren  
Maaike De Bie*