

## **NOMINET UK (“the Company”)**

### **OPINION**

#### **A. INTRODUCTION**

1. I have been asked to advise the independent committee of the board of directors of the Company (“the Independent Committee” and “the Board” respectively) in relation to a requisition notice dated 2 February 2021 and served on the Company by a number of its members (“the Requisition Notice” and “the Requisitioning Members” respectively) pursuant to section 303 of the Companies Act 2006 (“CA 2006”).
2. The Requisition Notice requires the Company to convene a general meeting to consider ordinary resolutions to remove five existing directors of the Company from the Board in accordance with section 168(1) CA 2006 (“Resolution (1)”) and to appoint two individuals, Sir Michael Lyons and Axel Pawlik, to the Board (“Resolution (2)”).
3. I have been asked to advise the Independent Committee as to the validity of the Requisition Notice. In summary, my view is that the Requisition Notice is valid in respect of Resolution (1) but not Resolution (2). Accordingly, the Company is required to convene a general meeting so that the members can consider Resolution (1) but is not required to propose Resolution (2) at that meeting.
4. It is important to note that my conclusion in relation to Resolution (2) results from the Company’s specific constitutional provisions. In relation to a company with a more conventional constitution, Resolution (2) would also be valid. For this reason, I summarise the relevant provisions of the Company’s articles of association (“the Articles”) and other constitutional documents in section B below.

#### **B. THE RELEVANT CONSTITUTIONAL PROVISIONS**

5. Articles 26 to 31 (inclusive) of the Company's Articles provide as follows:

- ”26. *Up to four directors may be elected by the Members (“Elected Directors”). An Elected Director may not be an executive of the Company. Election by Members shall be governed by election bye-laws that the directors shall from time to time set and publish.*
27. *Elected Directors shall automatically retire and be subject to re-appointment by election of the Members at the end of the third annual general meeting following their appointment.*
28. *Up to four executives of the Company, including the Chief Executive, may be appointed as a director by the Board (“Executive Directors”). Such appointments shall be for a maximum term of three years and at the expiration of such term an Executive Director shall be eligible for re-appointment by the Board.*
29. *Up to four further directors shall be appointed by the Board (“Appointed Directors”). An Appointed Director may not be an executive of the Company.*
30. *An Appointed Director shall hold office only until the end of the next following annual general meeting whereupon he or she shall resign subject to re-appointment by an ordinary resolution of the Members. Before the end of the third annual general meeting following any re-appointment by the Members, an Appointed Director shall be required to resign and be subject to further re-appointment by an ordinary resolution of the Members.*
31. *The Board may appoint a person who is willing to act to be a director to fill an Elected Director vacancy. A director so appointed shall hold office only until the end of the next following annual general meeting and shall not be taken into account in determining the Elected Directors who are to retire by rotation at the meeting.”*

6. In short, the Articles provide for a maximum of 12 members of the board, comprising:

- (a) up to four executives, including the Chief Executive, pursuant to Article 28 (“Executive Directors”);
- (b) up to four non-executive directors appointed by the Board themselves under Article 29 (“Appointed Directors”); and
- (c) up to four non-executive directors elected by the members pursuant to Article 26 (“Elected Directors”).

Currently, the Board comprises three Executive Directors, four Appointed Directors and four Elected Directors.

7. In addition, the Company has adopted specific provisions for the election of the Elected Directors (i.e. those elected by the members). In particular, Articles 26 and 52.1 provide for the Board to establish bye-laws for purposes including the election of the Elected Directors and “*the voting rights to which [Members] will be entitled...*”.
8. I have been provided with copies of the bye-laws adopted by the Board pursuant to Articles 26 and 52.1 and which provide for the number of votes capable of being exercised by the members generally and specific provisions that apply in relation to the election of non-executive directors by the members. These rules include provisions dealing with the nomination of the proposed directors and requiring a secret ballot.
9. It is against that very specific set of rules adopted by the Company that the validity of the Requisition Notice needs to be considered.

**C. THE VALIDITY OF THE RESOLUTION (1)**

10. Resolution (1) provides for the removal of five members of the board, being Eleanor Bradley, Russell Haworth, Ben Hill, Jane Tozer and Mark Wood. Eleanor Bradley, Ben Hill and Russell Haworth are Executive Directors and Jane Tozer and Mark Wood are Appointed Directors. None of them are Elected Directors.
11. I am instructed that the requisitioning members hold at least 5 per cent of the voting rights in the Company. Accordingly, the threshold required by section 303(2) CA 2006 has been met.
12. Furthermore, section 168 CA 2006 confers an absolute power on the members of a company to remove its directors by ordinary resolution. Resolution (1) seeks to exercise that right in respect of five directors. The Requisition Notice, insofar as it relates to Resolution (1), seems to me to be in order and the Board is therefore

required to convene a general meeting to allow the members to consider that resolution.

#### **D. THE VALIDITY OF RESOLUTION (2)**

13. For the reasons set out below, in my view, resolution (2) falls foul of section 303(4) CA 2006 and the board is not required to propose it at the general meeting convened to consider Resolution (1).
14. Section 303(4) CA 2006 provides that a resolution forming part of a requisition request “*may properly be moved at a meeting unless...it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company’s constitution or otherwise)*”.
15. As set out in paragraph 4 above, the Company has adopted specific constitutional provisions addressing the composition of its board. In particular, pursuant to Article 26, a maximum of four directors can be elected by the members (subject to the additional right to reappoint the (Board) appointed directors pursuant to Article 29).
16. There are currently four Elected Directors and none of the individuals proposed to be removed by Resolution (1) are Elected Directors. Accordingly, there are currently no vacancies for Elected Directors and none will be created on the passing of Resolution (1) (if it is passed).
17. Accordingly, passing Resolution (2) would not result in the appointment of Sir Michael Lyons or Axel Pawlik to the board as the maximum number of Elected Directors has been reached. The Requisitioning Members have not sought to remove any of the Elected Directors and have not sought to alter the Articles of the Company to change the provisions summarised in paragraph (4) above (which pursuant to section 21 CA 2006 would require a special resolution). All that the Requisitioning Members have sought to do is to appoint new directors by ordinary resolution.
18. Accordingly, in my view, resolution (2) is not a valid resolution for the purposes of section 303 of the CA 2006 and the Independent Committee is entitled to disregard it.

19. The advice contained in this opinion is provided for the sole use of the Independent Committee and may not be relied on by any other person without my prior written consent. The Independent Committee consists of the members of the Board not subject to potential removal under the terms of the Requisition Notice.

**Andrew Thornton QC**

**Erskine Chambers**

**15 February 2021**