

Disclosure Requirements on COVID-19 Impact for Issuers in Europe

European Securities and Markets Authority and National Supervisory Authorities Underline Certain Disclosure Rules that Apply to Issuers in the Context of the COVID-19 Outbreak

SUMMARY

In light of the COVID-19 pandemic, the European Securities and Markets Authority (“ESMA”), the French Financial Market Authority (*Autorité des marchés financiers*) (“AMF”), the United Kingdom (“UK”) Financial Conduct Authority (“FCA”) and Financial Reporting Council (“FRC”) as well as the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (“BaFin”) recently reminded market participants of their disclosure and other transparency obligations under applicable European and national laws.

In this regard, the European authorities particularly stressed the importance of the timely disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (as amended, the “Market Abuse Regulation”). However, in light of the current circumstances, ESMA and the other European supervisory authorities have provided certain facilitations with respect to the forthcoming publication of the annual and half-yearly financial statements and reports. While partially focusing on different special topics, European regulators, based on harmonized European capital markets laws, are generally very consistent in their guidance to market participants.

DISCLOSURE REQUIREMENTS ON COVID-19 IMPACT

In view of the continuing impact of the COVID-19 outbreak on financial markets and issuers’ business activities, financial position and economic performance in Europe, ESMA and national supervisory authorities in Europe have reminded issuers of their disclosure requirements under applicable European and national regulations.

1. Ad Hoc Disclosure of Inside Information

Pursuant to Art. 17 of the Market Abuse Regulation, issuers are required to inform the public as soon as possible of inside information – *i.e.*, precise, non-public information relating, directly or indirectly, to

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one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of their financial instruments.¹

ESMA: Importance of the Disclosure Rules Regarding Inside Information in the Context of the COVID-19 Outbreak

On March 11, 2020, ESMA emphasized the importance of such ad hoc disclosure rules in light of the current crisis.² Whereas the COVID-19 pandemic is a well-known crisis which has an impact on all sectors of the economy, the specific measures taken by each issuer to cope with the crisis or the specific impact of the crisis on the issuer could be considered as inside information if such information is price sensitive, *i.e.*, it might have a significant impact on the price of financial instruments issued by such issuer. Against this background, ESMA reminded issuers to particularly disclose as soon as possible any significant impact of the COVID-19 outbreak on their “*fundamentals, prospects or financial situation.*”

Similar statements, stressing the overall importance of the disclosure rules in times of crisis, have been issued by other national supervisory authorities in Europe. For example, the AMF made similar recommendations to ESMA on February 28, 2020, at a time when COVID-19 had just begun to spread across Europe, asking issuers to disclose without delay, through the publication of an ad hoc release, “*any knowledge of the epidemic’s significant impact on the activity, performance or prospects of the issuer*”³. Also, the FCA reminded issuers of their obligation to comply with their obligations under the Market Abuse Regulation and related FCA rules in a market bulletin published on March 17, 2020.⁴

Specific Guidance by National Supervisory Authorities

In addition to this rather generic advice, the BaFin, the AMF and the FCA have published more specific advice relating to the disclosure of inside information:

- ***Guidance by the BaFin:*** In FAQs published on its website on March 20, 2020, the BaFin pointed out that changes of forecasts due to the COVID-19 crisis only have to be disclosed “*if they are sufficiently probable*”⁵ and, given recent uncertainties, issuers:
 - are entitled to maintain their previous forecasts as long as they cannot predict the actual impact of the COVID-19 crisis;
 - should withdraw their previously announced forecasts through the publication of an ad hoc release without providing new guidance in case there is a sufficient degree of likelihood that the actual results will significantly fall short of the previously announced forecasts, even if they are unable to provide a new detailed forecast; and
 - have to disclose the new forecast in the form of an ad hoc disclosure once they can provide a sufficiently detailed forecast.⁶

With respect to the upcoming publication of quarterly financial figures, the BaFin highlighted that it is aware of current market volatility and the associated difficulties when determining if the difference between the actual figures and market expectations has a significant effect on the prices of the related financial instrument, and would therefore need to be regarded as inside information and published as soon as possible within the meaning of the Market Abuse Regulation.⁷

In this regard, the BaFin pointed out that – in contrast to its usual practice pursuant to which market expectations have to be determined on the basis of the mean value (arithmetical mean) of current analyst estimates – other means of determining market expectations “*on the basis of*

plausible information” are permissible in case the mean value cannot be determined (e.g., because there are not enough estimates available).⁸ Furthermore, the BaFin indicated that “*on an exceptional basis*” it might also be justifiable to adjust existing consensus estimates if they are “*clearly no longer up-to-date and do not take into account the current situation.*”⁹

The BaFin also stated that the mere postponement of an issuer’s annual general meeting and the associated postponement of the resolution on the distribution of profits does not in and of itself constitute inside information. However, if the issuer plans to change its dividend policy (e.g., as a result of the recommendation made by the European Central Bank to banks to not pay any dividends) or if other resolutions material to the issuer (e.g., relating to capital measures) will be postponed, such information could be regarded as inside information subject to an ad hoc disclosure obligation under the Market Abuse Regulation.¹⁰

- **Guidance by the AMF:** The AMF recommended that issuers periodically re-assess the known or anticipated impact of the COVID-19 pandemic on the issuer’s activity, performance or prospects with respect to the materiality and/or amount of such impact.¹¹ In this regard, the AMF also indicated, on March 23, 2020, that where a significant impact of the COVID-19 outbreak is known or anticipated, previously announced guidance that did not include an assumption regarding the potential impact of COVID-19 must be restated and disclosed by way of a press release from the issuer and published in accordance with the *Règlement général* of the AMF.¹² To date, several issuers of the French CAC40 index have issued ad hoc press releases withdrawing their previously announced forecasts without providing new guidance.¹³
- **Guidance by the FCA:** In addition to the points raised by the BaFin and the AMF, the FCA has also stated¹⁴ that it appreciated, that, in the short term, there may be slight delays in making required disclosures as new processes are put in place to assess the situation. While there is no guidance on what is an acceptable length of delay, past cases suggest that “short” really means very short. (For example, in relation to Marconi,¹⁵ the Financial Services Authority (as the FCA was then known) stated that a reasonable delay of the announcement of materially reduced expected financial performance would have been no more than 24 hours rather than the three days that it actually was taken.)

2. Yearly and Half-Yearly Financial Statements and Reports

Pursuant to Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (as amended, the “Transparency Directive”), issuers have to publish their financial reports (including audited financial statements and management report), at the latest, four months after the end of each financial year – *i.e.*, issuers that closed their accounts on December 31, 2019 have to publish their financial reports on or prior to April 30, 2020.¹⁶ In addition, issuers must also publish a half-yearly financial report, as soon as possible after the end of the relevant period.¹⁷

In France, the aforementioned deadlines were transposed to national law by Art. L. 451-1-2 of the French Monetary and Financial Code (*Code monétaire et financier*), in Germany by Sections 114 and 115 of the German Securities Trading Act (*Wertpapierhandelsgesetz*) and in the UK by a regulatory statement by the FCA.

ESMA: No Priority of Supervisory Actions Against Issuers Failing to Meet Deadlines

In a statement published on March 27, 2020, ESMA acknowledged the difficulties encountered by issuers in preparing financial reports and the challenges faced by auditors in carrying out timely audits of accounts due to the COVID-19 pandemic, which may impair the ability of issuers to publish within

the legislative deadlines. In this regard, ESMA announced that it expected national supervisory authorities not to prioritize supervisory actions against issuers in respect of the upcoming deadlines to publish their annual and half-yearly financial reports for two-month and one-month periods, respectively, after the deadlines set out by in the Transparency Directive.¹⁸

Specific Guidance by National Supervisory Authorities

Whereas the BaFin has not issued any additional guidance with respect to the deadlines and the preparation of the financial reports,¹⁹ the national supervisory authorities in France and the UK have issued further guidance as summarized below:

- **Guidance by the AMF:** The AMF has advised issuers that information regarding the main risks and uncertainties to which they are exposed as a result of the COVID-19 pandemic should be provided in their annual financial reports, including their management reports.²⁰ For issuers that closed their accounts on December 31, 2019, those risks and uncertainties are those that the issuer faces on the date of publication of its annual financial report (*i.e.*, on or prior to April 30, 2020). In addition, the AMF notes that the actual and potential impacts of the COVID-19 outbreak could also be considered as post-closing events requiring disclosure in issuers' year-end 2019 financial statements.²¹ For those issuers that have already finalized and published their 2019 year-end financial reports, information regarding the impacts of the COVID-19 outbreak will need to be provided in their interim financial reporting disclosures. The AMF has also granted issuers a two-month extension to publish their annual financial reports (for issuers that have a financial year ending between December 31 and March 31) and a one-month extension to publish the half-year financial reports which would have normally been published during that same period.²²
- **Guidance by the FCA:** The FCA has granted issuers a temporary two-month extension, to the four months from the end of their financial year they normally have, to publish their audited annual financial reports.²³ The FCA confirmed that it will not take normal regulatory action against issuers who avail themselves of this extension. However, the FCA reserves the right to take this action if necessary for other reasons. The FCA has also published a Q&A document providing additional information on the duration, scope and applicability of the temporary relief. Among other things, this confirms that:
 - The FCA will also give temporary relief from taking action against issuers with a UK listing that are not required to comply with the Transparency Directive, but are subject to the requirement to publish annual financial reports via other UK listing requirements.
 - The temporary relief does not extend to half-yearly financial reports which should be published within three months of the half-year end.
- **Guidance by the FRC:** In addition to the measures taken by the FCA, the FRC has issued further guidance²⁴ for UK companies preparing financial statements in the current uncertain environment. The guidance addresses the following topics:
 - **Capital maintenance.** Boards are required to pay attention to capital maintenance, ensuring that sufficient reserves are available when the dividend is made, not just when it is proposed. Relevant considerations when assessing whether a dividend is appropriate should include current and likely operational and capital needs, contingency planning and the directors' legal duties, both in statute and common law.
 - **Forward-looking statements.** The guidance also addresses the current difficulties in making forward-looking judgments in financial statements, including the company's strategic reports and viability statements, and aims to help boards to focus on areas of reporting of most interest to investors, and to encourage them to provide clarity on the use of key forward-looking judgments. The guidance covers in particular:
 - The need for narrative reporting to provide forward-looking information that is specific to the entity and which provides insights into the board's assessment

of business viability and the methods and assumptions underlying that assessment.

- Going concern and any associated material uncertainties, the basis of any significant judgements and the matters to consider when confirming the preparation of the financial statements on a going-concern basis.

3. Universal Registration Documents: Risk Factors and Financial Guidance

Another topic, which was predominantly addressed by the AMF in a statement published on March 23, 2020, is the impact of the COVID-19 pandemic on the description of the business, financial situation and outlook in the universal registration document (“URD”) of an issuer.²⁵ In accordance with Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (as amended, the “Prospectus Regulation”), the persons responsible for the prospectus must declare that, to the best of their knowledge, the information contained in the prospectus is “*in accordance with the facts*” and that “*the prospectus makes no omission likely to affect its import.*”²⁶ In this regard, the AMF stated, with respect to risk factors and financial guidance, the following:

- **Risk Factors:** In its March 23, 2020 communication, the AMF highlighted that the “Risk Factors” section of URDs and prospectuses should be up-to-date regarding COVID-19 upon filing of the URD or prospectus. The risk factors included in this section should be limited to risks which are material and specific to the issuer and its securities, as corroborated by the content of the URD or prospectus.²⁷ As regards the specificity of the risk factors, and in accordance with the relevant guidelines published by ESMA,²⁸ the AMF invited market participants to describe, where possible, the impact of the COVID-19 pandemic on their businesses and/or their main customers’ and suppliers’ specific uncertainties resulting from their businesses or geographical areas. Since the materiality and potential impact of the risk factor should be clear from the disclosure, the AMF also asked issuers to disclose any significant known or anticipated impact of the COVID-19 outbreak, along with their underlying assumptions.
- **Financial Guidance:** As regards forward-looking statements made by issuers, the AMF noted that those statements should be re-assessed in light of the current COVID-19 crisis, and the relevant disclosure included in the URD should be revised accordingly, in particular the information provided with respect to (i) item 5.4 “Strategy and objectives,” which includes a description of the issuer’s business strategy and objectives, taking into account its future challenges and prospects, and (ii) item 11 “Profit forecasts or estimates,” which should describe the issuer’s profit forecast or profit estimates, if any, and set out the principal assumptions upon which the issuer has based its forecast or estimate.

The AMF reminded issuers that where a profit forecast or estimate has been published by the issuer but is no longer valid, issuers must provide a statement to that effect in the URD along with an appropriate explanation, in accordance with Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (as amended, the “Commission Delegated Regulation”).²⁹ Given the limited visibility due to the evolving COVID-19 situation, issuers may decide to withdraw their outstanding profit forecast without disclosing a new forecast to the market and to further indicate that a new forecast cannot be provided at this stage given the uncertainty resulting from the current COVID-19 situation. This AFM guidance is in line with the corresponding BaFin FAQ (see above).

Conclusion

In their guidance, ESMA and the national supervisory authorities of France, Germany and the UK demonstrated that they are aware of the challenges faced by issuers in the context of the COVID-19 outbreak. Although they reminded issuers to adhere strictly to the ad hoc disclosure rules pursuant to the Market Abuse Regulation, ESMA and the other European supervisory authorities have eased the regulatory burden on issuers by providing certain facilitations with respect to the forthcoming publication of the annual and half-yearly financial statements and reports. Given the level of harmonization of European capital markets law, it can be noted that all European regulators, while partially focusing on different special topics, are generally very consistent in their guidance to market participants and are thereby able to increase legal certainty in a time of great economic and financial uncertainty.

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ENDNOTES

- 1 See Market Abuse Regulation, Art. 17(1).
- 2 See ESMA's press release, dated March 11, 2020, <https://www.esma.europa.eu/press-news/esma-news/esma-recommends-action-financial-market-participants-covid-19-impact>.
- 3 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 4 FCA 27th Primary Market Bulletin, dated March 17, 2020, <https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-issue-no-27-coronavirus-update>.
- 5 See BaFin's FAQs, available at https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html.
- 6 See, for example, the ad hoc releases of Infineon Technologies AG, dated March 26, 2020, <https://www.infineon.com/cms/en/about-infineon/investor/news/adhoc/>, and of Thyssenkrupp AG, dated March 23, 2020, <https://www.thyssenkrupp.com/en/newsroom/press-releases/disclosure-of-an-inside-information-according-to-article-17-mar--reliable-assessment-of-the-business-development-in-the-2019-2020-financial-year-currently-not-possible-20032.html>.
- 7 See BaFin's FAQs, available at https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html.
- 8 See BaFin's FAQs, available at https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html.
- 9 See BaFin's FAQs, available at https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html.
- 10 See, for example, the ad hoc releases of Commerzbank Aktiengesellschaft, dated March 30, 2020, https://www.commerzbank.com/en/hauptnavigation/aktionaere/service/archive/ir-nachrichten_1/2019_1/ir_nachrichten_detail_19_87818.html, and of Deutsche Lufthansa Aktiengesellschaft, dated March 13, 2020, <https://investor-relations.lufthansagroup.com/en/news/ad-hoc-releases/investor-relations-ad-hoc-releases/date/2020/03/13/lufthansa-executive-board-proposes-to-suspend-the-dividend-payment-and-decides-on-further-measures-t.html>.
- 11 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 12 See AMF's press release, dated March 23, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/depots-des-documents-denregistrement-universels-et-regles-dinformation-permanente-dans-le-contexte>.
- 13 See Saint-Gobain's press release, dated March 23, 2020, https://www.saint-gobain.com/sites/sgcom.master/files/20200323_coronavirus_update_va.pdf; Vinci's press release, dated March 23, 2020, <https://www.vinci.com/vinci.nsf/en/press-releases/pages/20200323-0800.htm>; Schneider Electric's press release, dated March 23, 2020, <https://www.se.com/ww/en/assets/564/document/125784/release-schneider-covid-update.pdf>; and Airbus' press release, dated March 23, 2020, <https://www.airbus.com/newsroom/press-releases/en/2020/03/airbus-announces-measures-to-bolster-liquidity-and-balance-sheet-in-response-to-covid19.html>.
- 14 See FCA statement of Policy: Delaying annual company accounts during the corona virus crisis dated March 26, 2020, <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>.
- 15 FSA Final Notice Marconi plc: dated April 11, 2003, https://www.fca.org.uk/publication/final-notice/marconi_11apr03.pdf.
- 16 See Transparency Directive, Art. 4(1).
- 17 See Transparency Directive, Art. 5(1).

ENDNOTES (CONTINUED)

- 18 See ESMA's press release, dated March 27, 2020, <https://www.esma.europa.eu/press-news/esma-news/esma-issues-guidance-financial-reporting-deadlines-in-light-covid-19>.
- 19 See BaFin press release, dated March 27, 2020, https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2020_Corona_andereBehoerden/meldung_2020_03_27_corona_virus18_ESMA_Finanzberichte.html.
- 20 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>, and French *Code de commerce*, Art. L. 225-100-1.
- 21 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 22 See AMF's press release, dated March 30, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/continuïte-de-linformation-periodique-dans-le-contexte-depidemie-de-coronavirus>.
- 23 See FCA statement of Policy: Delaying annual company accounts during the corona virus crisis dated March 26, 2020, <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>.
- 24 FRC Guidance for Companies COVID 19 March update, [https://www.frc.org.uk/about-the-frc/covid-19/company-guidance-update-march-2020-\(covid-19\)](https://www.frc.org.uk/about-the-frc/covid-19/company-guidance-update-march-2020-(covid-19)).
- 25 See AMF's press release, dated March 23, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/depôts-des-documents-denregistrement-universels-et-regles-dinformation-permanente-dans-le-contexte>.
- 26 See Prospectus Regulation, Art. 11(1).
- 27 See Prospectus Regulation, Art. 16(1).
- 28 See ESMA, Guidelines on Risk Factors under the Prospectus Regulation, dated October 1, 2019, https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293_guidelines_on_risk_factors_under_the_prospectus_regulation.pdf.
- 29 See Commission Delegated Regulation, Annex I, Item 11.1.

March 18, 2020

French Financial Markets Authority Announces Ban on Short Selling on All French Trading Venues

AMF Takes Temporary Action to Prohibit Short Selling of All Publicly Traded Equity Securities on French Trading Venues in Response to Market Turmoil Related to COVID-19 Outbreak

SUMMARY

On March 17, 2020, the French financial markets authority, the *Autorité des marchés financiers* (“AMF”), took emergency measures in light of recent market developments relating to the COVID-19 outbreak.¹ The first measure prohibits net short positions in relation to any equity securities traded on a French trading venue and for which the AMF is the competent authority for a 20-day period commencing at 12:00 a.m. CET on March 18, 2020.² The second measure extends the prohibition period to 30 days.³ Those orders replace an emergency order temporarily banning net short positions in respect of a limited number of shares traded on certain French stock exchanges, which applied until the end of the trading day on March 17, 2020.⁴

BAN ON NET SHORT POSITIONS

The first emergency order relating to net short positions (the “Prohibition Order”) was taken by the Chairman of the AMF and prohibits all persons from taking a net short position, or increasing an existing net short position, on equity securities issued by issuers whose shares are admitted to trading on a French trading venue (regardless of the domiciliary jurisdiction of the issuer) and for which the AMF is the competent authority for purposes of Regulation (EU) No. 236/2012 of the European Parliament and of the Council of March 14, 2012 on short selling and certain aspects of credit default swaps (as amended, the “Short Selling Regulation”). The Prohibition Order provides for an exception for market making activities within the meaning of the Short Selling Regulation. For purposes of the Prohibition Order, “net short position” means the position remaining after deducting any long position that a person holds in relation to the issued share capital of an issuer from any short position that such person holds

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in relation to that share capital; where “long position” and “short position” are defined in, and calculated in accordance with, the Short Selling Regulation.

In accordance with Article L. 421-16(II) of the French *Code monétaire et financier*, the board (*collège*) of the AMF decided to extend the 20-day prohibition period set forth in the Prohibition Order up to 30 days from March 17, 2020. Therefore, the Prohibition Order is effective at 12:00 a.m. on March 18, 2020 and is scheduled to terminate at 11:59 p.m. on April 16, 2020, unless further extended by the AMF. By law, the board of the AMF may extend an emergency order taken by the Chairman of the AMF under the Short Selling Regulation up to three months from the date of the initial order, or renew emergency measures taken under the Short Selling Regulation for a three-month period.⁵

Consistent with the provisions of the Short Selling Regulation, the European Securities and Markets Authority (“ESMA”) issued a positive opinion on March 18, 2020 on the measures set forth in the Prohibition Order.⁶

SHORT SELLING BANS IN OTHER EU JURISDICTIONS

Similar short selling bans have recently been put in place in other EU jurisdictions, such as Italy and Spain, and other EU countries can be expected to follow suit. For instance, in Italy, the Italian *Commissione Nazionale per le Società e la Borsa* (“CONSOB”) issued a similar prohibition on net short positions, which shall apply for a three-month period from March 18, 2020.⁷ In Spain, the *Comisión Nacional del Mercado de Valores* (“CNMV”) decided to adopt a similar prohibition for a one-month period, which entered into force on March 17, 2020 before market opening and will expire on April 17, 2020, after market close.⁸

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¹ See AMF’s press release, dated March 17, 2020, <https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/amf-announces-short-selling-ban-one-month>

² See the decision of the Chairman of the AMF, dated March 17, 2020, <https://www.amf-france.org/en/regulation/exceptional-intervention-measures/decision-17-march-2020-regarding-ban-net-short-positions>

³ See the decision of the Board of the AMF, dated March 17, 2017, <https://www.amf-france.org/sites/default/files/2020-03/20200317-decision-du-college-art-20-clean-veng.pdf>

⁴ See the decision of the Chairman of the AMF, dated March 17, 2020, https://www.amf-france.org/sites/default/files/2020-03/20-03-16-decision-amf-article-23-en_0.pdf

⁵ French *Code monétaire et financier*, Art. L. 421-16(II).

⁶ See ESMA’s opinion, dated March 18, 2020, https://www.esma.europa.eu/sites/default/files/library/esma70-155-9581_opinion_on_amf_emergency_measure_under_the_ssr_all_shares-tc.pdf

⁷ See CONSOB’s press release, dated March 17, 2020, http://www.consob.it/web/consob-and-its-activities/news-in-detail/-/asset_publisher/kcxlUuOyjO9x/content/press-release-17-march-2020-hp/718268 and related ESMA opinion, dated March 17, 2020, https://www.esma.europa.eu/sites/default/files/library/esma70-155-9565_opinion_on_consob_emergency_measure_under_the_ssr_all_shares.pdf

⁸ See CNMV’s press release, dated March 16, 2020, <http://cnmv.es/portal/verDoc.axd?t=%7B5baf609e-ed4e-4dad-a697-80c55548e181%7D>, and related ESMA opinion, dated March 17, 2020, https://www.esma.europa.eu/sites/default/files/library/esma70-155-9556_opinion_on_cnmv_emergency_measure_under_the_ssr.pdf

March 25, 2020

Germany Introduces Online-Only Shareholders' Meetings in Response to COVID-19

New Law Applies to German Stock Corporations, German Partnerships Limited by Shares and European Companies (*Societates Europaeae*) Registered in Germany

SUMMARY

The new law allows online-only participation and voting by shareholders, shortens the period to convene both physical and virtual shareholders' meetings from 36 days to 21 days, and provides for questions to be asked by shareholders and responded to by management in advance of the meeting by way of FAQ posted to the company's website.

RAPID ADOPTION OF THE NEW LAW

On March 25, 2020, the German Parliament (*Bundestag*) resolved on the Act for the Mitigation of the Consequences of the COVID-19 Pandemic. The new law, among other things, allows German companies for the first time to hold online-only shareholders' meetings. The Council of the German Federal States (*Bundesrat*) is expected to approve the law on March 27, 2020, so that it may become effective as early as March 28, 2020. The legislative process will have been executed within less than ten days after the initial draft became public on March 20, 2020 and was agreed by the German Federal Government (*Bundesregierung*) on March 23, 2020.

The law includes the following key provisions:

Online Shareholders' Meeting

The management board may hold an online shareholders' meeting in which shareholders can only participate by means of electronic communication or vote via absentee ballot. While the management board itself should still attend in person, members of the supervisory board can dial in via video or audio transmission, even if the company's articles of association do not provide for this option.

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An online shareholders' meeting must comply with the following requirements:

- **Transmission:** The entire shareholders' meeting, including the general debate, voting and announcement of results, must be broadcast via a live video stream (e.g., on the Internet).
- **Voting rights:** Shareholders must be able to vote by electronic means of communication (absentee ballot or electronic participation) or through a proxy.
- **Information rights:** The company must provide shareholders with the opportunity to ask questions by electronic means of communication. The management board may, in the prudent exercise of its discretion (*pflichtgemäßes, freies Ermessen*), decide which questions to answer and how. Preference may be given to questions from major shareholders and shareholders' associations. The management board may also require shareholders to submit their questions electronically no later than two days prior to the shareholders' meeting, and may answer any or all of these questions in advance by way of FAQ posted to the company's website.
- **Limited right to object:** Shareholders who have voted their shares as described above must be given the opportunity to submit an objection to the notary public via electronic means of communication by the end of the meeting. However, the right to challenge any resolution adopted at the meeting by filing an action (*Anfechtungsklage*) with the competent court is limited. Technical disturbances affecting shareholder rights at the meeting as well as the management board's decision how to answer questions, and potentially which questions to answer, only allow a shareholder to challenge a resolution if he proves that the company acted willfully or intentionally – for certain affected shareholder rights gross negligence is sufficient. The legislator expressly points out that the risk of shareholder actions should not prevent companies from holding online shareholders' meetings. Nevertheless, the reliable technical implementation of the online shareholders' meeting will be one of the most important issues to address by any company wishing to make use of the flexibility provided for in the new law.

Online Access to Physical Shareholders' Meeting

As an alternative to an online-only shareholders' meeting companies may open up their traditional physical meeting for (additional) online participation by shareholders even if the company's articles of association currently do not provide for this opportunity.

Timing of Shareholders' Meeting

To increase flexibility, companies may decide to shorten statutory notice periods, and certain dates are moved closer to the meeting. Companies may also hold their annual shareholders' meetings at the end of the financial year.

- **Notice period:** The management board may decide to publish an invitation to a shareholders' meeting only 21 instead of 36 days prior to the meeting.
- **Record date:** Typically, a company's articles of association require shareholders to prove their shareholding as of a specific record date. For listed companies the record date will be the beginning of the twelfth (instead of the twenty-first) day before the meeting. For bearer shares, the required confirmation must be submitted to the company no later than by the fourth (instead of the sixth) day prior to the meeting, unless a later date is indicated in the invitation to the shareholders' meeting. No confirmation is required for registered shares.
- **Registration period:** Typically, a company's articles of association require shareholders to register at least six days prior to the shareholders' meeting. Unless the invitation sets forth a shorter period, this requirement remains unchanged. Therefore, shareholders still have to register at least six days in advance to participate in the meeting but, in the case of bearer shares, must submit a confirmation of their shareholding by the fourth day prior to the meeting (see above). Companies may set forth a later date to register for the shareholders' meeting in order to align these dates.

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- **Additional agenda items:** If the management board decides to shorten the notice period, shareholders requesting additional items to be added to the agenda must submit the request at least 14 days prior to the meeting instead of at least 30 days.
- **Shareholders' meeting may take place at the end of the financial year:** Currently, the annual shareholders' meeting of a German stock corporation (*Aktiengesellschaft*) or a German partnership limited by shares (*Kommanditgesellschaft auf Aktien*) must be held within the first eight months of a financial year; in the case of a European company (*Societas Europaea*) it must be held within the first six months. Under the new law, the management board of a German stock corporation or a German partnership limited by shares may decide to hold the annual shareholders' meeting instead during the last four months of the company's financial year, as long as the meeting still takes place in 2020. This extension does not apply to European companies (*Societates Europaeae*). However, the management board should only use this possibility if rescheduling is necessary due to COVID-19. Therefore, it should consider whether a physical shareholders' meeting can still be held within the eight-month period. At the same time, the management board does not have to refrain from holding an online meeting because a physical shareholders' meeting is still possible within the first eight months of the financial year.

Interim Dividends

German stock corporations may only pay dividends on the basis of a resolution of the shareholders' meeting or, prior to the annual shareholders' meeting, if the articles of association provide for limited installment payments on the basis of the (preliminary) net profit for the completed financial year. The new law makes the latter option available to any stock corporation regardless of the provisions set forth in its articles of association. However, the statutory restrictions on the amount of such payments apply unchanged, *i.e.*, payments may not exceed the lower of 50% of the net profit for the 2019 financial year after deducting the amounts that must be transferred to retained earnings under statutory law or the articles of association, and 50% of the net profit for 2018.

Supervisory Board Approval

Any decision of the management board outlined above must be approved by the supervisory board. The supervisory board may take this decision by written, oral or comparable resolution, even if the company's articles of association or rules of procedure for the supervisory board do not provide for this option.

Technical Set-Up

Companies should prepare any online shareholders' meeting in close coordination with their technical service providers. These service providers are currently preparing the necessary technical solutions for online meetings and expect to have them ready in a few weeks.

Temporary Rules

The above provisions apply only to shareholders' meetings taking place in 2020. If necessary, the German Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*) may extend the provisions of the law without further legislative approval until December 31, 2021.

CONCLUSION

Companies are not required to use the possibilities introduced by the new law. The management board should consider whether – depending on individual circumstances – it may be possible to hold a physical shareholders' meeting at a later date in 2020. At the same time, the management board does not have to refrain from holding an online meeting because a physical shareholders' meeting may still be or become possible.

To avoid legal uncertainties, companies that have already published invitations to their shareholders' meeting but want to take advantage of the possibilities of the new law should cancel their scheduled meeting and publish a new invitation.

* * *

April 7, 2020

U.K. Covid Corporate Financing Facility

U.K. Government Initiative Offers Short-Term Sterling Liquidity for Non-Financial Companies That Make a Material Contribution to Economic Activity in the U.K.

SUMMARY

On March 23, 2020, HM Treasury (the “**Treasury**”) and the Bank of England (the “**BoE**”) launched the Covid Corporate Financing Facility (“**CCFF**”) to provide short-term liquidity for businesses making a material contribution to the U.K. economy.

Under the facility, which is implemented by the BoE on behalf of the Treasury, the BoE will acquire short-dated commercial paper in the primary and secondary markets issued by eligible companies who had an investment grade credit rating or equivalent on March 1, 2020. The CCFF is one component of a broader set of U.K. Government-sponsored measures aimed at supporting U.K. businesses through the economic disruption caused by COVID-19.

KEY FEATURES OF THE CCFF

1. **What is the CCFF?** The CCFF seeks to alleviate temporary illiquidity for businesses making a material contribution to the U.K. economy which held an investment grade credit rating prior to the COVID-19 crisis. The BoE will acquire commercial paper with a maturity of up to one year both on the secondary market and directly from eligible companies.

The BoE has stated that it intends the CCFF to operate for an initial period of 12 months.

2. **Which companies are eligible to participate in the CCFF?** Non-financial companies (and their finance subsidiaries) that make a material contribution to economic activity in the U.K. are eligible to participate so long as they can demonstrate sound financial health prior to the COVID-19 crisis. The BoE will determine the eligibility of a company to participate in the CCFF,

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taking into account whether the company generates significant revenues, serves a large number of customers or has a number of operating sites in the U.K.. However, the BoE has stated that eligible companies will generally include U.K.-incorporated companies, including those with foreign-incorporated parents, with a genuine business in the U.K., as well as companies with “significant employment” or headquarters located in the U.K. Companies can obtain an early indication from the BoE whether they will be eligible prior to establishing a commercial paper program, although the BoE is currently advising companies who think that they may be eligible to participate in the CCFF to first liaise with their bank.

Companies do not need to have previously issued commercial paper in order to participate.

Leveraged investment vehicles or companies within groups that are predominantly banks, investment banks or building societies are not eligible, and neither are companies over which the U.K. or an EU member state (or regional or local authorities of the U.K. or an EU member state), directly or indirectly, exercises dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it.

3. *What securities are eligible to be acquired under the CCFF?* The CCFF will only acquire commercial paper, which is short-term unsecured debt issued under a commercial paper program. To be eligible for the CCFF, commercial paper must:

- a.** be sterling denominated;
- b.** have a maturity of between one week and 12 months;
- c.** either (i) where available, have a minimum short-term credit rating of A3/P3/F3/R3 from at least one of Standard & Poor’s, Moody’s, Fitch or DBRS Morningstar as at March 1, 2020 or (ii) otherwise satisfy the BoE as to its credit status (see also question 4 below);
- d.** be guaranteed by the primary entity in the group (if relevant);
- e.** not have non-standard features (such as extendibility or subordination to unsecured and unsubordinated debt of the group); and
- f.** be issued directly into Euroclear and/or Clearstream.

The BoE will purchase commercial paper that meets the eligible securities criteria set out above in the primary market from banks who act as principal and in the secondary market from eligible institutions. A company wishing to participate in the CCFF must therefore involve a bank which is participating in the CCFF. The banks who are currently participating in the CCFF are Bank

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of America, Barclays, BNP Paribas, Citi, Credit Suisse, Goldman Sachs, HSBC, JP Morgan, Lloyds, Morgan Stanley, NatWest and Standard Chartered.

4. **What credit rating is required for participation in the CCFF?** To be eligible for participation in the CCFF, a company must have had a short-term rating of A3/P3/F3/R3 or above, or a long-term rating of BBB-/Baa3/BBB- or above by at least one of S&P, Moody's, Fitch or DBRS Morningstar. If a company has short-term ratings from different agencies and one of these is below investment grade then the commercial paper will not be eligible.

However, subject to approval by the Treasury, a company which has demonstrated sound financial health prior to March 1, 2020 will remain eligible if there is a ratings downgrade effective after March 1, 2020.

A company which does not have an existing credit rating may approach a ratings agency for either a public rating or (if they have not previously approached a ratings agency) a private point in time credit opinion or assessment in a form that can be shared with the Treasury.

Alternatively, the BoE has indicated that it may deem a company to be equivalent to having a public investment grade credit rating where the company's bank confirms to the BoE that the company was viewed internally by its commercial bank counterparties as equivalent to investment grade as at March 1, 2020. The BoE has advised that its assessment in this situation will draw on a range of information, including the range of banks' internal ratings across all of a company's commercial bank counterparties, and that a company will need to be rated consistently by its banks as investment grade in order to be deemed equivalent to having a public investment grade rating.

5. **What terms will the CCFF offer?** Commercial paper will be acquired in the primary market at a spread over a reference rate, based on the current sterling overnight index swap rate ("OIS") on the relevant dealing date. The spreads are subject to review but as at March 23, 2020 were:

<i>Rating</i>	<i>Spread to OIS</i>
A1/P1/F1/R1	20 bps
A2/P2/F2/R1	40 bps
A3/P3/F2/R2	60 bps

Commercial paper that is acquired in the secondary market will be purchased at the lower of: (i) the price calculated on the same basis as primary purchases set out above; and (ii) amortized cost from the issue price. The BoE will apply a small additional fee to the company for use of the secondary facility (as at March 23, 2020 this was set at five bps).

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6. *How much commercial paper can be issued?*

For primary market purchases, the BoE has published an indicative guide to the maximum limit of commercial paper that an individual issuer can issue. The limits can be adjusted downwards at the BoE's discretion and are subject to review, but as at April 3, 2020 were:

<i>Rating</i>	<i>Initial issuer limit</i>
A1/P1/ F1/ R1	Up to £1bn
A2/P2/F2/R2	Up to £600m
A3/P3/F3/R3	Up to £300m

7. *What documents are required to participate in the CCFF?*

To participate, a company must complete a set of standard application materials available on the [BoE's website](#). These comprise an issuer eligibility form and supporting evidence, an issuer undertaking and confidentiality agreement, a guarantee (if the primary group company is not the issuer) and a legal opinion from external counsel (on the capacity of the issuer and the guarantor, if applicable).

In addition, where a company has not previously issued commercial paper, it must establish a commercial paper program. The mechanics for establishing a program are similar to those required for EMTN or similar programs, although the program documents are in a shorter form. The BoE has stated that it will accept commercial paper with standard features that is issued using ICMA market standard documentation (ICMA is making the Euro Commercial Paper materials from the ICMA Primary Market Handbook available to non-ICMA members [here](#) to facilitate this). The program documents principally comprise a dealer agreement, information memorandum, global note and associated corporate authorizations and legal opinions.

Provided that the program documents are in place, issuers should be able to participate in the CCFF promptly. The BoE has stated that it aims to confirm whether commercial paper is eligible as soon as possible and, provided confirmation is received before 4 p.m. on a working day, the company will be able to sell commercial paper to the BoE the next working day.

8. *What public disclosure implications are there from participation in the CCFF?*

The BoE will publish on a weekly basis the total aggregate amount of commercial paper purchased that week (for the week ending on April 1, this amount was £1.908 billion). The BoE has stated that it will not publicly identify those companies who participate in the CCFF.

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Disclosure considerations for individual companies which are subject to public reporting requirements will vary from case to case.

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U.K. Covid Corporate Financing Facility
April 7, 2020

Update — UK's FCA Announces Temporary Measures Designed to Assist Issuers

UK's Financial Conduct Authority (FCA) Announces a Series of Temporary Measures Designed to Assist Issuers Raising Capital During the COVID-19 Pandemic

SUMMARY

On April 8, 2020, the FCA published temporary measures relaxing certain of its listing and disclosure rules designed to assist issuers raising capital during the COVID-19 pandemic. These new temporary measures are intended to strike a balance between enabling issuers to act quickly whilst at the same time providing appropriate protections for investors.

The new temporary measures, include:

- Permitting a clean working capital statement in a prospectus relating to equity shares to include assumptions relating to the impact of the COVID-19 pandemic.
- Permitting shareholder approvals to be obtained for significant transactions or related party transactions without the need to hold a shareholder meeting provided a dispensation is obtained from the FCA and the requisite majority of shareholders give written undertakings confirming their approval of the transaction.
- Welcoming the Pre-Emption Group's revised guidelines on placings of new shares which permit investors to support resolutions to disapply pre-emption rights in respect of up to 20% of an issuer's issued share capital.
- Encouraging eligible issuers to make use of the simplified prospectus regime introduced by the Prospectus Regulation, which recognises that, for certain issuers, investors already have access to a range of information relating to the issuer and accordingly removes the need to include information such as organisational structure, capital resources, remuneration and benefits and board practices.

At the same time, the FCA also reminds issuers and other market participants that, during the period in which these temporary measures apply, such issuers and market participants continue to be subject to the requirements set out in the Market Abuse Regulation (MAR). In particular, the FCA reminds issuers that they continue to be required to fulfil their obligations regarding identifying, handling and disclosing inside information. In the context of issuers raising capital this includes sharing information in accordance with the requirements of MAR and maintaining insider lists. Issuers, insiders and other persons who have access to inside information must continue to carefully assess what information constitutes inside information at this time, recognising that the COVID-19 pandemic and policy

responses to it may alter the nature of information that is material to a business's prospects, and in relation to market recapitalisations.

The new temporary measures apply from April 8, 2020 until the FCA advises otherwise.

Working Capital Statements

Background: The Prospectus Implementing Regulation (Item 3.1 of Annex 11) requires an issuer to include in a prospectus for an issue of new equity securities, a statement (the so-called working capital statement) whether or not, in its opinion, the issuer and its group have sufficient working capital for their present requirements, that is for at least 12 months from the date of the prospectus. The UK Listing Rules also impose a similar requirement for certain types of shareholder circulars. Working capital statements are supported by extensive due diligence which involves, among other things, detailed financial modelling undertaken on the issuer and its group by its advisors.

The European Securities and Markets Authority (ESMA) Recommendations¹ for the consistent implementation of the Prospectus Directive (which also apply to the Prospectus Regulation) contain guidance on the preparation of working capital statements to which the FCA has regard when approving a prospectus. Under the ESMA Recommendations, a working capital statement can only take one of two forms:

- “Unqualified” (or “clean”) – this confirms that the issuer ‘has sufficient working capital for its present requirements’ [that is for at least 12 months], without any caveats, qualifications, assumptions, sensitivities or cross-references to risk factors; or
- “Qualified” – this confirms that the issuer ‘does not have sufficient working capital for its present requirements’ [that is for at least 12 months], with an explanation of why and a description of the proposed action plan to remedy the current shortfall in working capital. A qualified working capital statement in a prospectus is relatively rare in the UK.

According to the ESMA Recommendations², disclosure of the assumptions in the financial models underpinning a working capital statement is generally not acceptable (as it places the onus on investors to reach their own conclusion regarding adequacy of working capital). The FCA supports this approach and, in particular, the position that a clean working capital statement should not normally include assumptions. However, the FCA also now recognises that the economic impact of, and public policy response to, the COVID-19 pandemic makes the financial modelling underpinning working capital statements challenging. In particular, one of the principles in the ESMA Recommendations for preparing working capital statements (both clean and qualified) is that an issuer is expected to have undertaken an assessment of whether there is sufficient margin or headroom to cover a reasonable worst-case scenario. The FCA recognises that, due to the COVID-19 pandemic, and its effects many issuers are

¹ ESMA Recommendations, available at: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-319.pdf>

² ESMA Recommendations, paragraphs 116 et seq. available at: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-319.pdf>

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currently unable to model such a scenario and that compliance with the ESMA Recommendations in this respect would result in a significant number of working capital statements being qualified.

The FCA considers that such qualified working capital statements will not be very useful to existing and potential investors. Consequently, the FCA has published a Technical Supplement on working capital statements in prospectuses and circulars³, setting out the following approach:

- Key modelling assumptions underpinning the reasonable worst-case scenario will be permitted to be disclosed in an otherwise clean working capital statement.
- These assumptions may only be related to COVID-19 and they must be clear, concise and comprehensible. Consistent with usual standards, assumptions unrelated to COVID-19 are not permitted to be included.
- There must be a statement that the working capital statement has otherwise been prepared in accordance with the ESMA Recommendations, and the FCA's Technical Supplement on working capital statements in prospectuses and circulars.

Shareholder Meetings

Background: Under the UK Listing Rules, premium listed issuers (which comprise those UK and overseas issuers which have a premium listing of equity securities) are required to convene a shareholder meeting to obtain shareholder approval for Class 1 transactions and for related party transactions.

Class 1 Transactions: Transactions are classified according to their size relative to that of the issuer as a result of applying certain percentage ratios (the gross assets, profits or gross capital of the business being acquired or sold against those of the issuer or the size of the consideration to be paid for the acquisition or disposal against the market value of the issuer). A Class 1 transaction is one where any percentage ratio is 25% or more.

Related Party Transactions: A related party transaction is one between a premium listed issuer (or any of its subsidiaries) and a related party (with only certain limited exceptions). Related parties include any person who holds 10% or more of the voting shares of an issuer, the issuer's directors (or a director of a subsidiary or parent of the issuer), a person exercising significant influence or an associate of any such related party.

The FCA recognises that, during the COVID-19 crisis, issuers may face challenges in holding shareholder meetings required to approve a Class 1 transaction or a related party transaction. Further, the notice period typically required for a shareholder meeting adds to the transaction timetable and might also jeopardise an issuer's ability to complete a critical fundraising transaction quickly. Consequently, the FCA is temporarily modifying the UK Listing Rules requirements for Class 1 transactions and related party transactions, on a case-by-case basis, in the circumstances described below.

³ FCA Technical Supplement on working capital statements in prospectuses and circulars during the coronavirus epidemic, available at: <https://www.fca.org.uk/publication/primary-market/working-capital-technical-supplement.pdf>

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Conditional dispensation available: A premium listed issuer undertaking a Class 1 transaction or a related party transaction may apply to the FCA for a dispensation from the requirement to hold a shareholder meeting but the issuer would still be required to produce an FCA-approved explanatory circular to shareholders. A dispensation from the requirement to hold a shareholder meeting will be granted on a case-by-case basis in relation to each transaction, subject to the two conditions below being met.

1. The issuer has obtained, or will obtain, a sufficient number of written undertakings from shareholders (who are eligible to vote under the UK Listing Rules) that they approve the proposed transaction and would vote in favour of any resolution to that effect at a shareholder meeting were it to be held, so that the relevant threshold for obtaining shareholder approval would be met.
2. The issuer provides written confirmation to the market that it has obtained sufficient written undertakings to meet the relevant threshold to pass the resolution(s) and, subject to the dispensation being granted, is not proceeding with a shareholder meeting. This written confirmation could be included in the relevant FCA-approved explanatory circular and accompanying announcement via a regulatory information service (RIS). Alternatively, if sufficient written undertakings to meet the threshold have not been obtained at the time the FCA-approved explanatory circular is sent to shareholders, it could be included in a subsequent announcement (see below).

Where an issuer has already obtained written undertakings from a sufficient number of shareholders when the circular is published, the transaction can complete once the circular has been published (subject to the satisfaction of any other conditions which may apply). Where an issuer is yet to obtain written undertakings from a sufficient number of shareholders at the time when the circular is published, then when written undertakings from a sufficient number of shareholders are obtained, the issuer should release an additional announcement via a RIS announcing that these have been received. The transaction can complete at the point at which the additional announcement is issued (again, subject to the satisfaction of any other conditions which may apply).

The FCA has stated that an issuer must, where there is a material change to the terms of a transaction before the transaction has completed (LR 10.5.2R for Class 1 transactions and LR 11.1.7AR for related party transactions), continue to comply with the UK Listing Rules requirement to produce a new circular and obtain a new shareholder approval for the transaction as changed. This means that an issuer which had obtained a dispensation from the requirement to hold a shareholder meeting would have to re-run the process of obtaining shareholder undertakings following any material change. Either of the methods set out above could be used.

The FCA has published a Technical Supplement on the modification of shareholder meeting requirements under the UK Listing Rules which includes further information on how the dispensation works in practice, including FAQs⁴.

⁴ FCA Technical Supplement on modification of general meeting requirements under the Listing Rules, available at: <https://www.fca.org.uk/publication/primary-market/modification-general-meeting-technical-supplement.pdf>

Shareholders' Pre-Emption Rights

The FCA has also welcomed the statement by the Pre-Emption Group which has relaxed its usual guidance to investors voting on the disapplication of shareholders' pre-emption rights in response to the COVID-19 crisis.

Background. Shareholders in UK-listed issuers will benefit from pre-emption rights on the issue of new shares for cash, either because, in the case of a UK issuer, shareholders are granted pre-emption rights under statute or, in the case of an overseas issuer with a premium listing, the UK Listing Rules require such issuers, as a condition to obtaining a premium listing, to grant to their shareholders pre-emption rights which are equivalent to the statutory pre-emption rights enjoyed by shareholders in UK issuers.

These pre-emption rights are considered to be very important by UK institutional investors and the bodies that represent them, in particular the Pre-Emption Group, which issues guidelines advising its members how to vote at meetings on resolutions involving the issue of shares.

Under normal circumstances, the Pre-Emption Group guidelines advise investors to be supportive of proposals by issuers for general disapplications of pre-emption rights only where such disapplications are limited to issues of up to 5% of an issuer's issued share capital for general purposes, and up to a further 5% in connection with a specified acquisition or investment. In addition, the Pre-Emption Group guidelines recommend that general disapplications should have a duration of no more than 15 months, and that issuers should issue no more than 7.5% of their issued share capital for cash on a non-pre-emptive basis over a rolling three-year period.

On April 1, 2020, the Pre-Emption Group published a statement⁵ regarding its expectations for new issues of shares during the COVID-19 crisis, designed to assist issuers raising capital. The statement explains that the Pre-Emption Group recommends that investors, on a case-by-case basis, consider supporting issuers that wish to issue new shares for cash representing up to 20% of their issued share capital. The new 20% limit is important because it is in line with the exemption in the Prospectus Regulation that allows issuers to issue and admit to trading new shares representing up to 20% of their issued share capital without a prospectus. The Pre-Emption Group statement also recommends that, where issuers are seeking to use this additional flexibility, the following process should be followed:

- The particular circumstances of the issuer should be fully explained, including how it is supporting its stakeholders.
- Proper consultation with a representative sample of the issuer's major shareholders should be undertaken.
- As far as possible, the issue should be made on a soft pre-emptive basis, i.e., the bookrunner should allocate shares to investors in accordance with an allocation policy which, to the extent possible, replicates the existing shareholder base. The limitations of the exercise mean, however, that it is likely not all shareholders will be able to participate.

⁵ Pre-Emption Group statement on expectations for issuers in the current circumstances, available at: <https://www.frc.org.uk/news/april-2020/pre-emption-group-expectations-for-issuances-in-th>

- An issuer's management should be involved in the allocation process.

Simplified Prospectus Regime

Background: Article 14 of the Prospectus Regulation introduced a simplified prospectus regime for issuers who have had securities admitted to trading on a regulated market for at least 18 months. The rationale for this simplified prospectus regime is that investors will already be familiar with such issuers as a result of the requirement for them to make periodical financial and other disclosures (such as ad hoc disclosures of inside information under MAR) to the market, and therefore that such issuers should not be required to publish a full prospectus under the Prospectus Regulation.

FCA Statement: In its statement, the FCA encourages listed issuers issuing new equity in response to the COVID-19 crisis to use the simplified prospectus regime where possible in order to enable investors to focus on changes that have occurred since the publication of the issuer's previous annual report, as well as the reason why the issuer is issuing new equity. Disclosures which are not required under the simplified prospectus regime include an operating and financial review together with disclosures on organisational structure, capital resources, remuneration and benefits and board practices, all of which will already have been disclosed by the issuer. Although the FCA's statement does not state this expressly, having to produce a much shorter document should enable issuers to prepare a prospectus more quickly and with less expense. The FCA notes, however, that use of the simplified prospectus regime may not be an option where the offer has a non-EU component in a jurisdiction with its own disclosure requirements, for example if the offer has a US element.

Conclusion

These new temporary measures are designed to help streamline and potentially shorten the transaction process for UK-listed issuers, in particular for issuers who are required to publish a prospectus and/or whose capital raising may require shareholders' approval to disapply pre-emption rights, or who are undertaking a Class 1 transaction or a related party transaction.

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