

NEW ESMA GUIDANCE SIGNALS A RETURN TO A MORE FLEXIBLE APPROACH TO “UP TO AMOUNT” LISTINGS OF GLOBAL DEPOSITARY RECEIPTS

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To Our Clients and Friends:

On 20 June 2012, the European Securities Markets Authority (“ESMA”) published new guidance on the use of “up to amount” listings of global depositary receipts (“GDRs”) which provides much needed clarity to issuers and participants in the European GDR markets.¹ The ESMA guidance states that, if an issuer issues new shares after the date of its initial “up to amount” listing of GDRs and there is available headroom under the “up to amount” listing, those new shares may be deposited into the GDR facility in exchange for listed GDRs without the requirement for the issuer to publish a new prospectus or to make a new listing application. The guidance is, in effect, a confirmation of the accepted practice which had evolved since the introduction of the EU Prospectus Directive in 2005 but had been called into question by an approach to this issue taken by the United Kingdom Listing Authority (the “UKLA”).

BACKGROUND: THE USE OF THE “UP TO AMOUNT” LISTING

When applying for a listing of GDRs and admission to trading on the London Stock Exchange, issuers usually request an “up to amount” listing of GDRs (i.e., for a number of GDRs in excess of the actual number of GDRs in issue at the date of listing, typically equal to the entire issued share capital at the date of listing).² The concept of the “up to amount” listing was developed to reflect the dynamic nature of a GDR programme, in which the number of GDRs in issue varies as investors make deposits or withdrawals of shares into or from the facility since, under the EU Prospectus Directive, issuers would otherwise have been required to prepare a new prospectus and listing application if the total number of GDRs in issue increased to exceed the number in

¹ The full text of the ESMA guidance is available at <http://www.esma.europa.eu/documents/overview/10> under “Frequently asked questions regarding Prospectuses: common positions agreed by ESMA Members 14th updated version”.

² By way of illustration, an issuer may apply for the listing of up to 200 million GDRs, comprising 50 million GDRs in issue upon the listing date and up to 150 million additional GDRs that may be issued upon the deposit of further shares into the GDR facility. The number of GDRs comprising the “up to amount” listing may not exceed the issuer’s total issued share capital at the date of listing.

issue at the date of the initial listing. It was commonly understood in the market that the “headroom” under the “up to amount” listing was available for additional GDRs evidencing both shares in issue at the date of listing and shares issued after the date of listing. Consequently, issuers with sufficient headroom in their existing “up to amount” listing enjoyed the flexibility to conduct capital raisings by way of private placement without the need to publish a further prospectus or make a new listing application.

THE UKLA’S POSITION

In the last 12 to 18 months, the UKLA had indicated, in comments on prospectuses submitted to them for GDR listings and offerings, a more restrictive approach towards the use of “up to amount” listings following a review of their use in practice in the light of the EU Prospectus Directive. Although the UKLA had not yet published formal written guidance on the approach, the UKLA was in practice taking the position that only shares that were in existence at the date of the initial “up to amount” GDR listing could be deposited into the GDR facility, requiring issuers to include an express statement to this effect on the cover of each prospectus for an “up to amount” GDR listing. As a result, an issuer with a GDR listing would be required to publish a new prospectus whenever it issued new shares of the same class as the shares able to be deposited in the GDR facility, irrespective of the headroom available under its “up to amount” listing or the size of the new share issuance. This approach created potentially onerous obligations for GDR-listed companies which planned to issue new shares, even if outside the context of a capital raising, such as for the purposes of an employee share scheme.

THE NEW ESMA GUIDANCE

The new ESMA guidance, included in its revised edition of “Questions and Answers” in relation to Prospectuses dated 20 June 2012, affirms that new shareholders (i.e. persons holding shares that were issued after the date of “up to amount” listing of GDRs) may exchange their shares for GDRs without the requirement for the issuer to publish a new prospectus or make a new listing application, so long as the total number of GDRs in issue does not exceed the number for which an “up to amount” listing had been obtained. It is expected that the UKLA will follow ESMA’s guidance on this issue. This confirmation on the use of “up to amount” listings provides welcome clarity and flexibility for issuers with GDR listings.

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