

Disclosure Considerations for UK and EU Public Companies in the Context of the COVID-19 Pandemic

May 4, 2020

Public companies in the EU and the UK will be required to think carefully about their disclosure obligations as the COVID-19 pandemic continues. Many public companies have withdrawn or amended published earnings guidance as a result of the crisis, while various regulators have permitted delays to issuers' publication of annual and quarterly financial reports. Issuers should be conscious of their ongoing disclosure obligations under the EU Market Abuse Regulation ("MAR"),¹ both in the context of their ordinary course reporting to the market and in their offering documentation.

This memorandum sets out key considerations relating to issuer disclosure and publication of earnings guidance during the pandemic, in addition to a discussion of share buybacks in the current environment.²

If you have any questions concerning this memorandum, please reach out to your regular firm contacts, the attorneys listed to the right or our COVID-19 task force by [clicking here](#). For more information on our firm's resources relating to COVID-19, please consult our [COVID-19 Resource Center](#).

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¹ Regulation (EU) 596/2014

² For a discussion of equivalent considerations for U.S. public companies, please see our prior alert memorandum, available here: <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/leading-disclosure-issues-for-us-public-companies-in-the-covid19-era.pdf>.



I. Disclosure Obligations

A. General disclosure obligations

On 27 March 2020, the [European Securities and Markets Authority](#) (“ESMA”) published a statement reminding European issuers to continue complying with their ongoing disclosure obligations in light of the COVID-19 pandemic. The statement made particular reference to the obligation under MAR to disclose “inside information” to the market “as soon as possible.”³ Broadly, inside information is information of a precise nature which would be likely to have a significant effect (whether positive or negative) on the price of one or more of the issuer’s financial instruments. In the current context, unexpected and sudden events such as failures in supply chains, government interventions, restrictions on travel or even the absence of key personnel for health reasons may quickly give rise to inside information and, consequently, a disclosure obligation.

In line with ESMA’s statements, several national regulators have published statements in relation to listed issuers’ ongoing disclosure obligations:

- On 17 March 2020, the [UK Financial Conduct Authority](#) (the “FCA”) published a statement urging issuers to comply with MAR and FCA rules, and suggested that issuers’ own operational response to coronavirus may itself meet the MAR disclosure requirements.⁴
- On 23 March 2020, the *French Autorité des marchés financiers* (“AMF”) issued press releases encouraging issuers to regularly evaluate the need to publicly disclose the known or expected impact

of the crisis on their activities, financial condition and prospects.⁵

In its 23 March statement, the AMF reminded issuers that, at the latest in connection with the publication of their Universal Registration Document, they would be required to (i) update, if applicable, their guidance (with specific information as to the underlying assumptions) or if unable to provide updated guidance, to state, if applicable, that their previously disclosed guidance is no longer valid and (ii) update their risk factors to take into account the COVID-19 crisis.

On 30 March 2020, the AMF reiterated that issuers remain subject to ongoing disclosure requirements under MAR and underlined that issuers should keep the market regularly informed of any material trend, liquidity position and key financial information derived from unaudited financial statements.

- On 26 March 2020, the Belgian Financial Services and Markets Authority (“**Belgian FSMA**”) issued a press release in relation to inside information arising in the context of the ongoing COVID-19 crisis. The Belgian FSMA highlighted that it will often not be possible for issuers immediately to quantify the impact of such information but stressed that the absence of precise information on the financial impact does not exonerate the issuer from publishing inside information of which it is aware. The Belgian FSMA is taking the view that, in this case, the issuer should indicate in its press release that it is unable to quantify the financial impact and undertake to communicate as soon as it can be estimated.⁶

³ See <https://www.esma.europa.eu/press-news/esma-news/esma-recommends-action-financial-market-participants-covid-19-impact>

⁴ See <https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-issue-no-27-coronavirus-update#lf-chapter-id-about-this-edition>, https://www.esma.europa.eu/sites/default/files/library/esma31-67-742_public_statement_on_publication_deadlines_under_the_td.pdf

⁵ See <https://www.amf-france.org/fr/actualites-publications/actualites/continue-de-linformation-periodique-dans-le-contexte-depidemie-de-coronavirus>

⁶ See <https://www.fsma.be/en/news/covid-19-impact-listed-companies>. The Belgian FSMA reiterated this position in its FAQ on ongoing disclosure obligations for Belgian-listed issuers: <https://www.fsma.be/en/news/fsma-publishes-qa-about-impact-covid-19-obligations-listed-companies>.

The Belgian FSMA also encouraged issuers that publish an annual communiqué to include in it a paragraph about the current and expected impact of COVID-19 on their activities and their financial situation. The above-mentioned considerations on the ability to quantify the impact also apply. Even issuers that expect not to be impacted by COVID-19 should state this explicitly.

- On 9 April 2020, the Italian Market Authority (*Commissione Nazionale per le Società e la Borsa* or “CONSOB”) issued a “[call for attention](#)” (the “CONSOB Call for Attention”) inviting listed issuers to carefully comply with ESMA’s statements. CONSOB, among other things, encouraged Italian issuers to adequately disclose to the public, in compliance with MAR, the actual and potential impacts of the epidemic on their business.⁷

However, national regulators and ESMA have also acknowledged that issuers will face challenges in connection with the timely publication of their periodic reports:

- On 17 March 2020, the Italian government issued a decree-law which, among other things, extended the deadline for the approval of annual financial statements from 120 to 180 days from the end of the financial year (even if the company’s by-laws provide for a shorter term).⁸
- On 25 March 2020, the French government adopted an ordinance allowing French legal entities to delay, by up to 3 months, the 6-month period normally applicable to submit annual financial statements for shareholder approval, provided that such annual financial statements were not audited prior to 12 March 2020. In addition, on 30 March

2020, following ESMA’s statement (described below), the AMF stated that it would not take any action against issuers that are no more than two months late in publishing their annual financial reports or (for those issuers with a year-end in July or September) that are no more than one month late in publishing their half-year financial report.

- On 26 March 2020, the FCA announced that listed companies would be permitted an additional two months to publish their full-year financial statements. As a result of this change, public companies must now publish audited financial statements within six months of the end of the financial year.⁹
- On 27 March 2020, ESMA published a statement that it expected national competent authorities would not prioritise action against issuers that are no more than two months late in publishing their annual financial reports (where the issuer’s year-end occurs on or after 31 December 2019 but before 1 April 2020).¹⁰
- On 9 April 2020, the Belgian government adopted a royal decree that, among other things, allows for a 10-week extension of the deadlines for (i) the approval of annual financial statements within six months from the end of the financial year and (ii) the publication of the annual report within four months of the end of the financial year. Listed companies must announce any delay on their website and issue a press release indicating the expected length of the delay.¹¹
- The German Federal Office of Justice (*Bundesamt für Justiz*) has announced that it will follow the ESMA statement and will not enforce the obligation

⁷ See http://www.consob.it/documents/46180/46181/ra_20200409_06.pdf/2dd088c5-bff7-48ea-b458-2bdbc431ca06

⁸ See <https://www.gazzettaufficiale.it/eli/gu/2020/03/17/70/s/g/pdf>

⁹ See <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>

¹⁰ See https://www.esma.europa.eu/sites/default/files/library/esma31-67-742_public_statement_on_publication_deadlines_under_the_td.pdf

¹¹ Royal Decree of April 9, 2020 regarding various provisions on co-ownership and company and associations law within the framework of the fight against the COVID-19 pandemic; <https://www.fsma.be/en/news/covid-19-impact-listed-companies>; see <https://www.fsma.be/en/news/fsma-publishes-qa-about-impact-covid-19-obligations-listed-companies-0>

of listed issuers to disclose their 2019 stand-alone and consolidated financial statements by 30 April 2020, until 1 July 2020.¹²

There may be a tension between the ongoing obligation on issuers to disclose inside information under MAR as soon as possible and the willingness of regulators and public authorities to allow issuers to delay the publication of detailed year-end financials and related commentary. The key driver of this tension — the rapid spread of COVID-19 and its unknown medium- and long-term effects — is expected to continue to pose significant challenges, as issuers seek to balance this uncertainty with the need to update the market on their financial condition and operating results.

Analysing these matters from the perspective of inside information under MAR is far from straightforward. If issuers choose not to publish updates to the market, such issuers will need to be able to conclude that the relevant information does not constitute inside information — most likely, for this purpose, on the basis that the information is not sufficiently “precise”. Where an issuer holds inside information, MAR permits delaying disclosure only in limited circumstances where, among other things, immediate disclosure is likely to prejudice the “legitimate interests” of the issuer and such delay is not likely to mislead the public.

In its 2016 guidelines relating to circumstances in which delaying disclosure of inside information may be permissible, ESMA set out a non-exhaustive list of circumstances which would be likely to mislead the public.¹³ Most notably for present purposes (and the potential need to update existing guidance discussed below), such circumstances include delaying disclosure of inside information which is (1) materially different from the previous public announcement of the issuer on the same matter; or (2) in contrast with the market’s expectations, where such expectations are based on

signals that the issuer has previously sent to the market, such as interviews, roadshows or any other type of communication.¹⁴

Some national regulators have provided further guidance in this respect:

- In France, the AMF noted in its 30 March 2020 statement that the process of preparing financial statements or their audit may result in the issuer being in possession of inside information with no “legitimate interest” to delay disclosure in the current circumstances.
- In Germany, the German Financial Supervisory Authority (“**BaFin**”) published FAQs regarding the disclosure of inside information in the context of the COVID-19 outbreak.¹⁵ These FAQs should be read in connection with BaFin’s general administrative practice related to the disclosure of inside information as reflected in Part I of Modul C of its Issuer Guidelines.¹⁶ BaFin confirmed its view that, as a general rule, an issuer’s periodic financial results may constitute inside information if they deviate significantly from their relevant benchmark (e.g., the financial results for the prior year comparison period). However, BaFin pointed out that in the current market environment, which is characterised by high volatility, a more significant deviation from the benchmark may be required to constitute a “significant” deviation, as compared to what is required during less turbulent times. In any event, for purpose of the inside information analysis, according to BaFin it is irrelevant whether any COVID-19-related effects are expected to be one-time or recurring effects.
- In Belgium, the Belgian FSMA has published FAQs in relation to ongoing disclosure obligations of Belgian-listed issuers in the context of the

¹² See https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/EHUG/Unternehmen_Erleichterung.pdf?__blob=publicationFile&v=2

¹³ See https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf

¹⁴ *Ibid.*, at paragraphs 9(a) and 9(c).

¹⁵ See https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html?cms_gtp=13869762_list%253D2 under “Supervisory and regulatory measures [in reaction to Covid-19](FAQ)/Securities Supervision”

¹⁶ See https://www.bafin.de/SharedDocs/Downloads/DE/Leitfaden/WA/dl_emittentenleitfaden_modul_C.pdf?__blob=publicationFile&v=4; so far, available in German only.

COVID-19 outbreak,¹⁷ in which it reiterated its position on the disclosure of the financial impact of the inside information (*see above*).

Separately, on 17 April 2020, ESMA issued guidance on the application of alternative performance measures (“APMs”) in the context of COVID-19.¹⁸ This guidance restates existing guidelines on APMs. ESMA discourages the adjustment of APMs, or the use of new APMs, and instead encourages issuers to provide a narrative explanation of the impact of the pandemic.

B. Change statements

Issuers will also need to give careful consideration to disclosure around the impact of COVID-19 in the context of the change statements required in European offering documents. These statements require the issuer to state that there has been no significant change in the company’s financial position or performance, and no material adverse change in prospects, since a specified date, relating to the most recent audited or interim financials included in the disclosure document.

The severity of the anticipated impact of COVID-19 described in such disclosure will have direct consequences on the manner in which the issuer’s change statements are written. Disclosure that seeks to cast the implications of COVID-19 in general terms, noting that, although unquantifiable, the virus is expected to have an impact in some form, may pose particular challenges for change statements. A further aspect to consider is the attitude of the various securities regulators in Europe towards such change statements and qualifications thereto. While this is evolving, to date the approaches of different regulators appear to vary, ranging from (i) being willing to accept an issuer’s assertion that the change statements can be filed “clean,” without any qualification, to (ii) effectively requiring issuers to acknowledge the impact of COVID-19, either by including a specific reference to the

pandemic or a general qualification by reference to disclosure contained elsewhere in the document.¹⁹

As issuers may file with various European regulators concurrently, further ESMA guidance on this topic would provide clarity to the market and allow issuers to be consistent in their approach to disclosure.

C. Earnings Guidance and Quarterly Reporting

Companies that publish quarterly reports will need to consider carefully what earnings guidance they can provide to the market, as the reporting season for the first quarter (“Q1 2020”) is now underway. Companies will be understandably cautious given the unpredictable economic and public health situation but should remain aware of their obligations under MAR as discussed above. A particular challenge exists in respect of the first quarter, given that — at least for issuers with operations focused in Europe and the Americas — widespread lockdowns of the population and closing of businesses (and their related economic impacts) only occurred in the middle of March. As such, the impact of COVID-19 is likely to be discussed to a more limited degree in an issuer’s discussion of its Q1 2020 results year-on-year. Greater emphasis on the pandemic will likely be placed in the issuer’s forward-looking discussion of its outlook and prospects.

The approaches taken by UK issuers to such forward-looking information — particularly existing guidance — over the past six weeks may provide some indication of trends that will emerge in Q1 2020 reporting. During this period, a number of UK issuers have withdrawn revenue or profit guidance or issued updates to previously disclosed information, amending expectations or parameters. Broadly speaking, if an update to existing guidance has been made at all, the approaches taken fall into two categories:

- **Category 1:** Some issuers have focused on the steps they are taking to prepare themselves for the impact of the virus (e.g., suspending buyback programmes,

¹⁷ See <https://www.fsma.be/en/news/fsma-publishes-qa-about-impact-covid-19-obligations-listed-companies>

¹⁸ See <https://www.esma.europa.eu/press-news/esma-news/esma-issues-new-qa-alternative-performance-measures-in-context-COVID-19>

¹⁹ The FCA has historically been wary of general qualifications, requiring significant change disclosure to be as precise and detailed as possible – see, for example, UKLA / TN / 628.2 dated March 2017, available at: <https://www.fca.org.uk/publication/ukla/tn-628-2.pdf>

cancelling dividends or drawing down on revolving credit facilities) or their expectation of how their business will weather the storm (e.g., disclosing particular areas of risk, potential access to state aid or existing headroom under debt covenants) and avoided providing specific earnings guidance in quantitative terms.²⁰

- **Category 2:** A minority of issuers have gone further, offering clear forward guidance with reference to specific COVID-19-influenced scenarios.²¹

How far this delineation between approaches will remain in the context of Q1 2020 reporting is unclear. While more information will certainly be available at the time of publication of quarterly earnings, issuers falling into Category 1 may be inclined to maintain a consistent approach. In particular, issuers with a broad geographic footprint may find that the scale of their business may hinder their ability to present a coherent picture of the expected impact of the virus. Issuers that have not yet made public disclosures about the impact of COVID-19 may follow a similar approach.

Issuers falling into Category 2 may be better able (and may also consider it necessary) to update the market in similar detail to their prior announcements, especially if they have the data available to do so.²² However, such an approach is not without difficulty: as well as increasing the burden on internal reporting functions at a time when resources are already strained, developing a market expectation of such updates on a frequent basis presents its own risks from a liability perspective.

This trend has been similarly observed in Europe:

- In France, most of the Category 1 issuers have indicated that their previously published guidance

will be affected or even that they simply withdraw such previously published guidance.

- In Belgium, several issuers have indicated that their previously published guidance will be affected. Some issuers have even withdrawn their profit guidance for 2020 but have not characterised such withdrawal as inside information. So far, the Belgian FSMA has not taken an official position in this respect.
- In Germany, many issuers have withdrawn their earnings or profit guidance for 2020 in recent weeks. In accordance with BaFin's long-standing administrative practice, such withdrawal had to be made by means of disclosure of inside information under MAR. In their Q1 interim report (if they publish one) German issuers will need to provide an update regarding the expected financial performance for the year. Should such updated projections regarding an issuer's financial performance amount to a specific new or revised profit forecast, according to BaFin, such profit forecast may constitute inside information that will need to be published under MAR.²³
- In Italy, the CONSOB Call for Attention recommended that issuers that disclosed revenue or profit guidance update such guidance or, at least, specify whether or not it can still be deemed relevant. In addition, CONSOB encouraged Italian-listed companies to take into consideration its Guidelines on Inside Information issues in October 2017,²⁴ pursuant to which a profit warning should be issued in the event the analysts' market consensus no longer mirrors an issuer's forecasts.

²⁰ See, for instance, [Hammerson plc](#) RNS announcement dated 30 March 2020 and [Marks and Spencer Group plc](#) trading update dated 20 March 2020.

²¹ See, for instance, [Flutter Entertainment plc](#) trading update dated 17 April 2020 and [Compass Group PLC](#) trading update dated 17 March 2020.

²² See [Flutter Entertainment plc](#), Q1 2020 quarterly report, which contains a four-week performance update and

describing quantitative changes in revenue by operating division compared to the same period in 2019.

²³ See note 8 above.

²⁴ See http://www.consob.it/documents/46180/46181/LG_Gest_Inf_Priv_20171013.pdf/28cc9d88-f517-4a68-be85-c63ecabc2584

II. Share Buybacks and MAR

Just as UK issuers have taken different approaches to their earnings guidance and other disclosures in the era of COVID-19 depending upon their particular situation, issuers have also taken different approaches to the challenges (or opportunities) presented by recent market volatility, including with respect to share buybacks. A company's view on buying back its own shares will depend on its financial position and strategy. Some companies will see depressed share prices as an opportunity to repurchase shares at a favourable price. Other companies will seek to cease buybacks to preserve liquidity in the midst of market uncertainty.

MAR provides the framework for buybacks of securities on UK/EU trading venues. Importantly, it also applies to securities that have a price-value relationship with UK/EU securities purchased outside the UK/EU: buybacks of shares listed outside of the UK where GDRs representing the company's shares are listed in London, for example.

In examining their options with respect to share buybacks, issuers should also be mindful of potential restrictions that may be imposed by governments in this respect. For example, the French government took the position on 2 April 2020 that dividend distributions and share buybacks by large companies (as defined pursuant to certain thresholds) are restricted if such companies benefit from governmental measures to alleviate their treasury position in the COVID-19 context.

A. Setting up a new programme

Companies should generally conduct buybacks with regard to the MAR safe-harbour set out in the Buybacks Regulation 2016/1052.

Broadly, the safe-harbour applies where:

- the company has announced the share buyback and full details thereof;
- purchases do not exceed 25% of the shares' average daily trading volume;
- purchases are not at a price higher than the higher of the last independent trade and the highest current independent bid;

- the company notifies the national regulator of all purchases and publicly discloses their prices and volumes within seven days; and
- the buyback is, for certain purposes, set out in the Buybacks Regulation.

Before a company commences buybacks, or instructs a broker to do so, it must ensure it is not in possession of any inside information. A 'cleansing announcement' (seeking to ensure that any such information has been publicly disclosed) may well include disclosure as to earnings (see sections above).

B. Suspending an existing programme

Most programmes are discretionary: the company instructs a broker to conduct purchases at the broker's discretion, but within price, volume and duration parameters defined by the issuer. The idea is that the broker should not be exposed to the company's inside information and may, therefore, purchase company shares even in closed periods or when the company possesses inside information.

To ensure that the broker remains isolated from the company and its inside information, the agreement between the company and the broker should typically feature, among other things:

- no mechanism allowing the company to issue follow-up or amended instructions to the broker; and
- a termination clause that may not be exercised by the company when it is in possession of inside information or in a closed period.

Therefore, a company may need to terminate its broker agreement if it is seeking to stop buybacks under an existing programme.

Even if the broker agreement does not include the provisions described above, the company should terminate or amend its buyback programme outside of any closed period and where it does not possess inside information (making a cleansing announcement as necessary).

The termination or amendment of the broker agreement should be publicly disclosed due to the Buybacks Regulation.

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