

## ESMA allows “Up To” Listings of Global Depositary Receipts for New Shares

As reported in a previous Cleary Gottlieb [client alert](#), the United Kingdom Listing Authority (the “UKLA”) has been in the process of changing its approach to the use of “up to” or “block” listings of global depositary receipts (“GDRs”), making it more restrictive by effectively requiring a new prospectus to be published whenever a listed company issued new shares, regardless of the amount of “headroom” available under its block listing. On June 20, 2012, the European Securities Markets Authority (“ESMA”) issued an updated version of its frequently asked questions regarding prospectuses (“[FAQ](#)”) allowing block listings to be used for newly issued shares without the need to publish a fresh prospectus.

We expect the UKLA will follow ESMA’s guidance. This means that a prospectus published at the time of the IPO or subsequently to establish a block listing of GDRs will be valid to admit to trading both GDRs representing shares in issue at the time of establishment of the listing and GDRs representing shares issued after that date, up to the total limit of the block listing (which may not exceed the equivalent of 100% of the issuer’s share capital at the time of the listing). No new prospectus will be required in connection with such admissions, even where an issuer uses available headroom in a GDR block listing to raise new capital – this is effectively a reversion to the approach that existed before the UKLA’s shift in policy.

For a worked example of how ESMA’s guidance would operate to accommodate the deposit of existing shares and new shares into a GDR facility, please see our earlier alert under the column “Before Expected Change to UKLA Policy”. ESMA’s guidance is welcome news to companies with or contemplating listings of GDRs in London and elsewhere in Europe.

The full text of FAQ 77 is as follows:

*Q) How should the PD be applied in the case of admissions to trading of GDRs where, as a result of investors exchanging shares for GDRs (and vice versa) on a continuous basis, the number of GDRs in issue fluctuates?*

*A) “ESMA recognises that the operation of a typical GDR facility, where the number of GDRs in issue fluctuates as a result of the facility for investors to exchange shares for GDRs (and vice versa) at any time and outside the issuer’s control, should be accommodated by a pragmatic approach to the application of the PD. ESMA therefore believes that it is acceptable for a person applying for admission of GDRs to trading to produce a prospectus covering the admission of “up to” a specified number of GDRs. The number of GDRs can be no more than the equivalence of 100% of the issued capital of the issuer at the date of the GDR prospectus, because they can only reflect the existing amount of the issuer’s shares. That prospectus will be valid for admission(s) for so long as the total number of GDRs in issue does not exceed the limit set out in the prospectus. This would also allow new shareholders (individuals that hold newly issued shares that were issued after the date of the establishment of the GDR “up to”*

*facility) to exchange their shares for GDRs, so long as the number of GDRs in issue does not exceed the amount of the “up to” facility. The use of the “up to” amount is appropriate to facilitate market activity in that it enables shareholders to exchange their shares for GDRs.”*

\* \* \*

If you would like to discuss any of the above issues further, please feel free to contact any of your regular contacts at the firm on +44 (0) 207 614 2200 or any of our partners and counsel listed under Capital Markets in the “Practices” section of our website (<http://www.clearygottlieb.com>).

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