

Client Alert

Latham & Watkins
Corporate Department

ESMA Permits Deposits of New Shares Under GDR Block Listing Regime

Background

A distinguishing feature of the UK Listing Authority's (UKLA) GDR listing regime is that an applicant may submit a listing application (including a listing prospectus) to obtain a 'block listing' for its GDRs under which 'up to' a certain number of listed GDRs may be issued against deposits of the applicant's shares into the GDR program. The maximum size of the block listing an applicant can apply for is that number of GDRs that would be issued if 100 percent of its issued share capital as at the date of the block listing was deposited into the GDR program (the Program Limit)¹. Consequently, at any time that less than all of the issued shares of an issuer are deposited in the GDR program, 'headroom', or additional capacity to issue listed GDRs under the block listing, is available and is equal to the difference between the current number of issued GDRs and the Program Limit.

Prior to April 2011, the obvious advantage of the block listing regime was that, as long as sufficient headroom was available, it was possible at any time to issue GDRs under a block listing against the deposit of shares in issue as at the date of the block listing (Existing Shares) or shares issued after the date of the block listing (New Shares) without publishing a new listing prospectus. This flexibility was particularly valuable as (i) in practice, it is often not possible for a depositing shareholder, the depositary bank or the issuer to conclusively distinguish between New Shares and Existing Shares, (ii) GDRs can be issued to shareholders depositing shares into a GDR program without the issuer's involvement, and (iii) issuers could avoid the expense and effort required to prepare a new listing prospectus for each new issuance of GDRs.

Driven by concerns that any New Shares underlying GDRs would not have been subject to sufficient regulatory scrutiny and disclosure — in the form of a listing application and listing prospectus — in April 2011, the UKLA started to amend its interpretation of the block listing regime to prohibit the use of headroom for New Shares. Under such new approach, only GDRs representing Existing Shares could be issued under a block listing; New Shares could only be deposited into a GDR program to the extent the issuer published a new listing prospectus in respect of such New Shares. Unable to differentiate between Existing Shares and New Shares with sufficient certainty, issuers were forced to consider closing their GDR programs to all new deposits upon the issuance of any New Shares in order to ensure such New Shares were not inadvertently deposited — only upon the publication of a new listing prospectus in respect of such New Shares could the GDR program be re-opened. Any such restrictions on deposits would have

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an artificial impact on the market for both the underlying shares and the GDRs and could prevent holders from pursuing arbitrage opportunities or otherwise managing their share/GDR holding portfolio as they wished.

Recent ESMA Guidance

However, on 20 June 2012, the European Securities Markets Authority (ESMA) issued an updated version of its publication entitled '*Questions and Answers – Prospectuses*' in which it stated that, because of the nature of GDR facilities and the need to facilitate market activity and enable shareholders to swap their shares for GDRs (and *vice versa*), a "pragmatic approach" to the regulation of the GDR block listing regime was required. This recent ESMA guidance proposes that:

- The distinction between New Shares and Existing Shares should no longer be relevant.
- Any shares (whensoever issued) of an issuer may be deposited into its GDR program, provided that the number of GDRs issued at any time does not breach the relevant block listing limit.
- An issuer should not be required to publish a new prospectus in respect of newly listed GDRs unless and until its block listing limit is breached.

We anticipate that the UKLA will follow ESMA's guidance, with the effect that the block listing regime should revert to its pre-April 2011 form.

Working Examples of the UKLA's Anticipated Approach Following the Recent ESMA Guidance

Factual description	Prospectus Required?
Shareholder deposits shares into a GDR program and no new shares have been issued since the GDR block listing	New listing prospectus shall not be required provided that there is sufficient headroom
Shareholder deposits shares into a GDR program and new shares have been issued since the GDR block listing	New listing prospectus shall not be required provided that there is sufficient headroom
GDR issuer issues new shares in the form of GDRs in connection with a merger or acquisition	New listing prospectus shall not be required provided that there is sufficient headroom
GDR issuer sells GDRs in a secondary public offering which do not exceed the block listing limit	New listing prospectus shall not be required. Although, we would note that if the offering includes a 144A component or if the issuer otherwise has compelling reasons to prepare disclosure in connection with the offer – an offering memorandum may be prepared
GDR issuer wishes to increase its block listing limit in order to permit the deposit of additional shares	New listing prospectus shall be required
Local law regulatory restrictions increase the potential size of a block listing. For example, the restrictions on Russian FSFM GDR Permits are lifted, and a Russian GDR issuer wants to increase the size of its block listing	New listing prospectus shall be required

Endnotes

- ¹ The recent ESMA guidance referred to herein does not affect the Russian law restrictions that dictate that not more than 25 percent of the issued share capital of a Russian GDR issuer can be listed on a foreign exchange in the form of GDRs — typically block listings for Russian issuers are capped at the 25% limit under a GDR permit issued by the Russian Federal Service for Financial Markets (the FSFM).
- ² As a matter of practice, the UKLA typically would also require a prospectus to be prepared if the merger or acquisition was 'material' for the issuer (i.e. 25 percent or more of the issuer's assets, profits, market capital or gross capital).

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