

KEY DISCLOSURE CONSIDERATIONS FOR EXECUTIVES WITH RESPECT TO THE COVID-19 PANDEMIC

As the COVID-19 pandemic paralyses global business, companies around the world are assessing its impact and taking mitigation measures. In this regard, clear and consistent communication with investors is paramount, as is compliance with EU disclosure requirements. Below, we summarise key disclosure considerations for listed companies and their executives:

1. **Impact assessment:** Before making any disclosures, executives should assess on a continuous basis the likely impact of the COVID-19 pandemic and of government measures on the company's business, including (1) the company's ability to manufacture and distribute goods or deliver services; (2) the continuity of its supply chain, (3) changes in customer demand, and (4) the company's financial position, particularly its ability to pay its short-term debts. Determine and review what mitigation steps may need to be taken and their impact on the business.
2. **Forecasts:** Assess whether the company will be able to achieve the forecast earnings, revenue or other relevant KPIs for Q1 or FY2020 that it has previously guided or signalled to the market. If management concludes that the company is likely to fall short by a significant margin, an announcement will need to be made unless a delay is permitted (which is unlikely) or the information is not price-sensitive: see below. In the past few days, we have seen several companies issue such profit warnings, and more companies are likely to follow suit. Even if the company does not have inside information, consider announcing the withdrawal of previous guidance. In many instances, this will be permitted in the current situation under applicable laws without the need to offer new guidance.
3. **Inside information:** ESMA has guided issuers to "*disclose as soon as possible any relevant significant information concerning the impact of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under the Market Abuse Regulation.*" In other words, if a company has non-public information about how its financial position or prospects, or its strategy or business model, are likely to be affected by the COVID-19 pandemic, or by steps the company is taking in response, and if that information constitutes inside information, the company must announce it as soon as possible (unless the circumstances are such that a delay is permitted). Whether information constitutes inside information will depend on, in particular:
 - whether the information is sufficiently "precise": i.e. broadly, whether there is a realistic prospect that the negative impact will indeed occur; and
 - whether disclosure is likely to have a significant effect on the share price: although investors may have already "priced in" a deterioration in the company's performance in light of information about the pandemic that is in the public domain (for example, that the company has had to close its premises in key markets), it may be difficult to know exactly what information and assumptions have been priced in, particularly in a fast-developing situation. The company will likely have more granular information than investors about what is happening currently in the business, and therefore what the likely impact on the business will be. Companies should therefore be cautious about concluding that disclosure of such information would not move the share price, although it is possible that in certain circumstances such conclusion could be justified.

Assessing whether inside information has arisen can be particularly challenging amid current fast-moving events. On the one hand, except where the company already knows that it will not meet previous guidance, an announcement is unlikely to be required at an early stage when management is merely modelling different scenarios and making contingency plans for those currently considered most likely to occur. On the other hand, a company should not wait

until it is certain that a particular scenario or event will occur. If in doubt, companies should consult their brokers or outside counsel for advice.

4. **Share buybacks and dividend policy:** Some companies with share buyback programmes are currently considering whether to suspend their programmes, taking into account such factors as (1) when the company expects to complete the programme; (2) the rate at which the company expects its existing cash resources to be depleted as a result of the COVID-19 pandemic, and the extent to which it can access fresh liquidity; and (3) any existing restrictions in the company's debt facilities and any restrictions that are imposed by lenders as a condition to waiving any covenant breach. Similarly, we see companies considering whether dividend payments should be suspended or deferred, and some companies have already done this. A decision to change a dividend policy or to suspend a buyback programme is likely to require an announcement, particularly if as a result of the suspension the company no longer expects to reach the full amount by the end of the programme period.
5. **Communication:** Even if a company is not required to make an announcement, there may be benefits to voluntarily disclosing - through a press release, via the company's website or otherwise - details of the impact of the COVID-19 pandemic and what the company is doing in response. This could be an opportunity to demonstrate leadership and commercial initiative and to stand out from competitors. But beware of making statements that could quickly become out of date or look incomplete: they may need to be updated or corrected and the company could end up feeling compelled to give a "running commentary" on developments. And whichever channel of communication the company chooses to use, ensure that messages are kept consistent.
6. **Financial reporting:** Absent early disclosure, many issuers will publish their Q1 financial results or a trading update in April. ESMA has stated that issuers should provide transparency in their interim reporting on the actual and potential impact of COVID-19, to the extent possible based on both a qualitative and quantitative assessment on their business activities, financial situation and economic performance. This may affect various sections of the report, including the risk factors and recent developments sections. In more extreme cases, directors may need to re-assess and discuss with their auditors the basis for concluding that the company can continue as a going concern.

The same ESMA guidance applies to issuers who have not yet finalised and published their FY 2019 annual report. If a company is concerned that it may not be able to publish its annual report within four months of the year end, it should contact the relevant market authority. While in normal times, missing the publication deadline could result in the company's shares being suspended until the report is published, in the current circumstances, authorities may take a more lenient approach. Indeed, some authorities have extended the four month deadline, and others consider doing the same.

7. **Information flow:** To ensure reliability of management's continuous assessment of the potential impact of COVID-19 on the business, ensure proper information flow to management. Carefully delineate responsibilities between management and the board, the audit committee and other relevant committees such as the disclosure committee, if there is one. Involve IR, legal, accounting, controlling, treasury and outside counsel as appropriate.
8. **Insider trading:** Consider imposing or extending mandatory closed periods by prohibiting all or most dealings by directors, senior executives and potentially other employees, even if the company believes it does not currently have any inside information. The speed with which events are developing increases the risk that, with the benefit of hindsight, the regulator may take the view that the company did in fact have inside information (for example, that it should have published a profit warning) and that persons who dealt on the basis of that information committed market abuse. As well as reducing the legal and reputational risks to the company and individuals involved, in terms of optics, it may be preferable for directors and senior executives to be seen not to deal – and especially not to sell shares – at this time.
9. **Legal landscape:** Keep track of the rapidly changing legal landscape, especially companies with listings on multiple stock exchanges. Governments and regulators around the world are publishing guidance, re-interpreting rules or adopting new rules in response to the challenges that listed companies are facing. In recent days, we have seen regulatory initiatives in the area of short selling, shareholder meetings and financial disclosure deadlines. Other initiatives are likely to follow.

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