FCA fines the Chair of a listed company for market abuse

On 5 August 2022, the FCA issued a Final Notice against Sir Christopher Gent, the former non-executive Chair of ConvaTec Group Plc (the "**Company**"), fining him £80,000 for committing market abuse by unlawfully disclosing inside information.

The Final Notice is the most important statement by the Financial Conduct Authority ("**FCA**") as to how the UK Market Abuse Regulation ("**MAR**") and its predecessor, the EU Market Abuse Regulation ("**EU MAR**"), should be applied since the Upper Tribunal's decision in *Hannam*.

Of most significance are the FCA's conclusions on when information amounts to inside information (where the FCA confirms *Hannam*), how to interpret the obligation to disclose inside information "as soon as possible" and when it is appropriate to disclose inside information selectively.

Overview

In late September 2018, the board of the Company became aware of a risk of not meeting the Company's published guidance and directed that the Company's financial forecasts should be interrogated. On 3 October 2018, the Company received further news that a significant customer might seek to reduce its orders from the Company, which would have an adverse effect on the financial year results.

On learning of this information, Sir Christopher Gent, the Chair of the Company, proposed a meeting of the non-executive directors, which Sir Christopher acknowledged to the FCA was an indirect indication that, if the financial guidance needed to be revised, this would call into question the CEO's position.

As the Company worked to clarify whether its guidance needed to be revised and confirmation of a reduced order was received from the customer, the likelihood of needing to make an announcement became more likely. By 10 October 2018, the CEO approached Sir Christopher to say that he wished to explore retirement options.

Later that same day, Sir Christopher spoke with two of the Company's major shareholders in which he notified them that, depending on the Board's analysis of the new forecasts, the Company expected to make an announcement on 15 October 2018 that the Company was expecting to revise its forecasts and that the CEO would retire.

Decision

The Final Notice states that, in his discussions with the two shareholders, Sir Christopher's actions amounted to:

- unlawful disclosure of inside information under Article 10 of EU MAR (a person possesses inside information and discloses that information to any other person, and disclosure is not made in the normal exercise of an employment, a profession or duties); and
- a breach of Article 14(c) of EU MAR (a person shall not unlawfully disclose inside information).

The FCA further concluded that Sir Christopher acted negligently in disclosing the information: given the training he had received in respect of EU MAR (which was the applicable regime at the time), his experience and position, Sir Christopher should have realised that the information he disclosed constituted, or may have constituted, inside information and that it was not in the normal exercise of his employment, profession or duties to disclose it selectively.

The FCA has agreed that Sir Christopher believed that he was acting in the Company's best interests, that he made no personal gains out of the disclosures and no trading took place as a consequence of them.

Sir Christopher has publicly stated that he disagrees with the FCA's decision but has decided not to appeal it to the Upper Tribunal. The Final Notice contains no censure of the Company, its advisers or the shareholders to whom the information was disclosed.

Definition of inside information

As to whether the information disclosed by Sir Christopher was inside information, the FCA broadly confirmed the approach the Upper Tribunal took in *Hannam*. The four limbs to the definition of inside information are that it has to relate to an issuer or its securities, not be in the public domain, be of a precise nature, and be likely to have a significant effect on the price of the issuer's securities.

The two key tests as to whether the information disclosed by Sir Christopher amounted to inside information were whether the information was precise and, if so, whether it would have a significant effect on the Company's share price.

In Hannam, the Upper Tribunal concluded that the test in Article 7(2) of EU MAR, which states that for information to be precise it must concern a set of circumstances which existed and/or an event which was reasonably expected to occur, meant that there only needed to be a realistic prospect of the event to which the information relates occurring.

In the FCA's view, at the time of the disclosures by Sir Christopher, he believed or expected that the financial guidance would need to be revised and that it was distinctly likely that the CEO would retire, meaning that there was a realistic prospect of both happening and the information was therefore of a precise nature. This is notwithstanding the Company needed to complete their review of their financial forecasts and any revision of the financial guidance was "subject to the board's analysis", and the CEO had not yet confirmed they would be retiring.

Having concluded both pieces of information were precise, the FCA determined that a conclusion could be drawn as to their possible effect on the Company's share price, meaning both pieces of information met the criteria of inside information. This was even though the disclosures made by Sir Christopher did not provide detail as to the extent or likely range of the expected guidance revision. In concluding this information met the test, the FCA pointed expressly to *Hannam*, which stated that there is no need to know the extent to which the price would be affected.

Timing of disclosure of inside information

The Final Notice states that the test as to whether something is inside information does not include whether the information is currently suitable for announcement, which the FCA accepts was not the case when Sir Christopher made the disclosures. It was not until 15 October 2018, five days after Sir Christopher spoke with the two shareholders, that the Company had sufficient information to update the market appropriately.

The requirement in Article 17(1) of UK MAR is that an issuer must disclose inside information "as soon as possible". The FCA has clarified that this should be interpreted as meaning that an issuer has a short period of time between inside information coming into existence and making a public announcement "to make preparations for the announcement to be made and to avoid disclosing information which would lead to the public making incorrect or incomplete assessments of the information disclosed."

In this instance, the FCA seems content that the Company acted with appropriate haste to clarify the information and disclose it to the market as soon as it could.

As the FCA consider that where there is a short period where preparations are made for disclosure, this satisfies the test of disclosing "as soon as possible", this means that an issuer is not required to notify the FCA justifying a delay in disclosure of inside information in these circumstances. This differs from where an issuer relies on Article 17(4) of UK MAR, which allows for a delay in certain circumstances where disclosure would prejudice the legitimate interests of the issuer (e.g., when an issuer is negotiating an M&A transaction).

Selective disclosure

It is possible to make selective disclosure of inside information if you do so within the normal course of your employment, profession or duties. However, the FCA concluded that Sir Christopher's disclosures were not made in such circumstances for various reasons, including:

- the disclosures were not reasonable and it was not necessary for them to be made for Sir Christopher to perform his proper functions, nor was it a proportionate way for him to discharge his duties as Chairman; and
- although Recital 19 to EU MAR provides that discussions of a general nature regarding the business and market developments are permissible between shareholders and management concerning an issuer, Sir Christopher's disclosures of inside information were outside the scope of that type of discussion.

The FCA highlighted that the reason for Sir Christopher's discussions was to let the shareholders know of the impending announcement. If the discussions had been meaningful consultations as to whether the Company should seek to retain the services of the CEO notwithstanding the financial performance of the Company, it seems that the FCA may have come to a different conclusion.

The FCA also noted that the fact that confidentiality obligations were imposed on the recipients of the disclosures was not sufficient to allow for selective disclosure. Under MAR 1.4.5G(2), even where confidentiality obligations are imposed, the disclosure must nonetheless be reasonable and must be to enable the person to perform the proper functions of their employment, profession or duties. The ECJ has interpreted the exception to the rule against non-disclosure of inside information to be one that must be interpreted strictly, such that the disclosure of such information is justified only if it is "strictly necessary for the exercise of an employment, profession or duties and complies with the principle of proportionality". The FCA agrees that this limited exception to the rule against non-disclosure of inside information should be interpreted strictly. In the FCA's view, the disclosures were not reasonable, necessary or proportionate. The FCA thinks that there were other more appropriate means by which Sir Christopher could have ensured the support of the Company's major shareholders, for example, by giving them access to the Company's senior management team in calls held immediately after the RNS announcements.

Our view

The FCA's decision is a sobering one, but we think the guidance provided is helpful.

Hannam left many market participants struggling with how to apply the market abuse regulations. This was primarily because of a belief that UK MAR requires inside information to be disclosed immediately, which is how most interpreted the meaning of "as soon as possible" in the regulation itself.

This belief perhaps led to a reticence amongst companies and their advisers to conclude that information was of a precise nature up until the point in time that it was ready to be disclosed, even if there was a reasonable prospect of the event to which the information related occurring.

This position is now clarified. The acknowledgement from the FCA that it is possible to have inside information but not be in a position to announce it should treat information as inside information earlier and apply the proper controls around that information. If the Company had done so in this instance, Sir Christopher acknowledged that he would not have sought to disclose the information to the shareholders.

None of this is to say that once inside information is identified, a company does not have to act with urgency to disclose that information as soon as possible. Issuers and their advisers should be vigilant to ensure that the time between identifying the inside information and disclosure of that information is used appropriately and there is no unnecessary delay.

Further, the Final Notice is a good reminder that when sharing inside information with shareholders, the disclosing party should ensure that there is a legitimate reason for doing so. It is not enough to want to manage relationships by giving a "heads up", it has to be with the intention of having a genuine and meaningful consultation and where it is proportionate to do so.

So, the key takeaway here is for directors or senior individuals in possession of confidential information that is bordering on inside information to take advice, and consider carefully what information can and should be conveyed on a selective basis.

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