UK MAR: Key themes for 2023

The UK Financial Conduct Authority ("FCA") published three final notices in 2022 relating to breach of its on-going disclosure regime for listed companies, against Carillion plc (June), Sir Christopher Gent (August) and Metro Bank PLC (December). In December 2022, it also published Primary Markets Bulletin 42 ("PMB 42") which provided commentary on *Gent* and other recent enforcement actions by the FCA. In this briefing, we comment on some key themes arising from the final notices and PMB 42 which listed issuers and their advisers should be aware of. We also look forward to 2023 and highlight possible changes to the UK disclosure regime arising from a new UK MAR.

Carillion

On 24 July 2022, the FCA published a decision notice censuring Carillion plc for contravening Article 15 of the EU Market Abuse Regulation ("EU MAR") (prohibition of market manipulation), Listing Rule 1.3.3R (misleading information must not be published), Listing Principle 1 (procedures, systems and controls) and Premium Listing Principle 2 (acting with integrity). The FCA noted that it would have fined the company £37,910,000 had it not been in liquidation. Three of the company's executive directors have also been publicly censured and fined although the three individuals concerned have referred their decision notices to the Upper Tribunal of the FCA and so their findings are provisional.

On 10 July 2017, Carillion announced an expected provision of £845m as at 30 July 2017, of which £375m related to projects in Carillion Construction Services ("CCS"). Carillion's share price fell by 39 per cent on the day of the announcement and by 70 per cent within three days. It went into liquidation on 15 January 2018. Carillion had previously made announcements on 7 December 2016, 1 March 2017 and 3 May 2017 which made positive statements about Carillion's financial performance and specifically about the performance of CCS. The announcements did not reflect significant deteriorations in the expected performance of CCS' portfolio and increasing financial risks associated with it, notwithstanding that CCS' management had highlighted these to one or more of the three executive directors.

Please click here for our more detailed briefing on *Carillion*.

Gent

On 5 August 2022, the FCA issued a final notice against Sir Christopher Gent, the former non-executive chair of ConvaTec Group plc, fining him £80,000 for committing market abuse by unlawfully disclosing inside information. The fact pattern is complicated but briefly, the board of ConvaTec became aware in late September 2018 that there was a risk that the company's published guidance would not be met and requested that the financial data be interrogated further. On 3 October 2018, the company was informed by a significant customer that it intended to reduce its orders which would have an adverse effect on the financial year's results. The company subsequently spent some days clarifying the customer's position and the potential impact on the full year guidance with the customer confirming on 5 October 2018 and 8 October 2018 that it would be ordering a materially lower level of inventory in Q4 2018. On 10 October 2018, the CEO approached Sir Christopher to say that he wished to explore retirement options. Later that day, Sir Christopher spoke with two of the company's shareholders and told them that, depending

on the analysis of the new forecasts, the company expected to make an announcement on 15 October that the company was expecting to revise its forecasts and that the CEO would retire. The relevant announcements were released to the market on 15 October; by market close the company's share price had fallen by 33.1 per cent.

The FCA held that Sir Christopher had unlawfully disclosed inside information in breach of Articles 10 and 14(c) of EU MAR. Key points from the final notice include the following:

- **Definition of inside information** – the FCA stated that inside information existed on 10 October when Sir Christopher spoke to the shareholders. There was a realistic prospect of both events happening and the information was therefore of a precise nature. This was the case notwithstanding that the company had not yet completed its review of the financial forecasts and that any revision of the financial guidance was subject to the board's analysis and that the CEO had not yet confirmed that he was retiring. The information was specific enough for a conclusion to be drawn as to the possible effect on the share price and therefore it constituted inside information;

- **Requirement to disclose as soon as possible** – the FCA noted that the test of whether information is inside information is not whether it is currently suitable for announcement and held that in this case the company had met the requirement to disclose inside information "as soon as possible". This was the case even though there was a gap of five days between the inside information coming into existence and the company's announcement of it;

- **Selective disclosure** – Article 10 of EU MAR permits selective disclosure of inside information where it is in the normal course of employment, profession or duties. However, in this case, the FCA held that Sir Christopher's disclosures were not made in such circumstances as the disclosures were not reasonable, necessary or proportionate. They appeared to have been made in order to give the shareholders a "heads up" in relation to the forthcoming announcement rather than to consult the shareholders. Imposing confidentiality obligations on the recipient does not make the disclosure lawful if the disclosure was not reasonable or necessary in the first place; and

- **Experienced NED** – the FCA held that Sir Christopher had acted negligently in disclosing the information given the training he had received and his previous considerable experience and position. He had failed to consider what information he might properly disclose, as well as when, in what manner and to whom and he failed to obtain clear, formal advice before making the disclosures.

Please click here for our more detailed briefing on *Gent*. It should be noted that 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 does not censure the company, its advisers or the shareholders to whom the information was disclosed.

Metro Bank

On 12 December 2022, the FCA published a final notice censuring Metro Bank PLC for contravening Listing Rule 1.3.3R (misleading information must not be published) and fining it £10,002,300. The company's two executive directors have also been publicly censured and fined although the individuals concerned have referred their decision notices to the Upper Tribunal of the FCA and so their findings are provisional.

The FCA found that Metro Bank had published inaccurate information in its trading update on 24 October 2018 when it stated that its risk weighted assets ("RWA") totalled £7,398m as at 30 September 2018 when it had been informed by no later than 11 September 2018 by two external consultants that it was using an incorrect risk weighting of 50 per cent for a certain type of commercial property loan when it should be 100 per cent. The company sought

external legal advice on 5 October 2018 and was advised that a market announcement was not required at that time as the information in question was not specific or material. Two separate board committees were informed that the RWA figure was incorrect on 22 and 23 October 2018 respectively and that correcting the error would lead to an increase in RWA figure of £574m. The company failed to consider whether anything needed to be included in the trading update on 24 October 2018 to qualify the incorrect figure or to take legal or other advice on the question. The updated RWA figure was not announced by the company until 23 January 2019. The company's share price dropped by 39 per cent on the day of that announcement, the largest single price drop experienced by a UK bank since 2009.

Primary Markets Bulletin 42

PMB 42 was published on 12 December 2022 and makes further observations on *Gent* in the light of feedback from a number of stakeholders as well as commentary on certain situations and types of behaviour that present a risk of unlawful disclosure of inside information. The FCA highlighted a number of points arising from *Gent*, emphasising that the context in which it has reviewed the disclosures made by Sir Christopher is Recitals 23 and 24 of EU MAR which explain that its purpose is to protect the integrity of the financial markets and enhance market confidence by ensuring that investors will be placed on an equal footing. PMB 42 then sets out a number of situations and types of behaviour that present a particular risk of unlawful disclosure of inside information. These are the use of both social and mainstream media, fundraisings and analyst and media briefings. Key points for listed companies and their financial advisers to note include the following:

- Inside information must always be disclosed via a regulatory information service and not via social media alone. It must not be combined with marketing material;
- Inside information must not be leaked in advance to mainstream media as such disclosures will very rarely be in the normal exercise of an employment, profession or duties for the purposes of Article 10 (see above). It is not a significant mitigant for a press article to be published outside of market hours;
- In relation to fundraisings where the FCA has investigated numerous potential leaks of inside information, issuers should protect themselves by putting in place tight systems and controls, restricting access to the information, creating "proper MAR-compliant" insider lists and insisting that their advisers do the same and follow the wall-crossing procedures set out in Article 11 (market soundings); and
- Executives need to be properly prepared for analyst and media briefings in order to avoid selective disclosure.

Finally PMB 42 makes some very pointed comments about issuers' written inside information policies and procedures, noting that they vary in quality and are often lengthy reproductions of MAR and the relevant FCA rules and guidance without any practical examples which are difficult for relevant employees and executives to digest and put in context.

Key themes and action points

Definition of inside information

The FCA in the *Gent* final notice confirmed the Upper Tribunal's position in *Hannam* that information was sufficiently precise to be inside information when it is more than fanciful that the event or circumstances in question may arise. The decision will likely lead to inside information being identified earlier than perhaps has happened in the past where it may have been the case that a company concluded that it was not in possession of inside information until (for example) numbers were sufficiently concrete and/or approved.

Disclosure of inside information

If inside information does arise earlier, it is helpful that the FCA has confirmed in Gent that the requirement to disclose inside information as soon as possible does not mean immediately and that a company has time to prepare an announcement as long as it does not delay. Once identified, the company and its advisers must then work hard to announce that information. In Gent the FCA concluded that 5 days was an appropriate amount of time in the circumstances, however, the time period will differ depending on the particular circumstances.

Selective disclosure

It is clear from PMB 42 that the FCA has received a number of queries as a result of *Gent*, particularly in relation to shareholder engagement. The bulletin states that any analysis of selective disclosure to shareholders will focus on the nature of the information shared and the rationale for doing so, rather than the number of shareholders which is helpful, and also that the FCA's intention is not to inhibit high quality engagement with shareholders. Nevertheless, *Gent* is a useful reminder of the narrowness of the exception set out in Article 10 of UK MAR. Selective disclosure should always be considered carefully prior to the disclosure taking place and external advice should be sought. It is clear that inside information should only be shared with shareholders if the purpose of such disclosure is to have a meaningful consultation with them. On no account should a company or its board be seeking to give shareholders a "heads up" of good or bad news to come that constitutes inside information.

Seeking external advice

In *Metro Bank* the FCA noted that the company did not seek advice in relation to the contents of the October trading update (rather it had sought advice in relation to its obligations under Article 17 of UK MAR) and the case is a salutary reminder that the right question must be asked at the right time rather than extrapolating advice given in relation to one question to a different question. If in any doubt as to whether there is an *ad hoc* disclosure obligation or a disclosure obligation in relation to a scheduled announcement has arisen, listed issuers should seek written advice from both their brokers and their lawyers.

The same can be said of selective disclosure. The *Gent* final notice draws attention in particular to the fact that Sir Christopher had failed to obtain clear, formal advice before approaching shareholders.

Record keeping

Both the *Carillion* and *Gent* final notices mention the importance of record keeping. In Carillion, there is mention of lack of proper records around contract accounting judgements which led in part to a finding of inadequate systems, procedures and controls. This meant that there was no clear record of the assessments being made, approved or reviewed. In particular, it is noted that adjustments were not fully documented and supported and minutes were not taken of some discussions. In *Gent*, Sir Christopher did not make any contemporaneous written notes or audio recordings of his conversations with the major shareholders.

As a general matter, listed issuers should be ensuring that records of material discussions (both internal and external) are kept as well as records documenting internal processes.

Review of inside information and social media policies

PMB 42 recommends that issuers should consider whether their written policies and procedures are adequate to address the risks highlighted (see above) and update and socialise them as necessary. Given the direct language from the FCA, issuers should be addressing this as a priority and also, given the comments on practical examples, considering whether refresher training highlighting the practicalities of dealing with inside information is necessary.

Breach of Article 17 of UK MAR

In both *Carillion* and *Metro Bank*, it is unclear why the FCA did not censure the companies concerned for breach of Article 17 of UK MAR, instead choosing to censure them for breach of LR 1.3.3R (requirement not to publish misleading information). In *Metro Bank*, it appears from the final notice that it could be argued that inside information existed over 4 months before the company announcement was made that corrected the RWA figure.

It may well be the case that bringing a case against the companies for breach of LR 1.3.3R was more straightforward. However, whatever the reason, in financial terms it seems to make little difference as Carillion would have been fined £37m if it had not been insolvent and Metro Bank was fined £10m, both of which are substantial sums.

New UK market abuse legislation

The Financial Services and Markets Bill once enacted will repeal the UK market abuse legislation set out in UK MAR (the UK version of EU MAR as amended since onshoring post-Brexit in January 2021) from a specified date and replace it with a new UK market abuse regime.

It is not yet clear when this will happen, however, we anticipate that the UK Government will in due course publish a consultation in respect of the new UK market abuse regime. It seems, on the basis of the Government's policy statement of 9 December 2022, that repeal of UK MAR will not be a priority for 2023. However, given the anticipated changes to the UK prospectus regime where much of the regime will be set out in detailed rules issued by the FCA rather than legislation, it is possible that a similar approach will be adopted and that in future the detail of the UK market abuse regime will be set out in FCA rules. This would return the regime to a situation akin to the pre-MAR regime where much of the detail was set out in the FCA Code of Market Conduct.

UK market participants have generally acknowledged that, after a period of bedding in, the UK MAR regime has worked well and we therefore think it is unlikely that the Government or the FCA will propose radical changes. In the meantime, it is interesting to note that, following a review of the EU MAR regime, the draft Regulation published by the European Commission ("Commission") on 7 December 2022 as part of the Capital Markets Union reforms, proposed the following changes to the EU market abuse regime which were described by the Commission as simplifications and clarifications which would not affect market integrity:

- **Definition of inside information** - whilst the definition of inside information will continue to include intermediate steps in a protracted process, the obligation to disclose such information will not apply as the information is too preliminary;

- **Disclosure of inside information** - the conditions set out at paragraph 5(2) of the European Securities and Markets Authority ("ESMA") guidelines in relation to situations in which delayed disclosure is likely to mislead the public will be set out in the Regulation (i.e. they will be law rather than guidance). The Commission will publish by way of a delegated regulation a non-exhaustive list of inside information and an indication of when it should be disclosed. The relevant competent authority will need to be notified of the decision to delay immediately after the decision to delay is taken rather than immediately after disclosure is made as is currently the case;

- **Market soundings** – the Commission has confirmed that market soundings provide a safe harbour if market participants choose to conduct them and they are not compulsory, rowing back from their previous position in its consultation paper that market soundings should be compulsory. This was consulted on by the Commission in December 2019 and notwithstanding push back from the majority of respondents to the consultation, ESMA reiterated in December 2020 that market soundings were compulsory and that changes to MAR were needed to make this clear.

It will be interesting to see which if any of the proposed changes to EU MAR will be incorporated into the new UK MAR regime, bearing in mind the political policy imperatives behind the post Brexit changes to legislation in the UK and the similar desire of the UK government to that of the Commission to have a regulatory regime that protects consumers whilst not placing unnecessary burdens on market participants.

Our view

We expect further enforcement cases from the FCA in 2023 for breach of both the market abuse and UK listing regimes. The FCA has shown itself increasingly willing to censure listed companies for breach of the listing rules and listed companies should ensure that their policies and procedures for dealing with inside information are robust and understood by both boards and employees, reviewing existing policies and offering refresher training as necessary. In due course, hopefully in 2023, we expect the Government to consult on new UK market abuse legislation to replace the existing EU model and whilst we do not anticipate that any major changes will be proposed, any changes are likely to make the regime less onerous for market participants.

Contacts

Alex Ainley
Partner, FS Regulatory
+44 (0) 20 7825 4248
alex.ainley@simmons-simmons.com

Colin Bole
Partner, UK ECM
+44 (0) 20 7825 3170
colin.bole@simmons-simmons.com

Jamie Corner
Partner, UK ECM
+44 (0) 20 7825 3564
jamie.corner@simmons-simmons.com

Emma Sutcliffe
Partner, Dispute Resolution
+44 (0) 20 7825 4250
emma.sutcliffe@simmons-simmons.com

Caroline Chambers
Senior Professional Development Lawyer, Corporate
+44 (0) 20 7825 4822
caroline.chambers@simmons-simmons.com

simmons-simmons.com.