FCA Censures Former FTSE 100 Company under EU Market Abuse Regulation

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Background. On November 17, 2023, the Financial Conduct Authority ("FCA") announced that it had censured NMC Health Plc ("NMC"), a private healthcare company headquartered in the United Arab Emirates, for market manipulation under EU Market Abuse Regulation (596/2014) ("EU MAR"), as a result of, among other matters, understating its debt position by nearly $4 billion.[1] The FCA did not impose a financial penalty (owing to the fact that NMC entered administration in 2020), but deemed the breach serious enough to warrant public censure.

The basis for the FCA's finding was that NMC had "committed market abuse (market manipulation) in breach of Article 15 of EU MAR".[2] Specifically, the FCA found that NMC had misled the market about the severity of its debt position in a number of financial reports it published between March 7, 2019 and February 27, 2020 (the "Relevant Period"). EU MAR aims to increase market integrity and investor protections, and applied to financial instruments admitted to trading on a UK regulated market until December 31, 2020, when the regulation was onshored into UK law through the European Union (Withdrawal) Act 2018 (as amended), supplemented by The Market Abuse (Amendment) (EU Exit) Regulations (SI 2019/310) (together, "UK MAR"). As NMC's shares were admitted to trading on the Premium Segment of the London Stock Exchange in 2012 (following which NMC entered the FTSE 100 in 2017), the FCA was the relevant regulatory authority for the purposes of EU MAR.

The Case. The FCA's case against NMC centered on three financial disclosures it made in 2019, as well as a subsequent investigation into the disclosures which resulted in the eventual suspension of trading of its shares on February 27, 2020. In March 2019, NMC published its financial report for 2018, in which it disclosed its total debt as $1.99 billion as of December 31, 2018. This figure was later repeated in NMC's 2018 Annual Report, published in May 2019. In its interim report for the first half of 2019, published in August 2019, NMC disclosed its total debt as $2.1 billion as of June 30, 2019. The subsequent investigation

1 FCA Censures NMC Health Plc (in Administration) for Market Abuse, https://www.fca.org.uk/news/press-releases/fca-censures-nmc-health-plc-administration-market-abuse.

2 Final Notice 2023: NMC Health Plc (in Administration), https://www.fca.org.uk/publication/final-notices/nmc-health-plc-2023.pdf.

estimated NMC's actual total debt as of December 31, 2018 to be $5.91 billion and as of June 30, 2019 to be $6.2 billion. Further, NMC had guaranteed debt facilities that had been "heavily drawn upon" by related parties of its subsidiary, NMC Healthcare LLC, which were also not included in the publicly disclosed total debt figures. In essence, NMC had been operating dual accounts, with the accounts used in the preparation of its public financial disclosures omitting certain liabilities. Consequently, according to the FCA, "[t]he concealment of NMC's debt position and subsequent collapse has left creditors including investors out of pocket".

The FCA found that NMC had committed market abuse by: (i) publishing false or misleading information in its financial disclosures; (ii) failing to declare the related party transactions it had guaranteed; and (iii) providing false or misleading statements when it initially denied allegations of market manipulation, at a time "when it knew, or ought to have known, that the information was false or misleading, in breach of Article 15 of EU MAR". In its Final Notice, the FCA cited Article 12(1)(c) of EU MAR in relation to the false or misleading information NMC had disseminated, which provides that the offence of market manipulation is committed through publishing information which "gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument".

Reflections. The FCA has seldom issued Final Notices for companies or individuals in breach of EU MAR, the other significant case being *Ian Hannam v FCA* in 2014, when Mr. Hannam was found to have engaged in two instances of market abuse by disclosing inside information. Due to the fact that NCM entered administration in 2020, the FCA opted to censure the company rather than issue a financial penalty, which would have reduced the funds available to creditors. Nevertheless, the FCA's actions serve as a warning for other non-UK-based issuers of equity or debt listed on the London Stock Exchange, or listed on other European stock exchanges, to be mindful of compliance with the relevant requirements of UK MAR or EU MAR, as applicable. Importantly, the FCA concluded that it was "satisfied that there was knowledge within NMC at a sufficiently senior level" that the information disseminated was false or misleading "to constitute the knowledge of NMC … for the purposes of market abuse". Those in similar positions of seniority or control should pay heed to these conclusions of imputed knowledge made by the FCA, and perhaps other relevant similar European authorities.

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Please do not hesitate to contact us with any questions.

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