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Inside information: what is "precise" has just become more uncertain

The EU market abuse regime regulates the misuse of non-public price-sensitive information which is of a "precise nature" (inside information). To be "precise" information must (i) indicate that circumstances exist or that an event has occurred (or may reasonably be expected to come into existence or occur) and (ii) be specific enough to enable a conclusion to be drawn as to the "possible effect" of those circumstances or that event on the price of the relevant investments.

In FCA v Hannam [2014] UKUT 0233, the UK Upper Tribunal held that for information to meet the second part of the precise test, one would need to be able to draw a conclusion as to the possible *direction* of any price movement.

The EU Court of Justice (CJEU) has now rejected that approach in its decision in the case of Lafonta v AMF (case C-628/13).

Mr Lafonta was chairman of a French company, Wendel. Wendel had failed to disclose information concerning a proposed acquisition of a shareholding in another company. The penalties commission of the *L'Autorité des marchés financiers* (AMF) imposed a penalty of EUR 1.5 million on Mr Lafonta.

Before the CJEU, Mr Lafonta argued that information is precise only if it allows the person in possession of that information to anticipate how the price of the security concerned will change when that information is made public.

The CJEU held:

- *[36] The increased complexity of the financial markets makes it particularly difficult to evaluate accurately the direction of a change in the prices of those instruments…. In those circumstances - which can lead to widely differing assessments, depending on the investor - if it were accepted that information is to be regarded as precise only if it makes it possible to anticipate the direction of a change in the prices of the instruments concerned, it would follow that the holder of that information could use an uncertainty in that regard as a pretext for refraining from making certain information public and thus profit from that information to the detriment of the other actors on the market.*
- *[37]….. the answer to the question referred is that, on a proper construction of point (1) of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124, in order for information to be regarded as being of a precise nature for the purposes of those provisions, it need not be possible to infer from that information, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the financial instruments concerned will be in a particular direction.*

That conclusion is contrary to the conclusion of the Upper Tribunal in Hannam, which held as follows (at 121(b)):

> *As to the requirements for information to be specific enough to enable a conclusion to be drawn as to possible effect on price, and in particular what the word "possible" means: the information must indicate the direction of movement in the price which would or might occur if the information were made public. The information does not need to indicate the extent to which the price would or might be affected. The information does not need to be such as to enable an*

investor to know with confidence that the price will move if the information were made public but only that it might move and, if it does, the movement will be in a known direction.

Conclusion

The CJEU decision in Lafonta significantly broadens the definition of "precise" as it was previously understood in this context. It therefore broadens the scope of the definition of inside information and the scope of issuer's obligations to announce inside information.

That said, as well as being precise, inside information must also be likely to have a significant effect on price. However, the Upper Tribunal indicated in the Hannam case that there need only be a "real prospect" of the information having more than a "de minimis" effect on price in order to be regarded as price sensitive information. Therefore, in practice, if non-public information passes the significant effect on price test, it is likely also to be regarded as being precise and thus "inside information" (especially since the case law also indicates that there need only be a "realistic prospect" of future events coming into existence for the information to satisfy the first limb of the definition of when information is precise).

The Lafonta decision reinforces the need to consider carefully whether information is inside information and whether an issuer has grounds to delay disclosure. Notwithstanding the recent Hannam decision, the FCA is likely to apply the Lafonta approach in the future.

Our briefing note on the Hannam decision, *Eight things we now really know about market abuse* (June 2014), is available at www.cliffordchance.com.

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