

**Insights**

## **UK CORPORATE BRIEFING DECEMBER 2024**

Dec 02, 2024

### **SUMMARY**

Welcome to the Corporate Briefing, where we review the latest developments in UK corporate law that you need to know about. In this month's issue we discuss:

#### **FCA fines a senior executive for breach of the Market Abuse Regulations ("MAR")**

This case is a timely reminder of the PDMR notification obligations when trading in listed securities and the prohibition of dealing during a MAR closed period.

#### **Primary Market Bulletin No. 52**

The FCA's latest edition of Primary Market Bulletin focuses on inside information and reminds issuers of their obligations in certain scenarios.

#### **Private Intermittent Securities and Capital Exchange System ("PISCES")**

HM Treasury has published the government's response to its consultation on PISCES together with draft regulations.

#### **Guidance on failure to prevent fraud offence**

The government has released the long-awaited guidance on what amounts to "reasonable procedures" under the Economic Crime and Corporate Transparency Act setting out procedures organisations can put in place to prevent persons associated with them from committing fraud offences.

#### **Takeover Panel response on the application of the Takeover Code**

The Takeover Code has published its response to its consultation on the application of the Code adopting amendments previously proposed in PCP 2024/1 subject to some modifications.

#### **Pre-Emption Group annual monitoring report 2023-2024**

The Pre-Emption Group has published its second report monitoring the use of its 2022 Statement of Principles.

### **FRC publishes Annual Review of Corporate Governance Reporting**

The Financial Reporting Council has published its annual review which emphasises, amongst other things, the continued importance of the 'comply or explain' approach and notes that there is still room for improvement on the quality of explanations for departures.

### **Glass Lewis 2025 UK Benchmark Policy Guidelines**

Glass Lewis has published the latest edition of its Voting Policy Guidelines which apply to shareholder meetings held after 1 January 2025.

### **ISS – proposed policy changes for 2025**

The ISS has published a consultation of policy changes, with the revised policy due to apply for shareholder meetings occurring on or after 1 February 2025.

### **FRC consultation on UK Stewardship Code**

The FRC launched a consultation on proposed updates to the UK Stewardship Code which aims to enhance transparency, disclosure and accountability in investment stewardship.

### **UK Green Taxonomy**

HM Treasury is consulting on whether to establish a UK Taxonomy.

## **FCA FINES A SENIOR EXECUTIVE FOR BREACH OF THE MARKET ABUSE REGULATIONS (“MAR”)**

This case is a timely reminder of the PDMR notification obligations when trading in listed securities and the prohibition of dealing during a MAR closed period.

The FCA has **fined** a senior executive £123,500 (reduced from £176,400) for breach of Articles 19(1) and 19(11) of MAR. The individual in question was a senior executive (with his reporting line one step removed from the Chief Executive Officer) of a company whose shares are listed on the Main Market of the London Stock Exchange plc. As a senior executive he had regular access to inside information and the power to take managerial decisions affecting the future developments and business prospects of the company. As a result, he was a PDMR – a person discharging managerial responsibilities. A PDMR is restricted from dealing, subject to exceptional circumstances, during a closed period (30 calendar days before the announcement of an interim or the year-end financial report) and when they are in possession of inside information. In addition,

any dealings by a PDMR must be notified to an issuer and the FCA within three working days after the date of the transaction and the company then has an obligation to notify the market accordingly.

## FAILINGS

- Between 4 April 2019 and 6 November 2020, the PDMR failed to notify the company and the FCA of 115 transactions in the company's shares within three business days (now working days) or at all. As a result, the company was not able to announce the transactions to the market in a timely fashion in accordance with Article 19(3) of MAR.
- The PDMR breached MAR by trading during a closed period on 18 occasions.
- The PDMR also failed to seek clearance, in accordance with the company's share dealing code, to trade in the shares. If he had, the company would have been given the opportunity to approve or reject his dealings.

The FCA states in the Final Notice that failure by PDMRs to notify dealing transactions in the shares of their issuers and unauthorised trading by PDMRs during closed periods undermines its strategic objective of ensuring that relevant markets function well, and its operational objective of protecting and enhancing the integrity of the UK financial system.

## PRIMARY MARKET BULLETIN NO. 52

The FCA has published a new edition of [Primary Market Bulletin](#) ("PMB") which focuses on inside information and reminds issuers of their obligations in certain scenarios.

## IDENTIFYING INSIDE INFORMATION

During an offer process a company may receive a series of formal offers from the same party. The FCA have seen cases where advice has been provided that it is only inside information when a final offer is accepted by the company's directors. Under the UK Market Abuse Regulation ("MAR"), inside information is "*precise if it indicates a set of circumstances which exist or which may reasonably be expected to come into existence*" and this includes where there is more than a fanciful chance of the future event or circumstances coming into existence or occurring. Therefore, whether the receipt of an offer is inside information needs to be assessed on a case-by-case basis and it could be inside information before it has been formally considered and recommended by the board. Where there is press speculation or rumours which amount to inside information during the offer process and the issuer has been delaying disclosure of that inside information under MAR, the issuer may need to make public the information as soon as possible as it is no longer able to ensure the confidentiality of that information.

## PERIODIC FINANCIAL INFORMATION

[FCA Technical Note 506.2](#) states that companies should assess on an 'ongoing' and case-by-case basis whether the information they hold fulfils the criteria of being inside information and they should record the assessment process. When making the assessment, companies should exercise judgement and good faith and start from the assumption that information relating to financial results 'could' constitute inside information. In situations where information could be of a precise nature and constitute inside information at an early stage of the process eg. board finance packs presented before a scheduled earnings statement show that revenue will not meet internal forecasts, an issuer will have to disclose the information in their scheduled results announcement as soon as possible. An issuer may be able to delay disclosure of the inside information but only in limited circumstances where immediate disclosure of the inside information is likely to prejudice the legitimate interests of an issuer and where the delay of disclosure is not likely to mislead the public. However, delaying disclosure of negative news until there is off-setting positive news is not acceptable.

## CEO RESIGNATIONS

Where inside information concerns a process which occurs in stages, each stage of the process as well as the overall process could constitute inside information. For example, where a CEO has signalled their intention to resign and/or the board has started discussions to appoint potential successors, this could be inside information at this early stage of the process. In addition, where a CEO is resigning and a successor is being appointed, separate assessments should be carried out for developments concerning each process as they are two separate pieces of information which may on their own constitute inside information at different points in time. Factors issuers may want to consider when assessing the price sensitivity of the resignation and appointment could include the length of service of the existing CEO and therefore the market expectation that they will retire, the expectation that a 'natural' successor exists or the reasons behind the CEO's resignation. If there is continuous press speculation on succession, then the issuer will need to carefully consider whether this constitutes a leak – factors to consider include the accuracy of the speculation with respect to both the identity and number of potential successors and the stage at which the identification and appointment of the new CEO has progressed.

## DISSEMINATION OF INFORMATION DURING SHAREHOLDER CALLS/MEETINGS

Some issuers communicate with smaller private shareholders using Whatsapp, Telegram or LinkedIn. Whilst the FCA recognise that these communication apps and associated calls provide smaller shareholders with an important opportunity to engage directly with the issuer's management, these kinds of dissemination can risk unlawful disclosure of inside information or market manipulation through misleading statements. To reduce these risks:

- issuers should avoid scheduling calls/communicating during a closed period ie. 30 calendar days before the release of a preliminary announcement of the company's annual results or the

half-yearly financial report. Communications could take place shortly after an issuer has published a financial report to align the messaging with those statements;

- at the outset of the call, management could reiterate that no inside information will be disclosed during the communication;
- where calls or meetings are not recorded, management could consider making a written, contemporaneous note of what was discussed during the call or meeting which can then be referred to if required; and
- in certain circumstances, an issuer may wish to publish an announcement following the call or meeting to confirm that it took place, set out any information that was shared and confirm that the issuer does not deem the information to be inside information.

Where there are untoward share price movements on the back of investor calls, the FCA are likely to make contact with the issuer's management team to discuss this further.

## DISSEMINATION OF REGULATORY INFORMATION DURING INTERRUPTIONS TO PIP SERVICES

Issuers must use a Primary Information Provider ("PIP"), also referred to as a Regulatory Information Service, whenever they are required to disclose regulated information. During the CrowdStrike-related IT outage in July 2024 some PIPs were unable to disseminate issuers' announcements. The obligation to disseminate regulated information via a PIP rests with the issuer and this does not fall away once the issuer has submitted the request to the PIP to disseminate the information. During the IT outage, the FCA noted that some issuers published regulated information on their websites despite the information not being released via the PIP. If issuers are intending to publish regulated information on their website, or via any other media channels, they should do so only once the information has been disseminated via the PIP. This excludes times when a PIP is not open for business where issuers may distribute the information in the manner set out in DTR 1.3.6 G (ie. not less than two national newspapers, two newswire services and a RIS for release as soon as it opens). Issuers may want to consider whether to set up and maintain a second PIP account which can be used when the first PIP account's service is interrupted.

## PRIVATE INTERMITTENT SECURITIES AND CAPITAL EXCHANGE SYSTEM ("PISCES")

HM Treasury has recently published the [government's response](#) to its earlier consultation on PISCES together with draft regulations.

PISCES is the proposed new trading platform for the intermittent trading of shares in a private company on a multilateral system. It is part of the government's strategy to reinvigorate capital markets through pro-innovation and pro-growth policies. Responses to the original consultation

welcomed the proposal and design of the proposed PISCES Sandbox, through which relevant legislation would be amended to allow the innovative model of trading in private company shares. Responses to the original consultation commented that PISCES would reduce the regulatory jump between private and public markets and support private company growth. The government therefore intends to proceed with PISCES and has published draft regulations to set up PISCES in a sandbox. Evidence from the sandbox will be used to decide how to legislate to make PISCES a permanent part of the UK regulatory regime.

## KEY FEATURES OF PISCES:

- PISCES will operate as a secondary market, facilitating the trading of existing shares in intermittent trading windows (e.g. ad hoc, quarterly, biannually, yearly etc). It will not facilitate capital raising through the issuance of new shares.
- Only shares in companies whose shares are not admitted to trading on a public market (in the UK or abroad) can be traded on PISCES. This includes UK private and public limited companies and overseas companies.
- Only institutional investors, employees of participating companies and investors who can meet the definition of high net-worth individuals and self-certified or certified sophisticated investors under the Financial Promotion Order (FPO), will be able to buy shares on PISCES. This approach seeks to strike a balance between allowing a sufficiently wide pool of investors to participate and reap the benefits of PISCES, while recognising the risks involved in investing in private companies and the need for investor protections.
- In a change to the consultation the PISCES regime will not include a public market style market abuse regime (MAR) with the FCA being given rule-making powers to create a new and bespoke disclosure regime for PISCES. Feedback from the consultation was that companies would face disproportionate costs to comply with a public markets style market abuse regime.
- As MAR will not apply to PISCES, it is also intended that there will not be any transaction reporting requirements for PISCES.
- There will be a new FPO exemption to cover PISCES disclosures, based on the exemptions available for promotions included in mandated public market disclosures. This should mean that companies on PISCES can publish material for investors through a PISCES platform with the benefit of the FPO exemption.
- PISCES companies should be able to pre-approve who has access to their disclosures and whether they can purchase shares.
- PISCES operators will be able to decide whether or not shares must be recorded into a Central Securities Depository (CSD).

- Companies will not be able to carry out buybacks on PISCES. However, given the feedback, the government will explore whether to allow this or not at a later stage, following the initial launch of the PISCES sandbox.

## NEXT STEPS

Any comments on the [draft legislation](#) should be provided to HM Treasury by 9 January 2025. The FCA will consult shortly on the accompanying PISCES rules. The aim is for the government to deliver the legislation by May 2025.

## GUIDANCE ON FAILURE TO PREVENT FRAUD OFFENCE

The Economic Crime and Corporate Transparency Act introduced a new corporate criminal offence of failing to prevent fraud. Where an “associated person” of a company commits a qualifying fraud offence for the company’s benefit, the company may be criminally liable for having failed to prevent the fraud. Its only defence to the allegation is to show that it had implemented “reasonable procedures” to prevent fraud during the period when the substantive offence was committed.

The government has released its long awaited [guidance](#) on what amounts to “reasonable procedures”. The guidance provides an overview of the offence, illustrated by some theoretical examples and describes the general principles for organisations in developing or enhancing procedures to prevent fraud. When a court is considering a case, adherence to these principles will be taken into account.

The offence will come into force on 1 September 2025 giving companies 10 months to implement their compliance processes.

## TAKEOVER PANEL RESPONSE ON THE APPLICATION OF THE TAKEOVER CODE

The Takeover Code (“Code”) has published its [response](#) to its consultation on the application of the Code and is adopting the amendments previously proposed in [PCP 2024/1](#) subject to some modifications. The changes will take effect on 3 February 2025 and transitional arrangements will run for two years until 2 February 2027.

The Code has been amended to refocus its application on companies which are registered in the UK, the Channel Islands or the Isle of Man (“UK registered”) and either:

- any of the company’s securities are admitted to trading on a UK regulated market ie. the Main Market, a UK multilateral trading facility ie. AIM and Aquis Growth Market, or a stock exchange in the Channel Islands or the Isle of Man ie. TISE (“UK quoted”); or
- the company was UK quoted at any time during the two years prior to the relevant date.

Subject to transitional provisions, the Code will no longer apply to a public or private company which ceased to be UK quoted more than two years prior to the relevant date.

[See our insight >](#)

## PRE-EMPTION GROUP ANNUAL MONITORING REPORT 2023-2024

The Pre-Emption Group has published its [second report](#) monitoring the use of its 2022 Statement of Principles.

By way of background the 2022 Pre-Emption Group Statement of Principles permit companies to disapply the statutory pre-emption rights for up to 20% of their issued share capital in any one year - 10% of the issued share capital for any purpose and a further 10% for use only in connection with an acquisition or specified capital investment. In addition, there is the ability to seek an additional authority of no more than 2% for making a follow-on offer for each of these limbs.

The latest report finds continued widespread use of the 2022 Principles but acknowledges that the levels of shareholder dissent are elevated above that for other types of resolutions tabled at the AGM. The report also notes that whilst companies should generally engage with shareholders prior to their AGM companies, this is especially important if companies are proposing resolutions outside the bounds of the PEG Statement of Principles.

Key findings from the report covering AGMs from 1 August 2023 to 31 July 2024:

- 67.1% of FTSE 350 companies sought enhanced disapplication authority (ie. the request exceeds the authority in the 2015 Statement of Principles)
- 64.1% requested authority for a specified capital investment
- 99.4% had all disapplication resolutions passed, with an average of only 4.7% votes against

## FRC PUBLISHES ANNUAL REVIEW OF CORPORATE GOVERNANCE REPORTING

The Financial Reporting Council (“FRC”) has published its [annual review](#) which emphasises, amongst other things, the continued importance of the ‘comply or explain’ approach and notes that there is still room for improvement on the quality of explanations for departures.

As companies prepare for the transition to the 2024 UK Corporate Governance Code (“Code”), this year’s review paid particular attention to risk management and internal controls reporting including a year-on-year analysis of risk disclosure practices. Key messages from the review:

- Disclosure in governance reports around how boards are promoting the desired culture is generally very low and more thorough reporting and better signposting in the strategic report is



urged;

- When reporting on culture, the FRC would like to see more transparency on the board's actions during the year rather than disclosure of policies and practices. Similarly on shareholder engagement, explaining the outcome of engagement activities with shareholders adds meaning and purpose to reporting;
- Directors – companies are encouraged to disclose information about the time commitments of their directors;
- Positive progress has been made in reporting on objectives and targets on diversity and inclusion;
- Current Provision 29 of the Code asks boards to report on their review of the effectiveness of risk management and internal control systems. In revised Provision 29 of the 2024 Code, which applies for financial years beginning on or after 1 January 2026, boards will have to make a declaration regarding the effectiveness of material controls as at the balance sheet date and provide more information on how this effectiveness has been reviewed. Reporting on the review has been an area of focus and the FRC are disappointed that fewer than half of their sample companies reported appropriately on this area. Good disclosures provided a summary of how the board had monitored and reviewed the effectiveness of the framework. This could include the type of information the board has received and reviewed, who it consulted with, any internal or external assurance received and the standard or guideline the board used to review the effectiveness;
- Viability – there is significant scope for improvement in this area. By clearly outlining the rationale for the assessment period and providing longer-term information where possible, companies would offer valuable insights to investors;
- AI – boards should have a clear view of the responsible development and use of AI and the governance around it; and
- Remuneration – there should be clear and understandable disclosures on the rationale behind key decisions.

## **GLASS LEWIS 2025 UK BENCHMARK POLICY GUIDELINES**

Glass Lewis ("GL") has published the latest edition of its [Voting Policy Guidelines](#) which apply to shareholder meetings held after 1 January 2025. Changes to note:

### **DIRECTOR TENURE**

The UK Corporate Governance Code 2018 and 2024 states that the chair should not remain in post beyond nine years from the date of their first appointment to the board. GL has updated its position given the general market acceptance of a wide range of rationales when extending the tenure beyond nine years and will consider the rationale provided on a case by case basis. However, they may recommend against the chair of the nomination committee where the tenure of the chair of the board exceeds nine years and a defined succession plan and definitive timeline for retirement has not been disclosed, absent a compelling rationale for the extension of the term.

## GENDER DIVERSITY

Absent mitigating circumstances, the benchmark policy generally expects FTSE 350 boards to be composed of at least 33% of gender diverse directors\* and for the boards of all other main market companies outside the FTSE 350 to have at least two gender diverse directors. The boards of AIM companies should contain at least one gender diverse director. Where a proposed board does not align with these targets, GL will generally recommend against the re-election of the chair of the nomination committee.

## ETHNIC DIVERSITY

In line with the Parker Review targets, GL will generally recommend that shareholders vote against the re-election of the chair of the nomination committee at FTSE 100 and, from 2025, FTSE 250 boards that have failed to appoint one director of an ethnic minority group and failed to provide clear and compelling disclosure for why they have been unable to do so.

## AI

This is a new section recommending that all companies that develop or employ the use of AI in their operations should provide clear disclosure concerning the role of the board in overseeing issues related to AI, including how companies are ensuring directors are fully versed on this rapidly evolving and dynamic issue. Where there is evidence that insufficient oversight and/or management of AI technologies has resulted in material harm to shareholders, GL will review a company's overall governance practices. GL will identify which directors or board-level committees have been charged with oversight of AI-related risks and may recommend voting against the re-election of accountable directors, or other matters up for a shareholder vote if they find the board's oversight, response or disclosure is insufficient.

## HYBRID PLANS, DILUTION LIMITS, ANNUAL BONUS DEFERRAL AND RESTRICTED SHARE PLANS

The guidelines have been updated in line with the recent Investment Association Principles of Remuneration (see [our November briefing](#)).

\* Women, and directors that identify with a gender other than male or female.

## ISS – PROPOSED POLICY CHANGES FOR 2025

The ISS has published a consultation with [policy changes](#). Comments are requested by 2 December 2024 with the revised policy due to apply for shareholder meetings occurring on or after 1 February 2025.

### KEY UK PROPOSED POLICY CHANGES

- **Remuneration:** confirms the Investment Association's (IA) position that remuneration committees need to justify their salary decisions based on the talent markets they are recruiting from, and that salary increases should not be approved purely on the basis of benchmarking against peer companies. In respect of LTIPs, performance periods longer than three years are encouraged.
- **Remuneration:** to reflect the provisions in the 2024 UK Corporate Governance Code, the circumstances and period in which malus and clawback could be used, and details on whether such provisions were used in the reporting period, are expected to be disclosed in the annual report on remuneration.
- **Remuneration - dilution limits:** in line with the IA's Principles of Remuneration, the previous 5% dilution limit for the issue of new shares or the re-issue of treasury shares under executive (discretionary) schemes in any rolling 10-year period has been removed. The 10% cap for all company share schemes in any rolling 10-year period remains.
- **Remuneration for smaller companies:** a negative vote against the remuneration report should be considered where (i) significant salary increases have not been adequately explained; (ii) incentive awards made during the year are not conditional on the achievement of performance hurdles; (iii) newly appointed executive directors are not appointed under formal service contracts or service contracts provide for more than 12 months' notice in the event of termination; and (iv) guaranteed and/or transaction-related bonuses were made to members of the board without sufficient rationale. These changes reflect current and recommended market standards.
- **Board and ethnic diversity:** the amendments clarify that the FCA requirement is for companies to report against the targets, as opposed to actually meeting them although progress against the targets is expected. The ISS may consider recommending a vote against the chair of the nomination committee if companies have not made progress in meeting the disclosure requirements in the Listing Rules in respect of board and ethnic diversity, in the absence of a satisfactory rationale.
- **Remuneration at financial institutions:** reference to CRD V has been removed reflecting the position that since 1 October 2023 UK banks and investment firms are no longer subject to the variable-to-fixed remuneration cap.

## FRC CONSULTATION ON UK STEWARDSHIP CODE

The Financial Reporting Council (“FRC”) launched a [consultation](#) on proposed updates to the UK Stewardship Code (“Code”) which aims to enhance transparency, disclosure and accountability in investment stewardship. The proposed changes aim to support effective stewardship without imposing excessive reporting burdens.

Key proposals include amending the definition of stewardship to encourage clearer communication across the investment chain, streamlining the principles to focus on insightful reporting and tailoring the guidance for proxy advisors and investment consultants respectively.

The consultation will run until 19 February 2025 and the Code is expected to be published in the first half of 2025, with an effective date of 1 January 2026.

## UK GREEN TAXONOMY

HM Treasury is [consulting](#) on whether to establish a UK Taxonomy to complement existing policies in meeting the objectives of mitigating greenwashing and channelling capital in support of the government’s sustainability objectives. A taxonomy is a classification tool which provides its users with a common framework to define which economic activities support climate, environmental or wider sustainability objectives. In addition, the government is also seeking feedback on how to maximise the usability of a UK Taxonomy, should respondents support taking one forward. This includes considering key design features that will impact the overall usability of a UK Taxonomy. Responses to the consultation are requested by 6 February 2025.

## RELATED PRACTICE AREAS

- Corporate

## MEET THE TEAM



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