

Who is a PDMR under MAR? The FCA provides some insight

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On 12 December 2019, the UK Financial Conduct Authority (“FCA”) issued its **Final Notice** against Kevin Gorman, a senior employee of Braemar Shipping Services plc (“Braemar”), for failing to notify Braemar and the FCA of personal trades he made in his Braemar shares.

The decision is noteworthy as the first action brought by the FCA against an individual for failing to comply with the notification requirements under Article 19(1) of the **Market Abuse Regulation** (“MAR”) for transactions by a person discharging managerial responsibilities (a “PDMR”). It also provides some insight into how the FCA determines whether an individual should be considered a PDMR and therefore subject to the managers’ transaction regime under MAR.

Managers’ transactions

Under Article 19 of MAR, PDMRs, and persons closely associated (“PCAs”) with them, are required to notify the national competent authority (i.e., the FCA in the UK) and the issuer of which they are a PDMR or PCA of every transaction conducted on their own account in that issuer’s shares, debt instruments, derivatives or other linked financial instruments promptly and, in any event, no later than three business days after the transactions if the total amount of transactions per calendar year has reached €5,000.

Further, save for some specific exemptions, PDMRs are not permitted to trade in such securities during ‘closed periods’ of 30 calendar days before the announcement of an interim financial report or a year-end report (or a preliminary year-end report if the issuer publishes one).

It is incumbent on an issuer to identify its PDMRs and to notify each such person in writing of their responsibilities.

The definition of a PDMR in Article 3(1)(25) of MAR is a person who is:

- a member of the administrative, management or supervisory body of the issuer; or
- a senior executive who is not a member of those bodies, who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity.

In **paragraph 3.1.2AG** of the FCA’s Disclosure Guidance and Transparency Rules, the FCA provides guidance that a person may be a senior executive irrespective of the nature, or absence, of any contractual arrangements between the individual and the issuer, provided the individual meets the other aspects of the test with regard to access to inside information and the ability to take management decisions.

The test therefore requires an issuer to make certain judgements as to both how much inside information an individual receives and whether the nature of the managerial decisions that such individual makes are sufficiently material to affect the future course of the issuer.

FCA’s Final Notice against Kevin Gorman

The facts of the case of Kevin Gorman do not appear from the Final Notice to be particularly contentious. As Managing Director of Braemar’s Logistics Division, Braemar considered him to be a PDMR and had notified him of his position on 22 July 2016. The company had then followed its internal procedures,

which the FCA did not criticise in its decision, by providing Mr Gorman with the relevant policies and memorandums in relation to his responsibilities and obligations as a PDMR and asking him to confirm that he had read and understood the materials.

Although Mr Gorman made the requested confirmations, between 31 August 2016 and 24 January 2017 he made three separate disposals of shares without providing Braemar or the FCA with the relevant notifications required under MAR. He also failed to comply with Braemar's internal share dealing policy that required him to seek approval prior to dealing in the shares.

The aggregate consideration for the three disposals was £71,235.28. Mr Gorman was fined £45,000, which was reduced from £64,300 because of Mr Gorman's co-operation.

What made Mr Gorman a PDMR?

In the Final Notice the FCA confirmed that they agreed with Braemar's assessment that Mr Gorman was a PDMR. In doing so, the FCA has provided some insight into the sort of questions it would expect an issuer to consider when compiling a list of PDMRs.

Mr Gorman was not on Braemar's board, but was a member of its executive committee and head of its logistics division. As such, whether he was a PDMR turned on whether he was considered to be a senior executive.

Paragraph 4.4 of the Final Notice sets out the FCA's thinking, the two key points of which are that he:

- was on Braemar's executive committee, which comprised five members, all of whom reported to the CEO within the senior management group; and
- received group management accounts on a monthly basis and board-level, confidential information was discussed at the executive committee, which meant he had sufficiently regular access to inside information.

The Final Notice provides some meat to the bones of the definition of PDMR in MAR, but it nevertheless remains a subjective judgement for the issuer.

It is clearly a relevant factor that a person sits on an executive committee, and an issuer should ensure that it considers whether members of any such committee are PDMRs. In that analysis, it will be necessary to consider the committee's size and composition, the nature of the matters discussed and information shared at meetings, and the role played by that individual on the committee.

That is not to say, however, that it is a prerequisite that an individual needs to sit on an executive committee to be a PDMR. The question remains one of the substance of the person's role and the information such person receives. If an individual who does not sit on an executive committee nevertheless makes material managerial decisions and has access to unpublished financial data and board packs, it may be necessary to designate such person a PDMR.

Ongoing ESMA consultation on managers' transactions

Whilst not directly relevant to the question of establishing who is a PDMR, it is worth highlighting that the European Securities and Markets Authority ("ESMA") has recently **consulted** on amending various aspects of the managers' transactions regime, including:

- whether the 30-day closed period prior to the announcements of interim or final results should be amended; and
- whether the minimum €5,000 threshold before notification obligations by managers are triggered is appropriate and whether national competent authorities should retain the option to increase this to €20,000 within their jurisdiction.

The consultation closed on 29 November 2019 and ESMA intends to submit its final report to the European Commission by spring 2020.

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