Online Chapter
Insider Dealing and Market Abuse

Introduction

Chapters 18 and 19 discussed a range of rules designed to ensure that specified company information is disclosed in a timely and fair manner, so that investors (and other persons) can make informed decisions. It is also important that certain information is disclosed so that shares can be accurately priced. Certain persons will have access to information that could affect the share price if made public, and they may use this information to benefit themselves or others (e.g. by selling shares before information is published that causes the share price to drop). Certain persons may try to engage in certain activities designed to affect a company's share price (e.g. by disseminating false information regarding the company). Such acts adversely affect the confidence in and integrity of stock markets, and so rules exist that seek to prevent insider dealing and market abuse. These rules are the subject of this chapter, beginning with a discussion of the insider dealing as a criminal offence.

Insider dealing under the Criminal Justice Act 1993

The original rationale behind prohibiting insider dealing was set out by Lord Lane when he referred to 'the damage to public confidence which insider dealing is likely to cause and the clear intention to prevent so far as possible what amounts to cheating when those with inside knowledge use that knowledge to make a profit in their dealing with others.'[1] However, whilst there is broad agreement that insider dealing should be prohibited, there has been considerable debate on whether it should be criminalised.[2] In the UK, insider dealing is a criminal offence and was first criminalised by Part V of the Companies Act 1980 (notably ss. 68 and 69). In order to comply with EU rules designed to harmonise insider dealing laws,[3] the law relating to the offence of insider dealing was amended and placed in Part V of the Criminal Justice Act 1993 (CJA 1993), which is where it remains to this day.

Part V of the CJA 1993 imposes criminal liability only and so the first issue to discuss is the offence of insider dealing.

The offence of insider dealing

Section 52 of the CJA 1993 sets out 'the offence' of insider dealing, but there are actually three separate insider dealing offences, namely:

1. dealing in price-affected securities;
2. encouraging another person to deal in price-affected securities; and

[1] *Attorney General's Reference (No 1 of 1988)* [1989} AC 971 (HL) 981.
[2] On this, see Shirley Quo, 'The Moral Ambiguity of Insider Trading as a White-Collar Crime' (2017) 38 Co Law 203.
[3] Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing [1980] OJ L334/30.

3. disclosing inside information to another person.

The three offences are not mutually exclusive so a defendant can be charged with multiple offences, as the following example demonstrates.

Eg: Insider dealing offences

Ivan, a director of Dragon plc, is aware that the company is about to acquire an extremely lucrative contract, the result of which will be that the company's projected profits will increase substantially. The company is due to announce the acquisition of the contract in a week's time and it is likely that the announcement will cause the share price of Dragon plc to rise. Two days before the announcement, Ivan purchases 5,000 shares in Dragon and says to his wife that 'the company's share price is going to go up soon due to the acquisition of an unannounced lucrative contract. You should buy shares in the company.' His wife purchases 2,000 shares in the company. The company announces the acquisition of the contract and the company's share price goes up by 10 per cent. Ivan and his wife then sell the shares they acquired and make a significant profit.

Here, Ivan is likely to have committed all three insider dealing offences:
- by purchasing shares based on his inside information, he has committed the dealing offence;
- by telling his wife to buy shares, he has likely committed the encouraging to deal offence, and;
- by telling his wife of the acquisition of the contract, he has disclosed inside information.

Ivan's wife has also likely committed the dealing offence.

Before discussing the three insider dealing offences, two important points should be noted. First, Part V of the CJA 1993 only apply to certain types of security:
- Part V will apply to the types of security set out in Schedule 2 of the CJA 1993,[4] which includes shares, debt securities, warrants, options and futures.
- Part V will apply to any security that satisfies any conditions applying to it under an order made by the Treasury.[5] Only one such order has been passed to date, namely the Insider Dealing (Securities and Regulated Markets) Order 1994,[6] which sets out several conditions, including the security is officially listed in a state within the EEA or that it is admitted to dealing on, or has its price quoted on or under the rules of, a regulated market.[7]

Second, all three offences impose liability on 'an individual.' From this, it follows that only natural persons can be convicted of insider dealing and legal persons (such as companies or LLPs) cannot.

[4] CJA 1993, s 54(1)(a).
[5] ibid s 54(1)(b).
[6] SI 1997/187.
[7] Insider Dealing (Securities and Regulated Markets) Order 1994, SI 1994/187, art 4.

The three insider dealing offences will now be discussed.

Dealing in price-affected securities

The first offence is found in s. 52(1) which states that an individual who has information as an insider is guilty of insider dealing if he deals in securities that are price-affected securities in relation to the information. In order to find an individual guilty of this offence, a number of conditions must be satisfied. First, the individual must 'deal' in the securities in question and an individual 'deals' in securities if:

- he acquires the securities (whether as principal or agent);[8]
- he disposes of the securities (whether as principal or agent);[9] or
- he procures, directly or indirectly, an acquisition or disposal of the securities by another person.[10]

Second, the acquisition or disposal in question must have occurred on a regulated market, or the individual dealing must have relied on a professional intermediary or is himself a professional intermediary.[11] Schedule 1 of the Insider Dealing (Securities and Regulated Markets) Order 1994 provides a list of regulated markets that includes the London Stock Exchange and NASDAQ. A 'professional intermediary' is a person who carries on a business that acquires or disposes of securities or acts as an intermediary between persons taking part in any dealing in securities.[12]

Third, the securities that are dealt in must be 'price affected' in relation to the inside information. This means that the information would, if made public, be likely to have a significant effect on the price of the securities.[13]

Fourth, the individual must have had the information as an insider. This is discussed in more detail below at p. 4.

Encouraging to deal

The second offence is found in s. 52(2)(a) which states that an individual who has information as an insider is guilty of insider dealing if he encourages another person to deal in price-affected securities. The use of the word 'person' means that the person who is encouraged to deal can be a natural or legal person.

[8] CJA 1993, s 55(1)(a). This includes agreeing to acquire the security and entering into a contract which creates the security (s 55(2)).
[9] ibid s 55(1)(a). This includes agreeing to dispose of the security and bringing to an end a contract which creates the security (s 55(3)).
[10] ibid s 55(1)(b).
[11] ibid s 52(1) and (3).
[12] ibid s 59(1)(a) and (2). A person who is employed by someone who undertakes these activities will also constitute a professional intermediary (s 59(1)(b)).
[13] ibid s 56(2).

As with the s. 52(1) offence, an individual will only be guilty of the s. 52(2)(a) offence if the acquisition or disposal in question occurred on a regulated market, or that the individual dealing relied on a professional intermediary or is himself a professional intermediary.[14]

Disclosing inside information

The third offence is found in s. 52(2)(b) which states that an individual who has information as an insider is guilty of insider dealing if he discloses that information to another person, otherwise than in the proper performance of the functions of his employment, office or profession. The use of the word ‘person’ means that the person to whom the information is disclosed can be a natural or legal person.

Information as an insider

It will be noted that, in all three offences, a conviction can only be obtained if the defendant had ‘information as an insider.’ Section 57(1) provides that a person has information as an insider if and only if:

- it is, and he knows that it is, inside information; and
- he has it, and knows that he has it, from an inside source.

As the defendant is required to know that the information is inside information and that it comes from an inside source, the requirement that the defendant has information as an insider effectively forms the *mens rea* requirement of the insider dealing offences.

We will now consider what ‘inside information’ is and what an ‘inside source’ is.

Inside information

Inside information is information which:

- relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally;
- is specific or precise;
- has not been made public; and
- if it were made public would be likely to have a significant effect on the price of any securities.[15]

If the information has been made public, it will not be inside information. Section 58 provides non-exhaustive rules[16] to help determine whether information has been made public or not. Information will be made public if:

- it is published in accordance with the rules of a regulated market for the purpose of informing investors and their professional advisers;

[14] ibid s 52(2)(a) and (3).
[15] ibid s 56(1).
[16] CJA 1993, s 58(1) provides that s 58 does not provide an exhaustive account of what ‘made public’ means.

- it is contained in records which by virtue of any enactment are open to inspection by the public;
- it can be readily acquired by those likely to deal in any securities to which the information relates, or of an issuer to which the information relates; or
- it is derived from information which has been made public.[17]

Information may be treated as made public even though:
- it can be acquired only by persons exercising diligence or expertise;
- it is communicated to a section of the public and not to the public at large;
- it can be acquired only by observation;
- it is communicated only on payment of a fee; or
- it is published only outside the United Kingdom.[18]

Inside source

A person has inside information from an insider source if, and only if:
(a) he has it through (i) being a director, employee or shareholder of an issuer of securities, or; (ii) having access to the information by virtue of his employment, office or profession; or
(b) the direct or indirect source of the information is a person within (a).[19]

Defences

An individual who appears to have committed the offence of insider dealing may nevertheless avoid conviction if he can successfully raise a defence. Section 53 provides several defences, one of which is general and applies to all three insider dealing offences, with the others applying to specific offences only.

The general defence

An individual charged with any of the three insider dealing offences will not be guilty if he can show that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities.[20] Persons who engage in insider dealing may do so not to make a profit, but to avoid a loss (e.g. where they sell shares because they have inside information indicating the share price will soon fall). Accordingly, as regards this defence, references to the word 'profit' shall also include the avoidance of a loss.[21]

The specific defences

An individual is not guilty of the s. 52(1) dealing offence or the s. 52(2)(a) offence of encouraging others to deal if he can show that:

[17] CJA 1993, s 58(2).
[18] ibid s 58(3).
[19] ibid s 57(2).
[20] ibid s 53(1)(a), (2)(a), and (3)(b).
[21] ibid s 53(6).

- at the time he believed on reasonable grounds that the inside information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; or
- he would have dealt in the securities/encouraged another person to deal even if he had not had the inside information.[22]

An individual is not guilty of the s. 52(2)(b) offence of disclosing inside information if he can show that he did not at the time expect any person to deal in securities as a result of the disclosure.[23]

Section 53(4) provides that several special defences found in Schedule 1 will have effect. These special defences provide that a person will not be guilty of the s. 52(1) dealing offence or the s. 52(2)(a) offence of encouraging others to deal if:

- he acted as a market maker;[24] or
- the information which he had as an insider was market information;[25] or
- he was acting in conformity with Article 5 of MAR or rules made under s. 137Q(1) of the FSMA 2000.[26]

Prosecution, penalties and remedies

The Secretary of State or the FCA are empowered to appoint investigators if there are circumstances suggesting that the offence of insider dealing may have been committed.[27] The CJA 1993 states that prosecutions for the offence of insider dealing can only be brought with the consent of the Secretary of State or the Director of Public Prosecutions (DPP).[28] However, the FCA is also empowered to commence a prosecution for insider dealing[29] and it does not need to obtain the consent of the Secretary of State or the DPP.[30]

Insider dealing is an either way offence, so an individual found guilty of the offence of insider dealing shall be liable:

- on summary conviction, to a fine not exceeding the statutory maximum and/or a term of imprisonment not exceeding six months; or
- on conviction on indictment, to a fine and/or a term of imprisonment not exceeding seven years.[31]

Part V of the CJA 1993 imposes criminal liability only and provides no civil remedies. Indeed, the 1993 Act states that '[n]o contract shall be void or unenforceable by reason only of

[22] ibid s 53(1)(b) and (c), and 53(2)(b) and (c).
[23] ibid s 53(3)(a).
[24] ibid Sch 1, para 1.
[25] ibid Sch 1, para 2.
[26] ibid Sch 1, para 5.
[27] FSMA 2000, s 168(2)(a) and (3).
[28] CJA 1993, s 61(2).
[29] FSMA 2000, s 402(1)(a).
[30] *R v Westminster Magistrates' Court* [2008] EWHC 3191 (Admin), [2009] 1 WLR 1905. Note that this case concerned the FSA, but the principle also applies to the FCA.
[31] CJA 1993, s 61(1).

section 52,'[32] although such a contract may be deemed unenforceable if the doctrine of *ex turpi causa* applies.[33] Even if the contract remains enforceable, this does not mean that a person who has engaged in insider dealing can keep their ill-gotten gains and escape civil liability:

- Where the defendant has benefitted from general criminal conduct, the Crown Court can make a confiscation order[34] requiring the defendant to pay an amount equal to the benefit obtained from that criminal conduct.[35]
- As insider dealing is also a form of market abuse, it can result in civil liability (discussed later in this chapter at p XXX).

The following example demonstrates how criminal and civil liability can be imposed for insider dealing.

Law in Action: The potential consequences of insider dealing

As a result of Operation Tabernula (the UK's largest investigation into insider dealing), the FCA commenced insider dealing proceedings against a number of individuals, one of whom was Martyn Dodgson. In May 2016, Dodgson was convicted of insider dealing and sentenced to 4.5 years in prison (the longest sentence for insider dealing handed down to date).[36] In May 2018, a confiscation order was made against Dodgson requiring him to pay just over £1 million within three months.[37] In November 2018, the FCA exercised its power to issue a prohibition order[38] which prohibits Dodgson from performing any function in relation to any regulated activity carried on by an authorized person or exempt person/firm.[39]

The Market Abuse Regulation

The rationale for prohibiting market abuse, and for harmonising market abuse rules across the EU, can be found in the Preamble of the 2014 Market Abuse Regulation, which states:

> '[t]here is a need to establish a more uniform and stronger framework in order to preserve market integrity, to avoid potential regulatory arbitrage, to ensure accountability in the event of attempted manipulation, and to provide more legal certainty and less regulatory complexity for market participants.'

The rules relating to market abuse derive from EU law. The first Market Abuse Directive was passed in 2003 and was implemented via Part VIII of the FSMA 2000. In particular, ss. 118-

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[32] ibid s 63(2).
[33] *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 308 (Ch).
[34] Proceeds of Crime Act 2002, s 6.
[35] ibid s 7.
[36] See https://www.fca.org.uk/news/press-releases/insider-dealers-sentenced-operation-tabernula-trial accessed 12 July 2019.
[37] See https://www.fca.org.uk/news/press-releases/fca-secures-confiscation-orders-totalling-1-69-million-against-convicted-insider-dealers accessed 12 July 2019.
[38] FSMA 2000, s 56.
[39] See https://www.fca.org.uk/publication/final-notices/martyn-dodgson-2018.pdf accessed 12 July 2019.

118C defined what forms of conduct amounted to market abuse. In 2014, the Market Abuse Regulation (MAR) was passed, which significantly amends the law relating to market abuse. Notably, as MAR is directly effective, it automatically forms part of UK domestic law and so it is now MAR itself which sets out what constitutes market abuse (as a result, ss. 118-118C of the FSMA 2000 have been repealed), with supplementary rules regarding enforcement being found in the FSMA 2000. As MAR is directly effective, it will no longer apply in the UK upon the UK leaving the EU (depending on the manner of the UK's exit). Parliament has passed secondary legislation that would effectively incorporate the relevant provisions of MAR into domestic law.[40]

The activities that constitute market abuse fall into two broad categories, namely (i) insider dealing, and; (ii) market manipulation. In addition, the rules relating to disclosure of inside information will be discussed.

Insider dealing

Article 14 provides that a person shall not:

- engage or attempt to engage in insider dealing;
- recommend that another person engage in insider dealing or induce another person to engage in insider dealing; or
- unlawfully disclose inside information.

It is clear that the three prohibited forms of insider dealing under MAR are extremely similar to the three insider dealing offences under the CJA 1993. As a result, a person found to have engaged in insider dealing under MAR may also have committed an insider dealing offence under the CJA 1993. One major difference between the regimes is that only an 'individual' (i.e. a natural person) can be convicted of an insider dealing offence, whereas Article 14 prohibits a 'person' (i.e. natural and legal persons) from engaging in insider dealing. Under MAR, liability can be imposed on both the company and any natural persons involved in the insider dealing. For example, where a legal person has engaged in the types of insider dealing covered by Article 8 of MAR,[41] then Article 8(5) provides that Article 8 'shall also apply, in accordance with national law, to the natural persons who participate in the decision to carry out the acquisition, disposal, cancellation or amendment of an order for the account of the legal person concerned.'

Each form of prohibited insider dealing will now be discussed.

Engaging in insider dealing

Article 8(1) of MAR provides that, for the purposes of MAR, insider dealing occurs where

> '[a] person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. The use of inside

[40] Market Abuse (Amendment) (EU Exit) Regulations 2019, SI 2019/310, Pt 6.

[41] Namely (i) engaging in insider dealing or; (ii) recommending that another person engage in insider dealing or inducing another person to engage in insider dealing.

information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing.'

A person can only be liable under Article 8(1) if they possess inside information, but Article 8(4) limits the scope of this by stating that Article 8 only applies to a person who possesses inside information as result of:

- being a member of the administrative, management or supervisory bodies of the issuer;
- having a holding in the capital of the issuer;
- having access to the information through the exercise of an employment, profession or duties; or
- being involved in criminal activities.

Recommending or inducing insider dealing

Article 8(2) provides that, for the purposes of MAR, recommending that another person engage in insider dealing, or inducing another person to engage in insider dealing, arises where the person possesses inside information and:

(a) recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or induces that person to make such an acquisition or disposal; or
(b) recommends, on the basis of that information, that another person cancel or amend an order concerning a financial instrument to which that information relates, or induces that person to make such a cancellation or amendment.

However, liability will only be imposed where the person using the recommendation or inducement knows or ought to know that it is based upon inside information.[42]

A person can only be liable under Article 8(2) if they possess inside information, but Article 8(4) limits the scope of this by stating that Article 8 only applies to a person who possesses inside information as result of:

- being a member of the administrative, management or supervisory bodies of the issuer;
- having a holding in the capital of the issuer;
- having access to the information through the exercise of an employment, profession or duties; or
- being involved in criminal activities.

Unlawful disclosure of inside information

Article 10 provides that, for the purposes of MAR, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

[42] MAR, Art 8(3).

A person can only be liable under Article 10 if they possess inside information, but Article 10 only applies to a person who possesses inside information as result of:

- being a member of the administrative, management or supervisory bodies of the issuer;
- having a holding in the capital of the issuer;
- having access to the information through the exercise of an employment, profession or duties; or
- being involved in criminal activities.[43]

Inside information

All three forms of insider dealing under MAR impose liability on persons who 'possess inside information.' It is therefore important to know what 'inside information' is. Article 7(1) defines what inside information is, with the key section being Art 7(1)(a) which states inside information is:

> 'information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.'

This definition is clearly very similar to the definition of inside information set out in s. 56 of the CJA 1993.

Legitimate behaviour

Article 9 provides that certain types of activity that would normally constitute insider dealing under Articles 8 and 14, will not result in liability as they are deemed to be forms of 'legitimate behaviour.' For example, Article 9(1) provides that a legal person who has engaged in insider dealing will not be liable where it:

- has established, implemented and maintained adequate and effective internal arrangements and procedures that effectively ensure that neither the natural person who made the decision on its behalf to acquire or dispose of financial instruments to which the information relates, nor another natural person who may have had an influence on that decision, was in possession of the inside information; and
- has not encouraged, made a recommendation to, induced or otherwise influenced the natural person who, on behalf of the legal person, acquired or disposed of financial instruments to which the information relates.

Market manipulation

Article 15 states that a person shall not engage in, or attempt to engage in, market manipulation. What amounts to market manipulation is set out in Art 12 and includes:

- entering into a transaction, placing an order to trade or any other behaviour which:

[43] ibid Arts 10(1) and 8(4).

(a) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument; or
(b) secures, or is likely to secure, the price of one or several financial instruments at an abnormal or artificial level;

- entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of one or several financial instruments, which employs a fictitious device or any other form of deception or contrivance;
- disseminating information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, or secures, or is likely to secure, the price of one or several financial instruments at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading;
- conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument, which has, or is likely to have, the effect of fixing, directly or indirectly, purchase or sale prices or creates, or is likely to create, other unfair trading conditions;
- the buying or selling of financial instruments, at the opening or closing of the market, which has or is likely to have the effect of misleading investors acting on the basis of the prices displayed, including the opening or closing prices.

Article 13(1) goes on to state that the Article 15 prohibition will not apply where the person does so in order to confirm to an accepted market practice. Competent authorities are empowered to establish what an 'accepted market practice' is, but the FCA has not done so to date.[44]

Public disclosure of inside information

Article 17(1) provides that an issuer shall inform the public as soon as possible of inside information which directly concerns that issuer. Detailed rules on how the information should be disclosed can be found in DTR 6.3.

Article 17 does not provide specific details on exactly when this information should be disclosed, but it does state that the relevant inside information should be made public 'in a manner which enables fast access and complete, correct and timely assessment of the information by the public …' However, Article 17(4) does allow an issuer to delay the publication of inside information if all of the following conditions are met:

- immediate disclosure would likely prejudice the legitimate interests of the issuer;
- delay of disclosure is not likely to mislead the public, and;
- the issuer is able to ensure the confidentiality of that information.[45]

[44] ibid Art 13(2).
[45] If the confidentiality of the information is no longer ensured, the issuer must disclose that information to the public as soon as possible (MAR, Art 17(7)).

In addition, the issuer must notify the FCA of the delay and shall provide the FCA with a written explanation of how the above three conditions were met.

The following case provides an example of a breach of Article 17.

Law in Action: Teejori Ltd[46]

Teejori Ltd ('Teejori') was an investment company that held a $3.35 million shareholding in BEKON Holding AG ('BEKON'). BEKON's shareholders had entered into a shareholders' agreement which provided that BEKON's majority shareholders could require the other shareholders to sell their shares in the event of a takeover. As part of a takeover of BEKON, the majority shareholders exercised this right and required BEKON to sell its shares under a share purchase agreement. This agreement provided that Teeejori would not receive any initial consideration for the shares, but may possible receive consideration later, which would nevertheless be considerably less than the shares' worth.

The takeover of BEKON was announced, but Teejori did not announce that it had not acquired any consideration for the sale of the shares until several days later. In the intervening period, Teejori's share price rose due to the perceived impression that Teejori would have received significant consideration for its sale of the shares.

The FCA concluded that Teejori's failure to announce to the market that it had received no consideration for the shares amounted to a breach of Art 17 that 'created a false market in Teejori's shares' and that '[i]nvestors who traded in Teejori's shares during that time would have done so on the basis of materially incomplete information, which prevented them from making fully informed investment decisions.' Accordingly, the FCA imposed a financial penalty of £70,000 upon Teejori Ltd (reduced from £100,000 due to Teejori's cooperation in reaching a settlement with the FCA).

Insider lists

Article 18(1) requires issuers to draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies. This insider list must include at least the following information:

- the identity of any person having access to inside information;
- the reason for including that person on the insider list;
- the date and time at which that person obtained access to inside information; and
- the date on which the insider list was drawn up.[47]

[46] Full details of this case can be found in the FCA's Final Notice at https://www.fca.org.uk/publication/final-notices/tejoori-limited-2017.pdf.
[47] MAR, Art 18(3).

An issuer must update their insider list promptly in the event of certain circumstances set out in Article 18(4), such as where a new person is added to the insider list. Issuers must retain their insider list for a period of at least five years after it is drawn up or updated.[48]

Manager's transactions

Article 19(1) provides that persons discharging managerial responsibilities[49] (PDMRs), as well as persons associated with them,[50] must notify the issuer and the FCA of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or to related derivatives and other financial instruments. This notification must be made promptly and no later than three business days after the transaction.

Enforcement

Article 22 provides that each EU Member State must designate a 'single administrative competent authority' for the purposes of MAR, and this competent authority 'shall ensure that the provisions of [MAR] are applied on its territory, regarding all actions carried out on its territory …' In the UK, the competent authority responsible for enforcing MAR is the FCA.[51]

Article 23 of MAR lists a range of powers that should be granted to competent authorities. Accordingly, the FSMA 2000 provides the FCA with a range of enforcement powers, including:

- a general power to require information[52] and a specific power to require information from issuers;[53]
- the ability to enter premises under a warrant,[54] and retain any documents taken;[55]
- the power to require the publication of corrective statements;[56]
- the power to suspend trading in financial instruments.[57]

In addition, the FCA may appoint investigators to conduct an investigation where there are circumstances suggesting that a contravention of Arts 14 or 15 of MAR may have occurred.[58]

Sanctions, injunctions and restitution orders

[48] ibid Art 18(5).
[49] Article 3(1)(25) defines a PDMR as a person within an issuer who is (a) a member of the administrative, management or supervisory body of that entity, or; (b) a person who does not fall within (a), but who has regular access to inside information relating directly or indirectly to that issuer and the power to take managerial decisions affecting the future developments and business property of that entity.
[50] This is defined in Art 3(1)(26) and includes a spouse, partner, child, and certain relatives.
[51] Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016, SI 2016/680, reg 3.
[52] FSMA 2000, s 122B.
[53] ibid s 122A.
[54] ibid s 122D.
[55] ibid s 122E.
[56] ibid ss 122G, 122H, and 122HA.
[57] ibid s 122I.
[58] ibid s 168.

A contravention of MAR results in civil liability only (although, as discussed on page 15 of this chapter, the Financial Services Act 2012 imposes criminal liability for a number of forms of market abuse). Where a person has engaged in prohibited market abuse, the FCA has a range of sanctions and remedies available.

Administrative sanctions

The FSMA 2000 empowers the FCA to impose one or more of the following sanctions[59] upon a person who has contravened MAR, including:

- imposing a penalty of such amount as the FCA considers appropriate[60] and or, instead of imposing a penalty, publishing a statement censuring that person;[61]
- temporarily or permanently prohibiting that person from holding specified positions (e.g. an office or position involving responsibility for taking decisions about the management of an investment firm);[62]
- temporarily prohibiting that person from acquiring or disposing of financial instruments;[63]
- suspending, for such period as the FCA considers appropriate (up to a maximum of 12 months), any permission which that person has to carry on a regulated activity;[64]
- imposing, for such period as the FCA considers appropriate (up to a maximum of 12 months), such limitations or other restrictions in relation to the carrying on of a regulated activity by the person as the FCA considers appropriate.[65]

Injunctions and restitution orders

The FCA may apply to the court for an order restraining the market abuse in question. If the court is satisfied that there is a reasonable likelihood that a person will contravene Articles 14 or 15 of MAR, or that a person has contravened Articles 14 or 15 and there is a reasonable likelihood that the contravention will continue or be repeated, then the court may make an order restraining the contravention.[66] The court can also make an order requiring a person to take specified steps to remedy the contravention,[67] or an order preventing the defendant from disposing of or dealing with specified assets.[68]

The FCA or the Secretary of State can apply to the court for a restitution order and the court can grant such an order if it satisfied that a person has contravened Articles 14 or 15 of MAR, and:

- that profits have accrued to him as a result or the contravention, or;

[59] Section 123C states that one or more of the sanctions may be imposed upon a person in relation to the same contravention.
[60] FSMA 2000, s 123(2).
[61] ibid s 123(3).
[62] ibid s 123A(2)(a).
[63] ibid s 123A(2)(b).
[64] ibid s 123B(2)(a) and (4).
[65] ibid s 123B(2)(b) and (4).
[66] ibid s 381(1).
[67] ibid s 381(2).
[68] ibid s 381(3) and (4).

- that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.[69]

A restitution order involves the court making an order requiring the defendant to pay the FCA such sum as appears to the court to be just.[70] The FCA must then pay this sum to persons to whom the profit should be attributable or who suffered the relevant loss.[71]

Offences relating to financial services

Under MAR, market manipulation imposes civil liability only. However, criminal liability can arise as a number of the types of market manipulation under MAR are also made into criminal offences by Pt 7 of the Financial Services Act 2012 (FSA 2012). In particular, ss. 89-91 of the FSA 2012 establish three criminal offences:

1. making a misleading statement;
2. making a misleading impression; and
3. making a misleading statement etc in relation to benchmarks.

Each offence will now be discussed.

Misleading statements

The first offence, which is found in s. 89, relates to misleading statements. Section 89(1) applies to a person (P) who:

(a) makes a statement which P knows to be false or misleading in a material respect, or;
(b) makes a statement which is false or misleading in a material respect, being reckless as to whether it is; or
(c) dishonestly conceals any material facts whether in connection with a statement made by P or otherwise.

Where P has engaged in one or more of these three types of conduct, then P will commit an offence if P makes the statement or conceals the facts with the intention of inducing, or is reckless as to whether making it or concealing them may induce, another person (whether or not the person to whom the statement is made):

- to enter into or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement; or
- to exercise, or refrain from exercising, any rights conferred by a relevant investment.[72]

Geographical scope

The s. 89 offence only applies where:

[69] ibid s 383(1) and (2).
[70] ibid s 383(4).
[71] ibid s 383(5) and (10).
[72] FSA 2012, s 89(2).

- the statement is made in or from, or the facts are concealed in or from, the United Kingdom or arrangements are made in or from the United Kingdom for the statement to be made or the facts to be concealed; or
- the person on whom the inducement is intended to or may have effect is in the United Kingdom; or
- the agreement is or would be entered into or the rights are or would be exercised in the United Kingdom.[73]

Defence

A person will not be convicted of the s. 89 offence if he can raise a defence. However, the only available defence applies solely to defendants who fall within s 89(1)(a), namely those who make a statement which they know to be false or misleading in a material respect. In such a case, it will be a defence for P to show that the statement was made in conformity with price stabilising rules, control of information rules, or the exemption for buy-back programmes and stabilisation found in Article 5 of MAR.[74]

Misleading impressions

The second offence is found in s. 90, which relates to misleading impressions. Section 90(1) provides that a person (P) who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in, or the price or value of, any relevant investments[75] commits an offence if P intends to create that impression, and:

- P intends, by creating the impression, to induce another person to acquire, dispose of, subscribe for or underwrite the investments or to refrain from doing so or to exercise or refrain from exercising any rights conferred by the investments;[76] or
- P knows that the impression is false or misleading or is reckless as to whether it is, and P intends by creating that impression in order to produce certain results specified in s 90(4) or is aware that creating the impression is likely to produce any of those results.[77] The s. 90(4) results are (i) the making of a gain for P or another or (ii) the causing of a loss to another person or the exposing of another person to the risk of loss.

Geographical scope

The s. 90 offence only applies if (i) the act was done, or the course of conduct engaged in, in the United Kingdom, or (ii) the false or misleading impression was done in the United Kingdom.[78]

[73] ibid s 89(4).
[74] ibid s 89(3).
[75] Section 93(5) states that what amounts to a 'relevant investment' will be set out in a Treasury order. Article 4 of the Financial Services Act 2012 (Misleading Statements and Impressions) Order 2013 (SI 2013/637) essentially states that a relevant investment will be defined as a 'controlled investment.' A list of controlled investments is found in Sch 1, Pt II of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529) and includes shares, debt securities, options and futures.
[76] FSA 2012, s 90(2).
[77] ibid s 90(3).
[78] ibid s 90(10).

Defences

A defendant charged with the s. 90 offence has access to a defence if he can show that:

- he reasonably believed that his conduct would not create an impression that was false or misleading;[79] or
- he acted or engaged in the conduct for the purpose of stabilising the price of investments and in conformity with price stabilisation rules; or
- he acted or engaged in the conduct in conformity with control of information rules; or
- he acted or engaged in the conduct in conformity with the exemption for buy-back programmes and stabilisation found in Article 5 of MAR.

Misleading statements etc in relation to benchmarks

The third offence (which is actually two separate offences) is found in s. 91 and relates to misleading statements etc. in relation to benchmarks. The first s. 91 offence (which is found in s. 91(1)) occurs where a person (A) makes to another person (B) a false or misleading statement commits, and three conditions are satisfied, namely:

(a) A makes the statement in the course of arrangements for the setting of a relevant benchmark;
(b) A intends that the statement should be used by B for the purpose of the setting of a relevant benchmark, and;
(c) A knows that the statement is false or misleading or is reckless as to whether it is.

The second s. 91 offence (which is found in s. 91(2)) occurs where a person (C) does any act or engages in any course of conduct which creates a false or misleading impression as to the price or value of any investment or as to the interest rate appropriate to any transaction, and four conditions are satisfied, namely:

(a) C intends to create the impression;
(b) the impression may affect the setting of a relevant benchmark;
(c) C knows that the impression is false or misleading or is reckless as to whether it is, and;
(d) C knows that the impression may affect the setting of a relevant benchmark.

Geographical scope

The s. 91(1) offence will only be committed if the statement was made in the United Kingdom or to a person in the United Kingdom.[80]

The s. 91(2) offence only apply if (i) the act was done, or the course of conduct engaged in, in the United Kingdom, or (ii) the false or misleading impression was created in the United Kingdom.[81]

[79] This defence only applies where the defendant has engaged in the conduct specified in s 90(2).
[80] FSA 2012, s 91(5).
[81] ibid s 91(6).

Defences

A person changed with the s. 91(1) offence can raise a defence if he can show that the statement was made in conformity with control of information rules or the relevant provisions of Article 5 of MAR.[82]

A person changed with the s. 91(2) offence can raise a defence if he can show that:

- he acted or engaged in the conduct for the purpose of stabilising the price of investments and in conformity with price stabilisation rules; or
- he acted or engaged in the conduct in conformity with control of information rules; or
- he acted or engaged in the conduct in conformity with the exemption for buy-back programmes and stabilisation found in Article 5 of MAR.[83]

Penalties and sanctions

The offences in ss. 89-91 are either way offences and a person who is guilty is liable:

- on summary conviction, to a fine and/or imprisonment for a term not exceeding twelve months;[84] or
- on conviction on indictment, to a fine and/or imprisonment for a term not exceeding seven years.[85]

Injunctions and restitution orders

The offences under ss. 89-91 of the FSA 2012 constitute a 'relevant requirement' under the FSMA 2000,[86] thereby allowing the FCA or the Secretary of State to take action in relation to those offences. First, the FCA or the Secretary of State can apply to the court for an injunction. If the court is satisfied that there is a reasonable likelihood that a person will contravene a relevant requirement, or that a person has contravened a relevant requirement and there is a reasonable likelihood that the contravention will continue or be repeated, then the court may make an order restraining the contravention.[87] The court can also make an order requiring a person to take specified steps to remedy the contravention,[88] or an order preventing the defendant from disposing of or dealing with specified assets.[89]

Second, the FCA or the Secretary of State can apply to the court for a restitution order and the court can grant such an order if it satisfied that a person has contravened a relevant requirement and been knowingly concerned in such a contravention, and:

[82] ibid s 91(3).
[83] ibid s 91(4).
[84] Note that, in Northern Ireland, this term is six months (s 92(2)(c)).
[85] FSA 2012, s 92(1).
[86] FSMA 2000, ss 380(6)(a) and 382(9)(a).
[87] ibid s 380(1).
[88] ibid s 380(2).
[89] ibid s 380(3).

- that profits have accrued to him as a result or the contravention; or
- that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.[90]

A restitution order involves the court making an order requiring the defendant to pay the FCA such sum as appears to the court to be just.[91] The FCA must then pay this sum to persons to whom the profit should be attributable or who suffered the relevant loss.[92]

Chapter Summary

- The criminal offence of insider dealing is found in Part V of the Criminal Justice Act 1993.
- The three insider dealing offences are:
    1. dealing in price-affected securities (s. 52(1));
    2. encouraging another person to deal in price-affected securities (s. 52(2)(a)); and
    3. disclosing inside information to another person (s. 52(2)(b)).
- A conviction for insider dealing requires the defendant to have information as an insider. A person will have information as an insider if (i) it is, and he knows that it is, insider information, and; (ii) he has it, and he knows that he has it, from an inside source.
- The CJA 1993 provides a general defence and several specific defences to insider dealing.
- Insider dealing in an either way offence.
- The rules relating to market abuse are found in the Market Abuse Regulation and the Financial Services and Markets Act 2000.
- There are two types of market abuse, namely (i) insider dealing, and; (ii) market manipulation.
- Article 14 provides that a person shall not:
    (a) engage or attempt to engage in insider dealing;
    (b) recommend that another person engage in insider dealing or induce another person to engage in insider dealing, or;
    (c) unlawfully disclose inside information.
- Article 15 states that a person shall not engage in market manipulation, with Article 12 setting out which types of activity amount to market manipulation.
- Article 17(1) provides that an issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.
- The FCA is responsible for enforcing MAR and may impose a range of sanctions upon those who engage in market abuse.
- Part 7 of the Financial Services Act 2012 provide that certain types of market manipulation constitute criminal offences.
- The three offences are:
    1. making a misleading statement (s. 89);

[90] ibid s 382(1).
[91] ibid s 382(2).
[92] ibid s 382(3) and (8).

2. making a misleading impression (s. 90); and
3. making a misleading statement etc. in relation to benchmarks (s. 91).

- The offences in ss. 89-91 are either way offences.

Further reading

Jack Davies, 'From Gentlemanly Expectations to Regulatory Principles: A History of Insider Dealing in the UK' (2015) 36 Co Law 132 and 163.

- Provides a detailed account of the evolution of insider dealing rules since 1945.

Shirley Quo, 'The Moral Ambiguity of Insider Trading as a White-Collar Crime' (2017) 38 Co Law 203.

- Discusses whether insider dealing is morally wrongful or not.

Victoria Callaghan and Zia Ullah, 'The LIBOR Scandal – the UK's Legislative Response' (2013) 28 JIBLR 160.

- Discusses the offences found in ss 89-91 of the Financial Services Act 2012.

https://www.fca.org.uk/markets/market-abuse

- The FCA webpage providing guidance on market abuse.

https://www.fca.org.uk/markets/market-abuse/regulation

- The FCA webpage providing guidance on the Market Abuse Regulation.