**Market abuse and insider dealing**

This element outlines the civil and criminal regimes in respect of insider trading, encouraging others to engage in insider trading and disclosing inside information inappropriately.

**Introduction**

The Criminal Justice Act 1993 (‘CJA’) contains strict prohibitions on three kinds of behaviour by a person who has information as an insider:

* Engaging in insider dealing;
* Encouraging another person to engage in insider dealing; and
* Disclosing the information inappropriately.

FSMA 2000 introduced a new civil offence of market abuse to sit alongside this criminal regime. The civil market abuse regime now sits in UK MAR (which replaces the intervening regime which was governed by the EU Market Abuse Directive (‘MAD’)). Many of the concepts which appeared in MAD were replicated in EU MAR (and, therefore, in UK MAR). As such, historic market abuse cases which occurred under the MAD regime provide useful guidance for our understanding of UK MAR. Both civil and criminal regimes are enforced by the FCA.

NB The language employed in each of the CJA and UK MAR regimes is similar **but not identical**. It is important to apply the correct definitions in each case.

**Criminal Justice Act 1993**

Insider dealing is a criminal offence under the CJA.

s. 52(1) “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.”

s. 52(2) “An individual who has information as an insider is also guilty of insider dealing if:

* (a) he encourages another person to deal in securities that are …. price-affected securities ….; or
* (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.”

A person may only have information as an insider for the purposes of this regime if (and only if):

* the information which the person has is (and the person knows that it is) inside information (as defined in s. 56(1) CJA); and
* the person has the information from an inside source (and they know that it is from an inside source) (as defined in s. 57(2) CJA).

As such, the CJA regime is subjective in nature.

**Elements of the CJA offences: an insider**

s. 52 CJA – the offences: an ‘insider’:

* deals
* encourages
* discloses

s. 57(1) CJA definition of “insider” (subjective test) has:

* inside information
* from an inside source

**Elements of the CJA offences: inside information from an inside source**

s. 56(1) CJA – definition of ‘inside information’:

* particular issuer/securities
* specific or precise
* not public
* ‘price sensitive information’ (see s. 56(2) CJA)

s. 57(2) CJA – definition of ‘inside source’:

* director, employee, shareholder
* employment, office, profession
* indirect source

**Elements of the CJA offences: “made public”, defences and penalties**

s. 58 CJA – how information is ‘made public’:

* announcement to RIS
* public records

s. 53 CJA – defences (depending on offence):

* did not expect to benefit
* believed information widely disclosed
* would have done it anyway
* did not expect dealing to occur
* special defences

s. 61 CJA – penalties

* fine and/or
* imprisonment (up to 10 years)

**Limitations on territorial scope – s. 62 CJA**

S. 62(1) CJA provides that a person is not guilty of the dealing offence unless:

* a) they were within the UK at the time of the alleged dealing;
* b) the market is a UK regulated market (including the Main Market of the London Stock Exchange and AIM); or
* c) the professional intermediary was within the UK at the time they are alleged to have committed the offence.

S. 62(2) CJA also provides that a person is not guilty of the encouraging or disclosing offences unless:

* a) they were within the UK at the time when they are alleged to have disclosed the information or encouraged the dealing; or
* b) the recipient of the information or encouragement was within the UK when they received that information or encouragement.

**Further limitations on the scope of the CJA offence**

The offence can only be committed by an individual (see s.52(1) CJA), not a company or any other kind of legal person (this contrasts with the civil market abuse offences).

As the offences are criminal offences, the standard of proof required to establish guilt is “beyond reasonable doubt”. The narrow scope of the offence means that it has been difficult to secure convictions under these provisions and this is part of the reason why the market abuse offences were introduced.

**Summary of insider dealing offences under CJA 93**

* A real person who has information as an insider
* (i.e. they have inside information from an inside source)
* engages in prohibited behaviour (deals, encourages, discloses)
* without the benefit of a defence

**The MAR prohibitions**

Art. 14 UK MAR prohibits a person from:

* (a) engaging or attempting to engage in insider dealing\*;
* (b) recommending or inducing another person to engage in insider dealing\*; or
* (c) unlawfully disclosing inside information.

\* NB: This is the civil offence of insider dealing: take care not to confuse it with the criminal offence of insider dealing under s.52 CJA.

MAR distinguishes between “legal persons” (i.e. companies, LLPs etc) and “natural persons” (i.e. human beings). You will see these distinct concepts being used throughout the explanation of UK MAR.

**UK MAR: inside information (Art. 7)**

In order to commit the offence of insider dealing, recommending insider dealing or unlawful disclosure, the relevant person must be in possession of inside information. The market abuse regime employs the definition of inside information set out in Art. 7 UK MAR (see element entitled Introduction to disclosure by listed companies).

**UK MAR: inside dealing (Arts. 8(1) and 14(a) UK MAR)**

Insider dealing arises when a person who possesses inside information “uses” that information by acquiring or disposing of (for their own account or for the account of a third party, directly or indirectly) financial instruments to which the inside information relates.

There is a rebuttable presumption that a person who possesses inside information and goes on to acquire or dispose of qualifying financial instruments has “used” that information in making the acquisition/disposal (Recital 24 UK MAR).

**UK MAR: recommending or inducing offence (Arts. 8(2) and 14(b) UK MAR)**

The recommending or inducing offence occurs where a person who possesses inside information recommends or induces, on the basis of inside information, another person (“A”) to acquire or dispose of financial instruments to which the inside information relates (Art. 8(2) UK MAR).

If A actually uses this recommendation or inducement, A’s behaviour also constitutes insider dealing provided A knows (or ought to know) that the recommendation or inducement is based upon inside information (Art. 8(3) UK MAR).

**UK MAR: possessing inside information (Art. 8(4) UK MAR)**

Pursuant to Art. 8(4) UK MAR, a person is deemed to possess inside information for the purposes of Art. 8 UK MAR if they possess inside information as a result of:

• being a director of the issuer (i.e. of the relevant financial instruments);

• having a holding in the capital of the issuer;

• having access to the information through the exercise of their employment, profession or duties; or

• being involved in criminal activities,

or where the person possesses inside information in any other circumstances and knows or ought to know that the information is inside information.

**MAR: ‘legitimate behaviour’ safe harbours (Art. 9 UK MAR)**

Art. 9 UK MAR sets out a number of ‘legitimate behaviour’ safe harbours in the context of the insider dealing offences under MAR. If a person who is in possession of inside information can demonstrate that they fall within one of these categories of legitimate behaviour, they will not automatically be deemed to have engaged in the insider dealing head of market abuse. As such, it will be for the FCA to prove that the person has, in fact, engaged in market abuse.

These include:

* Information barriers (Art. 9(1))
* Pre-existing commitment (Art. 9(3))
* Takeover transaction (Art. 9(4))
* Dealer’s own intentions (Art. 9(5))

**Pre-existing commitment (Art. 9(3) UK MAR)**

Where a person deals in financial instruments in order to discharge an obligation which has become due in good faith, and not to circumvent the prohibition against insider dealing, it will not be deemed from the mere fact that they are in possession of inside information that they have used that information and therefore engaged in insider dealing, provided that:

• the obligation results from an order placed or an agreement concluded before the person concerned possessed inside information; and/or

• the transaction is carried out to satisfy a legal or regulatory obligation that arose before the person concerned possessed inside information.

**Takeover transactions (Art. 9(4) UK MAR)**

Where a person has obtained inside information in the conduct of a public takeover or merger and uses the information solely for the purposes of proceeding with that takeover or merger, it will not be deemed from the mere fact that they are in possession of inside information that they have used the information and engaged in insider dealing provided that, at the point of approval of the takeover or merger by the shareholders of the target company, any inside information has been made public (or has otherwise ceased to constitute inside information). However, Art. 9(4)UK MAR does not apply to stake-building (defined as an acquisition of securities in a company which does not trigger a legal or regulatory obligation to make an announcement of a takeover bid in relation to that company – Art 3(1)(31) UK MAR).

**Dealer’s own intention (Art 9(5) UK MAR)**

The fact that a person uses their own knowledge of their intention to deal when they deal does not, of itself, constitute the use of inside information.

**Unlawful disclosure offences (Arts. 10 and 14(c) UK MAR)**

Unlawful disclosure 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, profession or duties.

Disclosing information as part of market soundings (see later in this element), is deemed to be disclosure in the normal exercise of a person’s employment, profession or duties, provided the disclosing market participant complies with the detailed requirements of Art. 11 UK MAR.

Under Art. 10(1) UK MAR, a person is deemed to possess inside information for the purposes of Art. 10 UK MAR if they possess inside information in the circumstances set out in Art. 8(4) UK MAR.

Where a person (“C”) has received a recommendation or inducement to deal for the purposes of Art. 8(2) UK MAR, C commits unlawful disclosure of inside information under Art. 10(2) UK MAR if they disclose the recommendation or inducement to someone else provided C knows or ought to know that it was based on inside information.

**Market manipulation (Arts. 12 and 15 UK MAR)**

Prohibitions

Art. 15 UK MAR states that a person shall not engage in or attempt to engage in market manipulation. Art. 12(1) UK MAR lists the behaviours which are deemed to constitute market manipulation. These include:

* undertaking transactions which give a misleading impression of the price or supply of financial instruments (Art. 12(1)(a) UK MAR); and
* disseminating information which is likely to secure the price of financial instruments at an abnormal or artificial level (Art. 12(1)(c) UK MAR).

Accepted market practices (Art. 13 UK MAR)

The market manipulation prohibition relating to misleading transactions pursuant to Art. 12(1)(a) UK MAR does not apply if the person transacting can establish that the transaction

* has been carried out for legitimate reasons; and
* conforms with accepted market practice, as established under Art. 13 UK MAR.

**FCA Market Conduct Sourcebook (MAR1 in the MAR sourcebook)**

The FCA Market Conduct Sourcebook is contained in Chapter 1 of the Market Conduct section of the FCA Handbook. It contains FCA non-statutory guidance on the market abuse regime.

**Enforcement and penalties under UK MAR**

The FCA’s powers to enforce all elements of UK MAR are set out in Part VIII FSMA. In particular, ss.122A to 122F FSMA contain the FCA’s powers to require issuers to provide it with information, together with various supplementary powers, and s. 122I FSMA sets out a power to suspend trading.

The FCA’s powers to impose sanctions for breaches of UK MAR are set out in Part VIII FSMA. Under s.123 FSMA, any person who has contravened Arts. 14 or 15 UK MAR, or contravened or been knowingly concerned in the contravention of any other provision of MAR or its supplementary legislation, may be fined (up to an unlimited amount) or censured by the FCA. Alternatively, in certain circumstances, the FCA may require an issuer to publish information, or may publish the information itself if the issuer fails to do so, under ss. 122G and 122H FSMA.

In addition, the FCA has the power, under s.384(2) FSMA, to make an order for restitution where a market abuse offence has been committed under Arts. 14 or 15 UK MAR and either profits have accrued to the perpetrator, or one or more persons have as a result suffered a loss or otherwise been adversely affected.

**Summary of market abuse regime under UK MAR**

* A person who possesses inside information
* engages in prohibited behaviour (deals, recommends, discloses)
* which is not legitimate behaviour (in relation to dealing or recommending)

**Fraud Act 2006**

The Fraud Act 2006 (‘FA’) includes the criminal offences of:

• dishonestly making a false representation (s.2(1) FA);

• dishonestly failing to disclose to another person information which he is under a legal duty to disclose (s.3 FA); and

• dishonestly abusing a position in which the occupier of the position is expected to safeguard, or not to act against, the financial interests of another person (including by omission) (s.4(1) FA).

Prosecutors could potentially seek to use this legislation in relation to insider dealing, alongside the insider dealing offences under the CJA and market abuse offences under UK MAR.

**Financial Services Act 2012**

Under Part 7 FS Act, it is a criminal offence for a person to make misleading statements (s.89 FS Act) or engage in market manipulation (s.90 FS Act). These offences are not mutually exclusive and a course of action could give rise to charges under both sections. The maximum prison sentence for an offence under Part 7 is 10 years.

**Summary**

* The criminal prohibition on insider dealing, encouraging others to engage in insider dealing and inappropriately disclosing inside information is set out in the CJA.
* The equivalent regime, which contains similar prohibitions, is set out in UK MAR.
* Safe harbours under UK MAR include:
  + Art. 9 UK MAR legitimate behaviours (in respect of the dealing offence); and
  + Art. 11 UK MAR market sounding (in respect of the disclosure offence).
* An additional civil offence involves market manipulation.
* The FCA has broad powers of enforcement in respect of both the criminal and civil regimes.
* Actions may be brought under the Fraud Act and/or the FS Act in the context of actions for market abuse or insider dealing.