Legal Aspects of Insider Dealing

Nita*

Abstract

Insider dealing or insider trading is the illegal buying or selling of securities on the basics of information that are unavailable to the public. Insider dealing involves the use of confidential information that would affect the price of the securities or stocks and shares that are being bought or sold. A person can only be an insider if he both know that information is inside information and he knows the information from an inside source. In UK, Criminal Justice Act 1993 provided only criminal penalty for insider dealing but later Financial Services and Markets Act 2000 introduced civil/administrative sanction for market abuse under which insider trading is included as one of the offences. Financial Services and Markets Act 2000 (FSMA) gives power to Financial Services Authority to undertake investigations and to impose unlimited fines for market abuse is expected to chasten the behavior of the insiders. In the United States insider trading or similar practices are regulated by the United States Securities and Exchange Commission (SEC). Those enactments of UK and US legislation on insider trading have been made to take account of the European Council Directives. The main aim of this paper is to analyze the major features of both the insider dealing legislation in UK and US under the EC Directives that seek to protect investors against insider dealing and market abuse in the financial markets.

Key Words: Insider, Inside Information, Prohibition of Insider trading in securities, Offences, Defences and Penalties of Insider Dealing.

Introduction

A very generalized attempt at defining the criminal offence of “insider dealing” would be along the following lines: a case of insider dealing in securities will usually involve the buying or selling of certain securities relating to a company by a person connected with that company who in doing so, is in possession of specific information which relates to those securities and is not generally known but which would be likely, if made public to have a significant effect on the market price of the securities. Insiders may generally include the company’s directors, shareholders and employees, and any other people who have access to relevant information about the company because of their office or professional status or if the direct or indirect source of his information is such a person. There are three criminal offences under the Act: dealing offence, encouraging offence and disclosing offence. And there are defences to these offences: general offences and special offences. Insider dealing as a crime can lead to imprisonment and/ or a fine. The enforcement is haphazard and it can be said in brief that most of the cases are being settled administratively out of court.

General Meaning of Insider Dealing

Insider dealing or insider trading is the illegal buying or selling of securities on the basics of information that are unavailable to the public. Insider dealing occurs when a person with information makes use of that information for his own gain or to enable another to gain.
According to Black Law Dictionary*, insider dealing is the use of material, nonpublic information in trading the shares of a company by a corporate insider or other person who owes a fiduciary duty to the company.

Insider dealing is used to describe the use (or, rather, the misuse) of confidential information by people who, as company officers or employees or as civil servants, avail themselves of knowledge which they acquire in the course of their work or by reason of their office to deal to their own profit in a company’s securities. Most people regard this practice as unfair in itself and damaging to the confidence of investors in the integrity of the share market.¹

A very generalized attempt at defining the criminal offence of insider dealing would be along the following lines: a case of insider dealing in securities will usually involve the buying or selling of certain securities relating to the company by a person connected with that company who, in doing so, is in possession of specific information which relates to those securities and is not generally known but which would be likely, if made public, to have a significant effect on the market price of the securities.²

Most of the insider dealing is based on corporate information, that is, information about a company’s finances or operations. So it may be defined that insider dealing or insider trading is the trading of a corporation’s stock or other access to non-public information about the company. Nobody can use that information for their own profit and without disclosing it to any other relevant parties; if not, it may be guilty of insider dealing.

**Definition of Insider**

To commit the offence of insider dealing, an individual must have information “as an insider”. A person will only be guilty of the primary or additional offences of insider dealing if he deals, encourages or discloses information when he has information as an insider. He will only have the information in this capacity if the information is, and he knows it is, inside information and he has it, and knows that he has it, from an inside source.³ A further limitation is that a person only has information from an inside source if:

(a) he has it through being a director, employee or shareholder of the company; or
(b) he has access to the information by virtue of his employment, office or profession; or
(c) the direct or indirect source of his information is such a person, that is to say he is a ‘tippee’.⁴

**Definition of Dealing**

Section 55 of the Criminal Justice Act 1993 defines what is meant by ‘dealing in securities’ for the purpose of the insider dealing provisions.

Only for the primary offence of insider dealing will it be necessary for the prosecution to show that such dealing took place, it being sufficient for the secondary offence of encouragement that an individual encouraged another person to deal knowing or having reasonable cause to believe that dealing, as defined by s 55, would take place. A person deals

---

³Section 57(1) of the Criminal Justice Act, 1993.
⁴*Ibid*, s 57(2).
in securities if he acquires or disposes of the securities (whether as principal or agent), or he
procures, directly or indirectly, an acquisition or disposal of the securities by any other person.\(^5\)
‘Acquire’ includes agreeing to acquire and entering into a contract which creates the security\(^6\)
and ‘dispose’ includes agreeing to dispose and bringing to an end a contract which creates the
security.\(^7\)

**Definition of Security**

For the purpose of the offences of insider dealing, ‘securities’ are those which are
contained in Schedule 2 and which also satisfy any order made by the Treasury. Schedule 2
includes a wide range of securities within the scope of the provisions, namely: shares and stock
of a company; debentures, and loan stock, bonds and certificates of deposit; warrants;
depository receipts; options to acquire or dispose of any security referred to in Schedule 2; a
contract for the acquisition of disposal of securities under which delivery is to be made at a
future debt and at a price agreed at the time the contract was made.\(^8\)

These conditions are basically to the effect that the securities falling with Schedule 2
must be officially listed in a State within the European Economic Area or that it is admitted to
dealing on, or has its price quoted on or under the rules of, a regulated market.\(^9\) The term
security embraces both the instruments commonly understood to be such, like stocks and
bonds, and a much broader class of interests called investment contracts. The Howey case that
follows defines the term.

In the case of Securities & Exchange Commission v. W.J. Howey Co.\(^{10}\) Howey owns
large tracts of citrus acreage in Florida. Each prospective customer is offered both a land sales
contract and a service contract. Purchases are narrow strips arranged so that an acre consists of
a row of 48 trees. These tracts are not separately fenced. The purchaser has no right of entry
and no right to specific fruit. The purchasers are nonresidents of Florida, predominantly
professional people who lack the knowledge and equipment necessary for the citrus business.
They are attracted by the expectation of substantial profits. It is admitted that the mails and
instrumentalities of interstate commerce are used in the sale of the land and service contracts
and that no registration statement has ever been filed with the Commission. The Securities Act
1933 of US defines “security” to include the commonly known instruments like stocks and
bonds. It also includes the term “investment contract”. These transactions clearly involve
investment contracts. Respondent’s failure to register the securities cannot be sanctioned under
the Act. Therefore, registration is the heart of the Securities Act 1933 (US).

**Historical Development of Laws Prohibiting Insider Dealing**

Insider dealing or insider trading was not considered illegal at the beginning of the
twentieth century. After the excesses of the 1920’s, the subsequent decade of depression, and
the resulting shift in public opinion, it was banned, with serious penalties being imposed on
those who engaged in the practice.

The prohibition of insider trading and the imposition of criminal penalties for insider
trading have a moral dimension. One of the key justifications for this response to insider

---

\(^6\) Ibid, s 55(2).
\(^7\) Ibid, s 55(3).
\(^8\) Schedule 2 of the Criminal Justice Act, 1993.
\(^10\) 328 US. 293 (1946).
trading is that it is “unfair” or even “immoral” for securities to be traded in a public market when one party has private information which, if it were publicly available, would or would be reasonably expected to affect the price of the securities and other parties in the market are ignorant of that information. Thus, insider trading, if unchecked, would lead to an erosion of confidence in the market and the exit of investors from the market with adverse consequences for the cost of capital.\textsuperscript{11}

Insider dealing can be illegal or legal depending on where the insider makes the trade: it is illegal where the material information is still non public-trading while having special knowledge is unfair to other investors who don’t have access to such knowledge. The more knowledge that investors have concerning the companies in which they intent to invest, the better their chances become of making profits. Disclosure of information is seen as being vital to the cause of investor protection, and thus to the maintenance of investor and market confidence.

Not all trading on information is illegal insider trading. For example, while dining at a restaurant, one hears the Chief Executive Officer of Company A at the next table telling the Chief Financial Officer that the company will be taken over, and then he buys the stock, he wouldn’t be guilty of insider trading unless there was some closer connection between them, the company, or the company officers.

In addition, some argue that this is a “victimless crime” in that it is not clear if there is actually a loser; others claim that the practice of insider trading increase the volume of sales on a market, so that overall the market gains.\textsuperscript{12}

It is not always easy to identify specific ‘victims’ in cases of insider dealing, particularly where shares are traded on an investment exchanges. Such transactions do not ordinarily take place between individual investors, and nobody is likely to be tricked into buying or selling shares which he or she would not otherwise have bought or sold to or from someone else. Investors deal with firms that are members of the exchange, and these firms also deal with each other.\textsuperscript{13}

Illegal insider dealing in the United States (U.S) requires the participation of a corporate insider or other person who is violating his fiduciary duty or misappropriating private information, and trading on it or secretly relaying it. In order to prosecute someone for insider dealing, they must prove that the defendant has a “fiduciary duty” to the company and intend to personally gain from buying or selling shares based upon the insider information. But directors are not the only ones who have the potential to be convicted of insider trading. Any person who gets inside information from any inside source and even family members can be guilty.

Until 1980, the restrictions on insider dealing in the United Kingdom were extremely limited. There was no statutory prohibition of the practice, nor did the common law make insider dealing actionable. Insider dealing first became a criminal offence in the UK upon the enactment of the Companies Act 1980, although these provisions were consolidated in the Company Securities (Insider Dealing) Act 1985 and the Financial Services Act 1986. The Criminal Justice Act 1993 repealed the latter Act and came into force on 1\textsuperscript{st} March 1994.\textsuperscript{14}

\textsuperscript{13}Stephen Griffin, Company Law, 3\textsuperscript{rd} Edition, Henry Ling Ltd, Great Britain, 2000, p. 179&180.
The law against insider trading has been strengthened further by Financial Services and
Markets Act 2000 (FSMA), which introduces a new offence of market abuse. The approach
adopted in the Criminal Justice Act follows that in the EC Insider Dealing Directive (IDD) in
that it treats insider dealing as an abuse of the market rather than as a breach of the insider's
fiduciary obligations to the company.\(^{15}\) In the leading case of Percival v. Wright\(^{16}\), the Court of
Chancery held that a corporate director owed a fiduciary duty only to the company and not to
its individual shareholders, and that therefore the director was ordinarily not obliged to disclose
information about the company to the shareholders before trading with them. Nevertheless, if a
director expressly or impliedly becomes an agent for one or more shareholders in a particular
transaction, the fiduciary duties arising out of the agency relationship may prevent him from
realizing a profit on the acquisition of securities to his own advantage.

Before the adoption of Securities Exchange Act of 1934, there was no codified rule in
the United States that regulated insider trading. Section 17 of the Securities Act of 1933
contained prohibitions of fraud in the sale of securities which were greatly strengthened by the
provisions relating to the protection of interest of investors against Insider Trading. More
recently, the U.S. has developed a number of supplementary statutory rules, such as The the
Securities Enforcement Remedies and Penny Stock Reform Act of 1990; Rule 14e-3 Tender
Offer Rule, Regulation FD, as well as the Sarbanes-Oxley Act of 2002.\(^{17}\)

Illegal insider dealing would occur if the officer of the company learned (prior to a
public announcement) that the company will be gone into liquidation, and sold shares knowing
that the shares would likely fall off. In the case of \(R v\) Reardon-Smith,\(^{18}\) Reardon-Smith was a
director of a company about to go into liquidation. Just before that stage, in May 1985,
Reardon-Smith sold shares in the company. He was guilty to insider dealing and was fined
£3,000.

One of the best known cases of insider dealing in the United Kingdom is \(R v\). Collier\(^{19}\). In this case, an adviser was a man called Geoffrey Collier who was then head
of securities at City of London finance house Morgan Grenfell which had been retained by a
client to advise on a takeover bid. When the bid was about to be launched, in the autumn of
1986, Mr Collier arranged the acquisition in London on his own behalf of shares of the target
company. He did so through a company registered in the Cayman Islands prior to the
announcement of the bid and was subsequently convicted on pleading guilty to insider dealing,
his prison sentence of twelve months being suspended for two years. He was fined £25,000,
ordered to pay £7,000 in costs and was subsequently also expelled from membership of the
Stock Exchange in London. Apparently, he only stood to profit in the amount of £15,000 as a
result of what he did.

And if the merchant banker in question had acquired some of those shares in advance
of the bid announcement, at the pre-bid price, he would be indulging in insider dealing if he
disposed of them following the announcement of the bid. A prosecution involving facts similar
to this may be found in the case of \(R v\). Titheridge & Titheridge\(^ {20}\). In this case, a company
called Joseph Stocks & Sons (Holdings) Limited was a takeover bid. Mrs Titheridge was

\(^{15}\) Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse, The British Institute of
International and Comparative Law, Charles Clore House, City Research Series, Number Eight 2005, p. 3.
\(^{16}\) [1902] 2 Ch 421.
\(^{18}\) (1985) 2WLC325.
\(^{19}\) [1967] 2 AC 134.
secretary to the chairman of the merchant bank which was advising the bidding company. She passed information to her husband who dealt in securities of Joseph Stocks in December 1980. Both Mr and Mrs Titheridge was guilty to insider dealing and were convicted. They were each order to pay a £4,000 fine.

Much of the development of insider trading law has results from court decision. In 1984, the Supreme Court of the United States ruled in the case of Dirks v. SEC\textsuperscript{21} that tippees (receivers of second-hand information) are liable if they had reason to believe that the tipper had breached a fiduciary duty in disclosing confidential information and the tipper received any personal benefit from the disclosure. In this case, the Court reversed a court of appeals decision that imposed liability on investment analyst Raymond Dirks, who was told by an employee of an insurance company that the insurer was being fraudulently managed. The employee hoped Dirks could help expose the fraud, which he did, but only after telling his clients to sell their holdings in the insurer. The Court held that Dirks could not be liable for insider trading because the information he received was not the result of a fiduciary breach and therefore, he had no duty to disclose it to the market.

In United States v. Carpenter\textsuperscript{22}, the journalist R. Foster Winans was also convicted, on the grounds that he had misappropriated information belonging to his employer, the Wall Street Journal. In this case, Foster Winans, a reporter for The Wall Street Journal, was one of the authors of the Journal's "Heard on the Street" column, a widely read commentary on the stock market. Winans told several acquaintances what companies would be profiled in upcoming columns and whether the coverage would be positive or negative. After these activities were discovered, the government charged that Winans' breach of his duty to his employer, the newspaper, was sufficient to satisfy the duty requirement of SEC Rule 10b-5. After the convictions of several members of the insider trading ring, the Second Circuit held that Winans' breach of the Journal's policy against using confidential information created a corollary duty to abstain from trading based on that information and affirmed the convictions. The Supreme Court granted certiorari in the case to determine the validity of the misappropriation theory, but was unable to come to a decision on those counts as it was split four to four. The Court did, however, affirm the convictions.

In 1997 the U.S. Supreme Court adopted the misappropriation theory\textsuperscript{*} of insider trading in United States v. O'Hagan\textsuperscript{23}. O'Hagan was a partner in a law firm representing Grand Met, while it was considering a tender offer for Pillsbury stock, resulting in profits of over $4million. When O'Hagan's trading was discovered, he was indicted on 57 counts of mail fraud, securities fraud and money laundering. He was convicted on all counts and sentenced to 41 months in prison. On appeal to the Eighth Circuit, O'Hagan argued that he could not be liable for insider trading because, quite simply, he was not a Pillsbury insider and owed no fiduciary duty to the company or its shareholders. The Eighth Circuit agreed with O'Hagan and reversed his convictions, rejecting the SEC's theory that O'Hagan was nonetheless liable for "misappropriating" the information entrusted to his law firm. The Eighth Circuit's decision exacerbated a split among the Circuits, with two (the Eighth and Fourth Circuits) invalidating the "misappropriation theory" of insider trading and three (the Second, Seventh and Ninth Circuits) embracing the doctrine. On June 25, 1997, by a six to three vote, the Supreme Court

\textsuperscript{21} 463 U.S. 646 (1983).
\textsuperscript{22} 484 U.S. 19 (1987).
\textsuperscript{*} A newer view of insider trading, the "misappropriation theory" is now part of US law. It states that anyone who misappropriate (steals) information from the employer and trades on that information in any stock (not just the employer's stock) is guilty of insider trading.
\textsuperscript{23} 521 U.S. 642,655(1997)
resolved the circuit split by upholding the misappropriation theory and reinstating O'Hagan's insider trading convictions.

Persons and Dealings to whom the Laws Apply

Having Information as an Insider

To commit the offence of insider dealing, an individual must have information “as an insider” which is defined in section 57 of the Criminal Justice Act 1933, as follows: A person has information as an insider if and only if -

(a) it is, and he knows that it is, inside information, and

(b) he has it, and knows that he has it, from an inside source.24

A person can only be an insider if he both knows that information is inside information and he knows the information from an inside source. It is not necessary to show that the insider is connected with the company that issued the securities. Insiders may generally include the company’s directors, shareholders and employees, and any other people who have access to relevant information about the company because of their office or professional status.25 The CJA 1993, section 57 created a distinction between a primary insider (a person who has direct knowledge of inside information) and a secondary insider (a person who learns inside information from an inside source). The primary insider usually obtains inside information through being a director, employee, or shareholder of an issuer of securities or any person who has information because of his employment or office. The secondary insider obtains inside information either directly or indirectly from a primary insider.

In the United States, corporate insiders are defined as a company’s officers, directors and any beneficial owners of more than ten percent of a class of the company’s equity securities.

Inside Information

“Inside information” means information which –

(a) 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;

(b) is specific or precise;

(c) has not been made public; and

(d) if it were made public would be likely to have a significant effect on the price of any securities.26

The Financial Services and Markets Act 2000 has adopted this meaning of the term “Inside Information”. The characteristics and elements of inside information are such that they should cover information that relates to a specific sector as well as to a specific security, while excluding general information. Under FSMA, general information has been defined as

24 Section 57(1) of the Criminal Justice Act, 1993.
25 Section 57(2) (i),(ii) of the Criminal Justice Act, 1993.
26 Ibid, s 56.
information which can be obtained by research or analysis conducted by or on behalf of users of a market.  

**Inside Source**

A person has information from an inside 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 his information is a person within paragraph (a).

Under the Criminal Justice Act, a person can only be an insider if he knows that the information is inside information and that it has come from an inside source. The UK law thus does not distinguish between primary and secondary insiders; both are subject to the ban on insider dealing, encouraging and disclosing. Shareholders are for the first time, regarded as an “inside source”.

**Making Public**

For purposes of defining inside information under section 56 another characteristic of it is that it has not been made public. Under section 58(2) & (3), inside information is made public or to be treated as made public in the following circumstances:

(a) if the information is published in accordance with the rules of a regulated market for the purpose of informing investors and their professional advisers;

(b) if the information is contained in records which, by virtue of any enactment are open to inspection by the public;

(c) if the information 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

(d) if the information is derived from information which has been made public.

In addition, the CJA 1993 provides five circumstances when information may be treated as having been made public, even though it has not. These are where information:

(a) can be acquired only by persons exercising diligence or expertise;

(b) is communicated to a section of the public and not to the public at large;

(c) can be acquired only by observation;

(d) is communicated only on payment of a fee; or

(e) is published only outside the United Kingdom.

---

28 Section 57(2) of the Criminal Justice Act, 1993.
29 *Ibid*, s 58(2).
30 Section 58(3) of the Criminal Justice Act, 1993.
Professional Intermediary

The insider dealing offence, only in so far as dealing and encouragement are concerned, could only be committed if the acquisition or disposal of securities occurs on a regulated market or if the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

The CJA 1993 defines professional intermediary as a person who carries on a business of acquiring or disposing of securities (whether as principal or agent); or a business of acting as an intermediary between persons taking part in any dealing in securities. An individual employed by such a person to carry out these activities is also defined as professional intermediaries. The definition of professional intermediary does not include a person whose activities are merely incidental to other activities or if those activities are only conducted occasionally.

Offences of Insider Dealing

Insider dealing was wrong and that statutory provisions would be introduced to make it, in certain circumstances, criminal offence. Dr. Janet Dine has calculated that Part V of the Criminal Justice Act 1993 in the UK requires 54 different elements to be proven in order for a conviction to be secured. The following are just some of those that relate to a conviction for actual dealing:

- The defendant bought (or sold) securities;
- The defendant was in possession of the relevant information;
- The information related to the securities which the defendant bought/sold;
- The information was capable of affecting the price of those securities;
- The information had not been made public.

Criminal Offence of Insider Dealing

There are three ways in which the offence of insider dealing can be committed under the CJA 1993. These are

(a) dealing in price-affected securities
(b) encouraging another person to deal in price-affected securities
(c) disclosing the information, otherwise than in the proper performance of the functions employment, officer or profession, to another person.

Dealing Offence

The first offence, the dealing offence, is aimed at those who deal in particular kinds of securities and in specified circumstances on the basis of inside information.

An individual is guilty of insider dealing if he has information as an insider and deals, in specified circumstances, in securities which are price-affected securities in relation to that information.

---

31 Ibid, s 59(2).
32 Ibid, s 59(3).
Encouraging Offence

The second offence, the encouraging offence, is committed by encouraging another to deal in particular kinds of securities and in specified circumstances.

An individual is guilty of insider dealing if he has information as an insider and encourages another person to deal in securities which are price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in specified circumstances.\(^{35}\)

Disclosing Offence

The third offence, the disclosing offence, is committed by disclosing the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

An individual is guilty of insider dealing if he has information as an insider and if he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.\(^{36}\)

The specified circumstances are that the dealing either occurs “on a regulated market” or that the person dealing relies on “a professional intermediary or is himself acting as a professional intermediary”.\(^{37}\)

Civil and Administrative Offences

Some EU Member States left it at that, notably most of the northern Member States: including the UK adopted criminal provisions for insider dealing, supplemented them with civil or administrative provisions. In some cases, these were in essence no more than an additional means of dealing with what were identical offences, but often there were important differences. The criminal offence of insider dealing was extremely restricted in its scope, but, in contrast, its civil counterpart was extremely wide-ranging. In time, however, there was an increasing recognition that the criminal justice system is ill-suited to deal with offences of insider dealing. Some took the view that insider dealing should not be a criminal offence at all, that it is something which, if it should be opposed at all, should be a regulatory matter for the markets: it should not attract the opprobrium of a criminal conviction. Others, although they took the view that insider dealing should be dealt with extremely seriously, to the extent of a criminal prosecution with accompanying penalties, felt that the criminal justice system simply did not work.\(^{38}\) There has been an increasing move, therefore, even the former “criminal only approach” states, to introduce a civil and/or administrative regime.\(^{39}\)

Although the measures are frequently referred to as civil, many of them are in fact more administrative in nature. For the most part, actions are brought not by alleged victims but by the financial services regulator. Indeed, it is very difficult to identify the victims of insider dealing (the offence of market manipulation, often grouped together with insider dealing, is of course a different matter). Just as it is the regulator that brings the action, the money that the

\(^{34}\) Section.52 (1) of the Criminal Justice Act, 1993.
\(^{35}\) Ibid, s.52 (2) (a).
\(^{36}\) Ibid, s 52 (2) (b).
\(^{37}\) Ibid, s.52 (3).
defendant, following a successful case, is compelled to pay tends to be in the form of a penalty rather than damages.  

The Financial Services and Markets Act 2000 introduced, for the first time, financial penalties (effectively civil or administrative fines) for market abuse, a new term itself created by the Act, although it has since been taken up by the European Commission in the creation of the new Market Abuse Directive. Part VIII of FSMA, as the Act soon became known, introduced a new offence of “market abuse”. Essentially, this consisted of two offences: insider dealing and market manipulation. Both of these had previously been criminal offences and they remained so: Part V of the Criminal Justice Act 1993 remained on the statute book, while the criminal offence of market manipulation was re-created in FSMA 2000. In contrast, market abuse was an explicitly civil/administrative concept. To emphasise the distinction, new terms were devised for the offences that it covered: “misuse of information”, “giving a false or misleading impression” (sometimes referred to as misleading statements and practices) and “distortion of the market”. FSMA 2000 protects against three forms of insider dealing: dealing by an insider, on the basis of inside information, relating to the investment in question insider dealing; improper disclosure by an insider otherwise than in the proper course of his or her duties and use by anyone information not generally available. However, it is confined to insider dealing and hence misuse of information: market manipulation, although linked to insider dealing, is not only a separate offence but a separate subject for study in its own right. 

The FSA is the UK’s single financial services regulator, established by the FSMA. The FSA to engage in a regulated activity, if a person commits an offence of market abuse, the FSA therefore has the power to deal with them. Although the criminal and civil/administrative offences overlap considerably, they are not identical.

**Defences to the Offences of Insider Dealing**

Various defences can be relied on a charge of insider dealing under the CJA 1993. There are general defences contained in section 53 and special defences in Schedule 1.

**General Defences**

Under section 53(1) & (2), it is a defence to a charge of either dealing or encouraging another to deal for the defendant to show that:

(a) 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; or

(b) at the time he believed on reasonable grounds that the 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

---

42 Section 118 B of the FSMA 2000.
43 *Ibid*, s 118 C.
44 L Sealy, Sarah Worthington, Cases and Materials in Company Law, p. 595.
(c) he would have done what he did even if he had not had the information.46

Under section 53(3), it is a defence to an allegation of disclosing inside information for the defendant to show that he did not expect:

(a) any person, because of the disclosure, to deal in securities; or
(b) the dealing to result in a profit attributable to the fact that the information was price-sensitive information in relation to the securities.47

Special Defences

The special defences in schedule 1 only apply to the dealing and encouragement offences. It is a defence that an individual acted in accordance with price-stabilization rules; that market-makers and their employees have acted in good faith; or where the individual is in possession of market information it was reasonable in view of his position to have acted as he did.

Penalties and Prosecution

Section 61 of the Criminal Justice Act, 1993 provides that an individual guilty of insider dealing is liable:

(a) on summary conviction, to a fine not exceeding the statutory maximum or imprisonment for a term not exceeding six months or to both; or
(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding seven years or to both.

Proceedings for offences cannot be instituted in England and Wales except by or with the consent of the Secretary of State or the Director of Public Prosecutions.

The UK courts only have jurisdiction to try cases of insider dealing if the offender or professional intermediary was present in the UK at the time of the alleged offence or if the dealing occurred on a regulated UK market.48

The consequences for noncompliance with the securities laws are potentially staggering including damages, Security Exchange Committee remedies, and civil and criminal penalties.49 In the United States, the Insider Trading Sanctions Act 1984 and the Insider Trading and Securities Fraud Enforcement Act of 1988 provide for illegal insider trading to be as high as three times the profit gained or the loss avoided from the illegal trading. The SEC may, in an insider trading case, impose a penalty of up to 300 percent of the profit gained or loss avoided by such trading. Further the SEC has the power to impose civil penalties generally for failures to comply with the securities laws. The penalties are up to $750,000 for individuals and $15 million for corporations. Both the 1933 and 1934 Acts contain criminal sanctions for willful violations of their provisions. The Sarbanes-Oxley Act 2002 extends the statute of limitations for civil action and Criminal penalties under the 1934 Act.50

46 Section 53 (1) & (2) of the Criminal Justice Act, 1993.
47 Section 53 (3) of the Criminal Justice Act, 1993.
48 Ibid. s.62.
Investigations into Insider Dealing

Provisions for investigations into insider dealing were introduced by the Financial Services Act 1986 to enable the offences relating to insider dealing to be more effectively detected.

Section 177 of the Financial Services Act 1986 provides that if it appears to the Secretary of the State that there are circumstances suggesting that an offence under Part V of the Criminal Justice Act 1993 may have been committed, he may appoint an inspector to investigate and report to him. The inspector has power to require any person whom he considers may be able to give information concerning the subject of his investigation:

(a) to produce documents;
(b) to attend before him; and
(c) in any other way able to give him all reasonable assistance in connection with the investigation.

Section 178 of the Financial Services Act 1986 deals with penalties which may be imposed on a person who refuses to comply with a request made under section 177 above or refuses to answer a question on a relevant matter. The inspector may certify the refusal to the court and, if the court is satisfied that the alleged offender had no reasonable excuse for his refusal, it may:

(a) punish him as if he has been guilty of contempt of the court; or
(b) direct that the Secretary of the State may cancel his authority to carry on investment business or may restrict his authority to do so to a specified extent.

The FSA has powers to prosecute the offence of insider dealing and to impose ‘civil’ penalties for market abuse. S 118(1) of the FSMA defines and prohibits market abuse. Further, the FSA handbook has listed behaviour which may amount to market abuse. These include: (a) ‘insider dealing’; (b) ‘improper disclosure’; (c) ‘misuse of information’; (d) ‘manipulating transactions’; (e) ‘manipulating devices’; (f) ‘dissemination of false or misleading information’; and (g) ‘misleading behaviour’ and ‘distortion’.

Taking Action for Insider Dealing in Myanmar

Now Myanmar practices the market-oriented economic system. Under this system, the role of business companies boasts day by day. More and more companies also come into operation. The larger companies are established in our country, the more problems will arise in their business dealings. So it is necessary to re-assess the present company law and some related laws. In Myanmar, if these kinds of similar case occur, it may be taken action by criminal law; section 406 (Criminal breach of trust) of the Penal Code. In the UK and the US, there is a specific law for insider dealing. Likewise in our country, there is very need to provide specific provision for insider dealing. It should be emerged as a special criminal law by means of inserting it in Penal Code as the UK law.

There is a case, Daw Kyi Kyi v. The Union of Myanmar, in which a director is prosecuted for criminal breach of trust by Sec- 406 of the Penal Code. Although the case is not directly related to insider dealing, it is presented just an example. It was held in this case that a

52 2002, Special Criminal Appeal No.15 & 16.
person, although he is one of the managing directors of company, can be prosecuted for criminal breach of trust by section.406 of the Penal Code due to the misuse of the money owned by the company entrusting to her without disclosing the other directors. So if the similar case appeared in our country, it would be taken action only by the criminal law.

**Conclusion**

In this paper the concept of insider dealing has been introduced. The general and special defences to the prohibition have also been covered. Insider dealing is carried out by someone who knowingly uses inside information from an inside source about securities. Anybody with inside information about the present or future value of the company’s securities, who uses that information for their own profit and without disclosing it to any other relevant parties, may be guilty of insider dealing. As the number of public companies in Myanmar does not exceed ten, there is no Stock Exchange Market here. However, such as FMI, which has, dealing with Foreign Stock Exchange does business of buying and selling of shares / stocks through them. In the future when the number of public companies increases, it will become necessary to provide prohibition of insider dealing provisions as the part of company law, to solve problems in Regulated Market whenever insider dealing crimes occur.

**References**


**Online Material**