Legal Regimes to Counter Insider Dealing and Market Abuse: A Comprarative Analysis of the UK and Jordan

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Abstract

The international investments in the Middle East has increased the level of stock market activity, this being the case in Jordan as well. This situation has raised issues of public interest. Precisely to what extent are some investors engaging in "insider dealing" and thereby making profits not available to others? Considering the threat of insider dealing to market integrity and investor confidence, Jordan has, like law-makers and financial regulators the world over, brought this issue under the spotlight and imposed a prohibition on insider dealing. Nevertheless, this thesis argues that Jordan's regime is neither effective nor enforced. During the last 17 years since the prohibition regime was enacted, no cases of insider dealing have been brought before the courts.

The study therefore explores and evaluates the policy for prohibiting insider dealing and market manipulation in Jordan. In particular, it examines why the prohibition was first created, and why it was not subsequently enforced. To best approach this important question, the study adopts a comparative and analytic methodology, considering both the UK and the Jordanian prohibition regimes. It would not be possible to assess the Jordanian regime fairly and appropriately unless it was viewed externally and in a larger context through the use of a comparative method. This comparative approach focusses both on the clarity of the statutory prohibition (the legal rules) in the UK and Jordan, and on the effectiveness of the enforcement (the law in action). The outcomes of this study are in the form of, on the one hand, suggestions for developing and strengthening the Jordanian prohibition regime, and on the other hand, recommendations for more effective enforcement of the UK prohibition regime.

Dedication

I dedicate this thesis to

Mahmoud Al-Qatanani, my father and role model; Rasha Odeh, my mother

and

to my sister Heba.

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Author’s declaration

This research is my original work. Wherever a contribution from another author’s work is included, best efforts are made to clearly reference it.

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Chapter 1 Introduction and Methodology

1.1 General Background

As a result of the globalization of finance[1] and the increase in international investments, the level of stock market activity has increased in the Middle East region in general, as well as in Jordan.[2] This situation has raised issues of public interest: is the stock market reflecting the true underlying value and worth of an issuer of securities through the price mechanism? And to what extent are some investors engaging in 'insider dealing' and thereby making profits not available to all others?

Insider dealing can be defined as: *the trading in a company's (or other issuer's) securities (e.g. shares, bonds, or stock options) by individuals with access to, or possessing non-public information relating to that company or issuer, which may, if more generally known, affect the relevant securities' price.*

Law-makers and financial regulators throughout the world have now brought this issue into the spotlight, have imposed prohibitions on insider dealing, and consider it to be an abuse of the stock market, which harms both society and individuals, by decreasing market accuracy and transparency.[3]

Insider dealing has been debated[4] mainly on two levels:[5]

1) Is it fair to trade when participants are not equally informed?

2) Is it economically efficient to permit insider dealing?

The bulk of the literature characterises insider dealing as an immoral, unfair and harmful practice, damaging investors' confidence in the financial markets. Furthermore,

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[1] See generally: Steinberg M I, *International Securities Law: A Contemporary and Comparative Analysis* (Kluwer Law International, 1999). Also see, Zufferey J B, *Regulations of Trading Systems on Financial Markets* (Kluwer Law International, 1997)

[2] According to the statistics of Amman Securities Exchange (ASE): In January 2006, shares owned by non-Jordanians represented 44.5% of ASE capitalization, 35.4% of which were owned by Arab investors and 9.1% by non-Arabs. While in September 2009, shares owned by non-Jordanians represented 48.7% of AES capitalization, 33.6% of which were owned by Arab investors and 14.7% by non-Arabs. This information is available at: <www.ase.jo/pages.php?menu_id>

[3] Rob M, 'The flaw at the heart of Europe's insider dealing', (2003) 34 Euromoney 34. Available at: <http://www.euromoney.com/Article/1002679/The-flaw-at-the-heart-of-Europes-insider-dealing-laws.html> Accessed 1/10/2010. Also see, The Board of Inland Revenue, 'Revenue tackles insider dealing' (2005) 125 Accountancy 9

[4] See the debate over insider dealing in details in Chapter 2, Sec.3

[5] Leland H E, 'Insider Trading: should it be prohibited?' (1992) 100 Journal of Political Economy 859

scholars justify the prohibition of insider dealing on a number of grounds:[6] mainly that it harms investors, and consequently undermines their confidence in the market; also that it harms issuers of the affected securities and affects the market's integrity.[7] Thus it should be regulated effectively.

By contrast, other scholars argue that insider dealing should be deregulated, and that it should be left to corporations to protect their inside information by means of contracts and policies. Others argue that insider dealing should be decriminalized, and thereby made a civil wrong, settled between affected parties without the intervention of criminal law.[8] The problem with this argument is that it would be difficult to determine the affected parties. The impersonal nature of market transactions makes it difficult to identify parties injured by insider dealing, or establish a causal link between the transaction and any resultant damages.

Economists, however, argue that insider trading is the best, if not the only, method of compensating corporate investors adequately. *Manne*[9] contends that insider dealing benefits markets and firms in whose securities the insider dealt, because:

1) Insider dealing moves the market for a particular security towards the price that the security would reach if the inside information were publicly disclosed.

2) Insider dealing is considered to be an efficient compensation mechanism for managers who produce valuable information.[10]

Insider dealing has given rise to a significant volume of academic material on the rationale for its prohibition, on evaluating its effects, and on the question of whether legal regulation has succeeded in reducing its incidence.

1.2 Brief Review of the Law in Relevant Jurisdictions

The United States was in the vanguard in prohibiting insider dealing, which it saw as trading in securities based on material, non-public information.[11] Numerous other

[6] Bainbridge S M, 'Insider Trading: An Overview', (1998) *University of California, Los Angeles-School of Law* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=132529> Accessed 9th November 2009
[7] Karnell E, 'White-collar crime and European financial crisis: getting tough on EU market abuse' (2012) 37 European Law Review 481. Karnell stated that market integrity, commonly, is negatively defined as "the extent to which investors engage in prohibited trading behaviour".
[8] Hutchinson A, 'The Case of Decriminalizing Insider Dealing' (1990) 11 Economic Affairs Journal 45
[9] Manne H, 'In defence of Insider Trading', (1966) 44 *Harvard Business Review* 113
[10] *Ibid*.
[11] Avgouleas E, *The mechanics and regulation of market abuse - A legal and economic analysis* (Oxford University Press 2005) 196. Avgouleas gave the example of the US insider dealing regime prominence by citing how it was adopted, in a varying degree, by the EU Insider Dealing Directive of 1989.

countries have since followed in its wake. Currently, there are three basic situations where the US law sees insider dealing as illegitimate:[12]

1) the "disclose or abstain" rule;[13] and

2) the misappropriation theory,[14] both of which were created by courts under Section 10(b) of the Securities and Exchange Act 1934,[15] and Rule 10b-5 thereunder;

3) trading based on information relating to a tender offer,[16] which came about later, when the Securities and Exchange Commission (SEC) adopted Rule 14e-3, to prohibit insider trading.

Likewise, the United Kingdom has criminalized insider dealing since 1980, in the Companies Act (CA of 1980), Part V, sections 69-73.[17] These provisions were subsequently consolidated in the Companies Act of 1985 (CA of 1985), then amended by the Financial Services Act of 1986 (FSA of 1986).[18] The impetus for further reform came from the European Community (EC) Directive of 1989, which was implemented in Part V of the Criminal Justice Act of 1993 (CJA of 1993).

However, activities and behaviours in the market continued to violate the spirit of these laws, and undermined investors' confidence, despite falling short of criminal behaviour under the Criminal Justice Act (CJA of 1993). This explains the decision to use Part VIII of the Financial Services and Markets Act (FSMA of 2000), to create a bespoke regime that employed civil regulatory sanctions against behaviour which fell short of the criminal law, but was judged to be abusive or manipulative of the market.

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[12] Bainbridge S M, 'Insider Trading: An overview' (n 6)

[13] The US began prohibiting insider trading from the case *SEC v Texas Gulf Sulphur Co.* 401 F.2d 833 (2nd Cir 1968) which put the rule of equality of access to information, i.e. anyone possessing material non-public information is obliged either to disclose it before trading or abstain from trading.

[14] This theory was raised by Chief Justice Burger. The theory required, like the disclose or abstain rule, a breach of fiduciary duty before trading on inside information, but the insider did not need to owe a fiduciary duty to the issuer of the securities that were traded, nor to the investor whom he traded with. The theory applies when the insider violates a fiduciary duty owed to the source of information (see; *US v O'Hagan*, 92 F.3d 612 (8th Cir. 1996) where the court stated that this theory was designed to protect market integrity against outsiders' abuse.). See, Bainbridge S M, 'Insider dealing: An overview' (n 6)

[15] Full articles of the Act and the court's decisions are at: <http://www.sec.gov/about/laws/sea34.pdf> Accessed 17 November 2009

[16] The rule prohibits insiders of the bidder from disclosing information about a tender offer, and also prohibits any person possessing material information relating to a tender offer by another person from trading in the target company securities. This prohibition is effective only when the bidding commences or any steps have started towards commencing it.

[17] Barnes P, 'The regulations of insider dealing in the U K: some empirical evidence concerning share prices, merger bids and bidders' advising merchant banks' (1996) 6 Applied Financial Economics 383

[18] Speech by Margaret Cole, then the FSA Director of Enforcement, at the London School of Economics, 'Insider Dealing in the City' 17 Mar 2007. At: <http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/0317_mc.shtml> Accessed 1/6/2013

Among many other changes which it introduced, FSMA 2000 gave the Financial Services Authority (FSA), the financial regulator at the time, a wide range of rule-making, investigatory, and enforcement powers, including the ability to prosecute offenders for breaches of the criminal law of insider dealing, and to impose civil penalties on those engaged in it – including fines and restrictions on their activities. As a consequence, action in respect of insider dealing can be brought on either a criminal or civil basis, although the definitions of what is prohibited behaviour differ between the criminal regime, the CJA of 1993, and the civil market abuse regime in Part VIII FSMA 2000[19].

In addition, there have been international moves to promote higher standards of securities regulation, and maintain just and efficient markets. These moves have been led by the International Organization of Securities Commissions (IOSCO)[20], which, via its member agencies, has resolved to:

1) exchange information to promote the development of domestic markets;

2) harness the efforts of its member agencies to establish effective standards for international securities transactions;

3) promote the integrity of markets by effective application and enforcement of those standards.[21]

The European Commission has also had a role in promoting and regulating financial markets, aiming to provide maximum harmonization in the markets of EU countries. The Commission recently reviewed evidence for the application of the Market Abuse Directive (2003/6/EC) (MAD), which aims to ensure that behaviours such as insider dealing and market manipulation are deterred.[22] The review resulted in the adoption, in 2011, of the Proposal for a Directive on Criminal Sanctions for Insider Dealing and

[19] On the 6th of May 1998, The Chief Secretary announced a package of measures to tackle market abuse. Tough new powers were set out to help the FSA tackle market abuse and financial crime. The proposed package included: giving power to the FSA to prosecute cases of insider dealing and market manipulation; the power to levy fines; a new civil regime for combating market abuse; a code of market conduct to be produced by the FSA to defined unacceptable behaviours in the market. <http://www.hm-treasury.gov.uk/press_69_89.htm> Accessed 17 November 2009. Also, the same proposed package was included in the FSA 10th CP, 'Market abuse Part I: Consultation on Draft Code of Market Conduct', 6 Nov 1998 <http://fsa.gov.uk/pubs/cp/cp10pdf> Accessed 13 November 2009

[20] OICU-IOSCO, Insider Trading, How jurisdictions regulate it: Report of the Emerging Markets Committee of International Organization of Securities Commissions 2003 <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf> Accessed 13 November 2009

[21] <http://www.iosco.org/about> Accessed 18 November 2009

[22] <http://europa.eu/rapid/pressReleasesAction.do?reference-IP/09/> Accessed 18 November 2009

Market Manipulation.[23] The EC proposal was intended to strengthen the existing framework, provided by the Market Abuse Directive (MAD) (2003/6/EC), and ensure market integrity and investor confidence.[24] For this reason, the proposed Directive introduced criminal sanctions, not just for insider dealing, but also for abusive behaviours (market manipulation).[25]

Jordan has only recently begun to regulate insider dealing, and this thesis will argue that its regime is neither effective nor enforced. In 1997, the Securities Law (SL of 1997) was enacted, which prohibits insider dealing and renders it a criminal offence.[26] Contemporaneously, the Jordan Securities Commission (JSC) was established as a public institution, to develop, regulate and monitor Jordan's capital market,[27] and to maintain a sound investment environment and protect investors. The SL of 1997 was amended in 2002, giving greater authority to the JSC. Pursuant to its rule-making authority under the Securities Law of 2002 (SL of 2002), the JSC issued by-laws to monitor the market for insider dealing, market manipulation and other breaches.[28] Despite the significant improvements in the SL of 2002, insider dealing still persists. The evidence for this is to be found in the fluctuation in securities prices over recent years.[29] Nor did the JSC issue sufficient instructions in furtherance of the ban on insider dealing,[30] introduced with the SL of 2002. Also, the thesis contends that, at the date of this study, no cases of insider dealing have been brought before the courts. The objective of the study, therefore, will be to look at ways to develop and strengthen the

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[23] EC Press Release, 'Getting tough on insider dealing and market manipulation', 20/10/2011. <http://europa.eu/rapid/press-release_IP-11-1217_en.htm?locale=en> Accessed 1/4/2012

[24] Amended proposal of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM (2012) 420 Final, 2011/0279 (COD), Brussels 25/7/2012. <http://ec.europa.eu/internal_market/securities/docs/abuse/COM_2012_420_en.pdf> Accessed 1/2/2013

[25] Karnell (n 7)

[26] <http://www.jsc.gov.jo/public/mainenglish> Accessed 11/2/2011

[27] This market is the only organized securities market in Jordan, established in 1978. <http://www.ase.com.jo> Accessed 1/4/2013

[28] <http://www.imcan.jo/usefulinformation/FAQs/Regulation/tabid/99/Default.aspx> Accessed 5/10/2009

[29] See more at: <http://www.ase.com.jo/bulletin/yearly/English_2008_new.html> Accessed 27/10/2009. There is no definite evidence that the crisis in the Amman Stock Exchange which happened in 2008 resulted from insider dealing. However, the crisis was not something normal for the market, and many press releases discussed it, as well as the Parliament. It was reported on the Jordan Times newspaper on 10 November 2008: 'MPs called for holding accountable those state agencies that perceptibly failed to carry out their duties in protecting citizens and their money…' <http://www.jordantimes.com/index.php?news=11992> Accessed 4th November 2009. Also, it was reported in the same newspaper on 17 November 2009; 'Analysts want the government to step in and stop the 'bleeding' as the share price index of ASE shed about 16 per cent over the past six trading days…' <http://www.jordantimes.com/index.php?news=12162> Accessed 4 Nov 2009

[30] This has been recommended since 2005. See: Kulczak Michael, 'Instructions on trading violations and burden of proof - Final report' 2005, Assessment of the National Association of Securities Dealers (NASD) in collaboration with the USAID Jordan. (hereinafter, Kulczak NASD Assessment of Jordan) at <http://pdf.usaid.gov/pdf_docs/PNADF324.pdf> Accessed 5/10/2011

regulatory structure of Jordanian law, as well as to recommend more effective means of enforcement.

1.3 Research Aims and Objective

The aims of this study are to:

1) Identify the underlying policy for prohibiting insider dealing and market manipulation in Jordan – in particular, to find out why prohibition was established in the first place, and why it was not enforced. This broad question will be approached in different ways, by looking at: the clarity of legal rules and their prohibition ambit; the efficacy of the financial regulator; and the financial regulator's approach to regulation and enforcement.

2) Assess the UK prohibition regime, and find out to what extent it is effective in combatting insider dealing and market abuse.

The objective of this study is to present a comparative-analysis of the UK and Jordanian legal and regulatory regimes for insider dealing and market abuse, which were both introduced to tackle misleading, manipulative, unfair and fraudulent practices in the financial markets.

The study starts by identifying how each regime uses insider dealing laws to underpin securities regulations objective relating to investor protection, and ensure that markets are fair, efficient and transparent. Both regimes are then critically analysed, to assess their weaknesses, and to make appropriate recommendations for further improvements where necessary.

1.4 Scope of the Research

The potential scope of this study, as its title indicates, is very broad. Regimes to counter insider dealing, market manipulation and market abuse are, of necessity, very extensive, as they must encompass elements of the legal framework, the financial regulator, and supervisory and enforcement processes which support regulatory goals (to maintain market integrity and investor confidence).[31]

[31] Carvajal A and Elliot J, 'The challenges of enforcement in securities markets: Mission impossible' (2009) IMF Working Paper WP/09/168, <http://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf> Accessed 1/5/2013

It is unrealistic for this study to attempt to examine such extensive regimes exhaustively. The study focusses, therefore, on those issues that best serve to answer the Research Questions in Section 1.5. Those questions are designed to achieve the aims of this study (Section 1.3), and, at the same time, to limit its scope.

1.5 Research Questions

In approaching Research Questions, certain criteria are employed to serve the comparative-analytical nature of this study. These criteria are presented in section 1.6, Research Methodology.

The initial rationale for conducting this comparative study was the weak implementation, to date, of the Jordanian regime. The lack of enforcement action also raises issues about its effectiveness. The UK regime for tackling market misconduct under the criminal and civil regimes, provide a comparator model that can shed light on the analysis of the Jordanian prohibition regime.

This thesis therefore asks the following Research Questions:

1) ***Why was insider dealing prohibited in Jordan?***

   Was it because legislators considered it an offence which would harm the economic interests and confidence of investors, and hence affect their participation in the market? Or was it prohibited as a consequence of the globalization of financial markets, which Jordan is keen to be part of? In other words, has Jordan amended its financial law in order to satisfy international standards for global financial markets, without paying sufficient attention to making that law effective?

2) ***Is the recently introduced Jordanian law effective?***

   Is there any enforcement of the law? If so, why are no cases brought to court? Do judges settle these cases using alternative dispute resolution? If there is no enforcement, what are the underlying factors that are hindering enforcement?

3) ***After decades of prohibiting insider dealing, has the UK legal framework succeeded in tackling insider dealing and market abuse effectively? If so, has this been achieved through the criminal or civil regime? In other words, which regime provided better level of credible deterrence?***

4) Does this comparative study of the UK and Jordanian law, afford any insights that could lead to recommendations for improvements to Jordanian law?

1.6 Research Methodology

An understanding of the research methodology used for this thesis, and why it was chosen, will help to explain those aspects of the subject which were addressed, as well as the approach adopted.[32] Examining the insider dealing and market abuse regimes in two different jurisdictions, requires the adoption of a critical, comparative-analytical method. The essence of comparative-analysis is to look at two legal systems, assessing each and then aligning similarities and differences[33]. In doing this, the UK and Jordan prohibition regimes are juxtaposed, first to reach an understanding of the content and ambit of both, then to gain insights into the Jordanian regime. A comparative-analysis like this offers more than an analysis focussed on the Jordanian regime alone. It is not possible to appropriately assess the Jordanian regime unless it is viewed externally and in a larger context, using the comparative method[34]. As *Wilson* says:

> *"……by looking at other legal systems, it has been hoped to benefit the national legal system of the observer, offering suggestions for further developments, providing warnings of possible difficulties, giving an opportunity to stand back from one's own national system and to look at it more critically…..[35]"*

The usefulness of comparison is one of the pervasive features of studies by law and finance scholars.[36] Their findings[37] are often considered by the World Bank[38] when assessing the quality of law "law on the books" and the effectiveness of institutions enforcing the law in a particular state "law in action"[39]. In their studies, law and finance

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[32] Cruz PD, *Comparative law in a changing world*, (3rd edn, Routledge-Cavendish 2007) 43
[33] Eberle E, 'Comparative law' (2007) Roger Williams University School of Law Research Paper No.52 <http://ssrn.com/abstarct=1019051> Accessed 1/5/2013
[34] Ibid
[35] Wilson G, 'Comparative legal scholarship' in McConville M and Chui W H (eds), *Research methods for law* (Edinburgh University Press 2007) 87-103, 87
[36] Siems M, 'Legal origins: Reconciling law & finance and comparative law' (2007) 52 McGill Law Journal 55
[37] Berkowtiz D, Pistor K and Richard J, 'Economic development, legality and the transplant effect' (2000) CID WP No.39 <http://www.cid.harvard.edu/cidwp/039.pdf> Accessed 7/7/2013
[38] See in this regard the World Bank's Doing Business Projects that were launched in 2002 and provided reports covering business regulation and reforms across countries. The reports were based on comparative quantitative data to compare business regulations across countries. <http://www.doingbusiness.org/about-us> (Accessed: 1/5/2013)
[39] Siems, 'Legal origins: Reconciling law & finance and comparative law' (n 36)

scholars use various approaches to measuring the quality of law,[40] but two in particular are considered: the first focusses on law on the books and links its quality to the legal system of the examined country; the second adopts a broader approach by measuring and assessing law on the books in its legal culture.[41]

As regards the first approach – linking the quality of "law on the books" to the legal system of the country – empirical analysis by scholars suggests that the quality of "law on the books" (statutes) plays a vital role in the development of financial markets within countries.[42] This approach, adopted by *La Porta et al*,[43] and the follow-up comparative-analysis,[44] placed too much emphasis on the substantive laws within countries. In measuring the quality of law between countries, their studies relied on the traditional distinction between common law and civil law countries.[45] Empirical studies by *La Porta et al*, mainly into shareholder and creditor protection laws, claimed that common law countries out performed civil law countries in terms of the quality and style of laws.[46] As this thesis will be looking at two different jurisdictions, with the UK being one of the common law countries, and Jordan claimed to be a civil law country, it will examine whether the findings of *La Porta et al* apply and are vindicated.

One of the criticisms of this approach was that it gave too little attention to the effectiveness / enforcement of laws.[47] Although good and clear statutes are necessary requirements for financial development, it can be argued, as *Pound* has, that the quality of "law on the books" does not guarantee that it will actually be enforced.[48] In line with this argument, an empirical study by *Berkowitz* and *Pistor's et al*, into the legal changes affecting financial development (equity markets, to be precise) in 24 transition economies, revealed that transition economies boasted higher levels of investor protection in their statutes "law on the books" than some of the developed countries.

[40] Pistor K, Raiser M and Gelfer S, 'Law and finance in transition economies' (2000) 8 Economics of Transition 325
[41] Ibid
[42] La Porta R, Lopez-de-Silanes, Shleifer A and Vinshy R, 'Legal determinants of external finance' (1997) 3 Journal of Finance 1131; La Porta R, Lopez-de-Silanes, Shleifer A and Vinshy R, 'Law and finance' (1998) 106 Journal of Political Economy 1113
[43] La Porta *et al*, 'Legal determinants of external finance'; La Porta *et al*, 'Law and finance' (n 42)
[44] See for example: Levine R and Zervos S, 'Stock markets, banks and economic growth' (1996) WB Working Paper No.1690 http://elibrary.worldbank.org/contenet/workingpaper/10.1596/1813-9450-1690> Accessed 1/7/2013
[45] Siems, 'Legal origins: Reconciling law & finance and comparative law' (n 36)
[46] La Porta *et al*, 'Legal determinants of external finance'; La Porta *et al*, 'Law and finance', supra at (n 42)
[47] Jackson H and Roe M, 'Public and private enforcement of securities laws: Resource-based evidence' (2009) 93 Journal of Financial Economics 207
[48] Pound R, 'The scope and purpose of sociological jurisprudence' (1911) XXIV Harvard Law Review 591; Berkowtiz *et al* (n 37)

However, they found that enforcement levels for such laws did not match the levels of statutory enhancement[49].

For this reason, the studies of other law and finance scholars, such as those of *Pistor,*[50] *Deakin,*[51] *Armour*[52] and *Siems,*[53] have adopted a different approach, which examines the quality of law within its legal environment. This, as *North* argues, plays a vital role in the effectiveness of legal institutions (like regulators and courts).[54] Similarly, *Siems* says that the emphases should be on the legal environment / culture in which the law sits. For this reason, it is necessary to consider many factors in the assessed country, such as politics, culture, religion, geographical institutions….etc.[55]

The comparative approach adopted for this thesis considered both, the "law on the books" and the "law in action" because it extends the knowledge of, and highlights the differences between, the legal systems in each of the countries. It allows the study to explore the historical events[56] under which insider dealing and market abuse regimes were established and developed – specifically: to consider the UK and Jordan prohibition regimes within the context of their respective legal cultures; to identify those rules which were established to combat market misconduct; and to determine how each regime functions, and to what extent its effectiveness is influenced by its surrounding culture.[57] Any consideration of the legal culture[58] surrounding the prohibition regime of either country requires, as *Curran* says:

> *"……immersion into the political, historical, economic…..contexts that modelled the legal system, and in which the legal system operates……..*[59]*"*

[49] Pistor *et al*, 'Law and finance in transition economies' (n 40)
[50] Ibid
[51] Deakin S, Lele P and Seims M, 'The evolution of labour law: Calibrating and comparing regulatory regimes' (2007) 146 International Labour Review 133
[52] Armour J, Deakin S, Lele P, Seims M, 'How do legal rules evolve? Evidence from a cross-country comparison of shareholders, creditors and work protection' (2009) European Corporate Governance Institute Law WP No.129/2009 <http://ssrn.com/abstract=1431008> Accessed 29/6/2013
[53] Siems, 'Legal origins: Reconciling law & finance and comparative law' (n 36)
[54] North D, *Institutions, Institutional change and economic performance* (Cambridge University Press 1990) 107
[55] Siems, 'Legal origins: Reconciling law & finance and comparative law' (n 36)
[56] Yntema H E, 'Comparative legal research - Some remarks on looking out of the cave' (1956) 54 Michigan Law Review 901; Zweigeret k and Kolz H, *An introduction to compa**ra**tive law* (Oxford University Press 1998) 15
[57] Eberle (n 33)
[58] Ibid
[59] Curran V, 'Cultural immersion, differences and categories in the US comparative law' (1998) 46 American Journal of Comparative Law 43

Thus, this thesis does not limit itself to prima facie written legal rules.[60] Although words, if they are clearly drafted, are capable of conveying the meaning and ambit of a prohibition regime, words only reveal what is on the surface.[61] For this reason, political and economic factors in both countries are also considered, and help to answer the Research Questions (see 1.5). While examining the effect of those factors on prohibition regimes, the study also tests the argument of law and finance scholars, about the impact of legal culture on the effectiveness of prohibition regimes.

Thus, the comparative approach employed not only offers a broader vision, by being cognisant of the legal culture of foreign regulatory regimes,[62] it also enhances and refines the skills and techniques needed to interpret texts and rules, and helps in identifying underlying policy.[63]. Answering the Research Questions for this thesis would not have been possible without adopting a comparative approach and considering both "law on the books" and "law in action", in both countries. Using this approach, it was possible to assess the prohibition regimes in both countries, identify their strengths and weaknesses, and suggest reforms.[64]

The comparative-analysis of the UK and Jordan legal and regulatory regimes in the previous sense proves that the UK prohibition regime cannot be transplanted to Jordan. Even if UK financial statute could be transplanted, the legal culture, which influences the effectiveness of the legal institutions enforcing the law, could not. Also, a number of major differences between the two countries make transplanting impossible, as follows.

1) There are clear differences between the legal systems and the judicial structures in each country. Law and finance scholars claim that Jordan belongs to the group of civil law countries,[65] however Jordan's history suggests otherwise. Jordan was under the Ottoman Empire before World War I, then part of Great Syria, as a French colony and later as a British colony (Transjordan in 1920).[66] This suggests

[60] It was always stated that merely considering the legal rules and analysing them would not provide proper understanding, and that comparison requires more than this. See: Chynoweth P, 'Legal research' in Knight A and Ruddock L (eds), *Advanced research methods in their built environment* (John Wiley & Sons 2008) 28-38; Eberle (n 33)
[61] Eberle (n 33)
[62] Yntema (n 56)
[63] Chynoweth P (n 60); Eberle (n 33)
[64] Hey E and Mak E, 'The possibilities of comparative law methods for research on the rule of law in a global context' (2009) 2 Erasmus Law Review 287
[65] Berkowtiz *et al* (37); Djankov S, McLiesh C and Shleifer A, 'Private credit in 129 countries' (2005) NBER Working Paper No.11078 <http://www.nber.org/papers/w11078> (Accessed: 8/7/2013). In both articles Jordan was one of the countries subject to the comparative analysis.
[66] Klaifat R, 'The British Resident in Transjordan and the financial administration in the Emirate Transjordan 1921-1928' (2012) 5 Journal of Politics and Law 159

that Jordan would have a mixed legal system: Islamic principles inherited from Ottomans; Napoleonic Commercial Code influenced by the French mandate; and British financial and administrative regimes influenced by the British Resident in Amman in the 1920s. Certainly these all shaped the country's legal system and enacted laws, [67] and illustrates how Jordan's legal system was initially transplanted. In light of this, law and finance scholars argued that legal systems were transplanted around the world from two original parenting systems: the English common law system, and the French civil law system.[68] But the extent to which transplanted legal rules were adapted to local needs, is another issue which is examined in this study

The UK's legal system is the original common law system, with case law as its hallmark. In common law countries, the role of judicial precedents, in developing finance and supporting the economic growth of the country, was vital.[69] This is because judges have discretion to shape rules to changing circumstances.[70] Judges are claimed to be the producers of case law, which evolves to meet the needs of the society and economy, as they change over time.[71] By contrast, civil law countries are said to be inherently more rigid, since law can only be changed and developed through legislative procedures.[72] This difference, and its effect on the evolution of prohibition regimes to counter insider dealing in both countries, is highlighted in this study.

2) Regarding their differing experience of regulating financial markets, Jordan, as a developing / transition country, has begun, especially in the last two decades, to modify its economic regulations, in an attempt to attract foreign investments. By contrast, the UK, as a developed country, has reformed its legal regime in light of the expansion in the financial system,[73] to maintain investor protection. For this reason, the UK experience will be used as a guide when suggesting suitable modifications to the Jordanian financial regime.

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[67] Ibid
[68] See for example in the law and finance literature: Djankov *et al* (n 65); Pistor *et al* (n 40); Berkowtiz *et al* (n 37); Deakin *et al* (n 51)
[69] La Porta *et al*, 'Legal determinants of external finance'; La Porta *et al*, 'Law and finance', supra at (n 42)
[70] Armour J, 'Shareholder Protection and Stock Market development: An Empirical Test of the legal Origins Hypothesis' (2008) 5 <http://ssrn.com/abstract=1094355> Accessed 12/5/2013
[71] Ibid
[72] Djankov *et al* (n 65)
[73] This expansion in the financial system occurred after the breakdown of the Bretton Woods Agreement in the 1970s. See: Dignam A and Galanis ,'Corporate governance and the importance of macroeconomics' (2008) 28 Oxford Journal of Legal Studies 201

3) There are clear differences in the size and type of each country's financial markets. Jordan has only one organised securities market, with limited securities (stocks and equities) traded, whereas the UK has different financial markets with various kinds[74]of traded securities and dealing mechanisms.[75]

4) Both countries have their own political and economic policies that serve their respective financial position. As emphasised by *Pistor et al,*[76] *Siems*[77] and *Deakin,*[78] the legal culture, that surrounds regulation and influences legal institutions for enforcing the law, is vital for credible enforcement. This legal environment is specific to each country and cannot be transplanted.

5) The importance of language should not be overlooked. It is, as *Seims* described, "a key determinant of how well ideas travel between different countries.[79]" Each country's language and local understanding of legal concepts, affects the translation of transplanted regulation, and results in different interpretations when enforcing the law.

For all of these reasons, legal transplantation is always problematic. Transplanting legal rules from the UK to Jordan is ineffective, because the environment in which the regime operates – the culture and the political context – cannot be abstracted.[80] Thus, even if the UK prohibition regime was effective in tackling insider dealing and market abuse within the UK, it would not necessarily operate effectively in other jurisdictions.[81]

These arguments for the inefficacy of legal transplantation, and the differences highlighted between the UK and Jordan, beg the question: why attempt this comparative study at all?

Comparing such different jurisdictions can be justified on many levels. In this era of globalization, the study argues that the nature of commerce and finance requires legal

[74] Hudson A, *Securities law* (Sweet & Maxwell 2008) 157
[75] MiFID (Markets in Financial Instruments Directive 2004/39/EC) is: 'a maximum harmonization directive designed to achieve a level playing field for firms across the EU countries by requiring the same rules to be implemented in each state'. <http://ec.europa.eu/internal_market/securities/isd/mifid_en.htm> (Accessed: 17 November 2009). Also see: The European Communities (Markets in Financial Instruments) Regulations 2007, released on 20 Feb. 2007, which came into effect on 1st November 2007
[76] Pistor *et al* (n 40)
[77] Seims M, 'What does not work in comparing securities laws: A critique on La Porta et al's methodology' (2006) 16 International Company and Commercial Law Review 300
[78] Deakin *et al* (n 51)
[79] Siems, 'Legal origins: Reconciling law & finance and comparative law' (n 36)
[80] Legrand P, "European legal systems are not converging" (1996) 45 International and Comparative Law Quarterly 56
[81] For more discussion on this see: Watson A, *Legal transplants: An approach to comparative law*, (Scottish Academic Press 1974)

transplantation,[82] at least to implement minimum international standards and address the globalization needs of securities markets.[83] This is illustrated in Jordan, where the financial reform programs have addressed globalization requirements.[84] Globalization has fostered the dismantling of boundaries, capital freedom and competitiveness, as countries have developed financial regulations in response to these pressures. This effect is identified in this study, both in the UK and Jordan.[85] Therefore, globalization in the financial industry can serve as a common base between regimes, and justifies comparisons being made between the regimes of the UK and Jordan.

Also, even though the UK and Jordan belong to two different legal systems, both have financial statutes that define offences for insider dealing and market abuse. These statutes have effectively implemented those neo-liberal and globalization requirements which support the argument of *Zweigert* and *Koz,*[86] that "different legal systems give the same or very similar solutions, even as to detail, to the development, conceptual structure…" In support of this reasoning, the study will identify, for example, similarities in the geneses of prohibitions on insider dealing (fiduciary relation), and in the statutory requirements for the offence of criminal insider dealing.

Paralleling this legal similarity, the financial regulations in both countries give financial regulators the autonomy and powers to tackle market misconduct. Therefore, it is possible to compare how each regulator uses its regulatory mandate to enforce the prohibition regime.

Another reason for choosing the UK as benchmark for this comparative study, is historical. The effects of British financial and political policies can be traced back to the time when Jordan was a British colony.[87]

To sum up, this critical, comparative-analytical approach allows the study to:

1) compare the UK and Jordan legal frameworks governing insider dealing; explore themes in the UK framework; allow comparisons with the situation in Jordan; and assess whether Jordanian law promotes transparency, stability, and efficiency in

[82] Twining W, *Globalization and legal theory*, (Butterworth 2000) 4
[83] Ibid
[84] Berkowtiz *et al* (n 37); Djankov *et al* (n 65). In both articles Jordan was one of the countries subject to the comparative analysis.
[85] See Chapter 2, Sec.1 where globalization had contributed, in reforming the regulatory structure, towards creating the FSA. In Jordan, the financial reform was conducted to bring the securities market into line with the minimum requirement of globalization.
[86] Zweigert and Kotz (n 56)
[87] Klaifat (n 66)

its securities markets;

2) highlight similarities and differences, advantages and disadvantages, and weaknesses and strengths, in each of the two legal frameworks;

3) assemble comparative results to determine what can be learned from the two legal frameworks, and how any insights might be relevant to reforming Jordanian law.

In the course of the comparative-analysis, relevant scholarship, publications, cases, and doctrine will be reviewed and discussed.

1.7 Comparison Criteria

For the purpose of comparison, the study defines 'Comparison Criteria' to be used, as follows:

(i) the financial regulator's independence

(ii) the clarity of regulation

(iii) adequacy of human capital

(iv) regulatory transparency

Compared to UK regulation, the Jordanian prohibition regime lacks the enforcement structures which underpin the effectiveness and sufficiency of law[88]. This lack of enforcement is one of the main justifications for this comparative-analysis of legal frameworks, and illustrates how the UK regulator's long experience in monitoring securities markets and prosecuting offenders,[89] can contribute to the debate in Jordan.

1.8 Limitations, Potential Difficulties and Originality of the Study

As outlined in Section 1.2, above, the Jordanian legislator has recently introduced regulation of the financial market, and prohibited insider dealing. Before the Companies Law of 1997, there were few provisions for regulating investment in the financial markets by company directors, or for requiring them, or their families, to disclose any securities owned in their companies. Similarly, it was not expressly stated that insider

[88] On the relationship between laws and enforcement, see: La Porta, Lopez-de-Silane F and Shleifer A, 'What works in securities law?' (2003) Harvard University Working Paper Series <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=51246> Accessed 17 November 2009

[89] UK judges have long experience in dealing with insider dealing cases, which is evident when reviewing the case law. While their experience in market abuse cases is relatively recent, this is explained by the recent date of such laws, e.g. the FSMA of 2000 was enacted only recently in relation to insider dealing regulation.

dealing was prohibited, until the Securities Law (SL of 1997) was enacted. These recent changes mean that there is a dearth of literature on insider dealing, and this has proved problematic and challenging for this study. The scholarly studies that were reviewed, merely contained general discussions on the prohibition of insider dealing, and lacked specifics[90]. Similarly, the financial regulator, the Jordan Securities Commission (JSC), has not issued sufficient instructions or by-laws to explain the law in general, or clarify ambiguities in the prohibition regime. Thus, this legal area remains overlooked by the regulator and by legal scholars. Finally, Jordanian law schools do not teach law of financial markets as a separate subject, but only refer to it briefly when teaching company law. This explains the lack of interest in conducting legal research.

This scarcity of research and literature, on either the substantive content, or the enforcement practices of the Jordanian insider dealing regime, underlines the originality of this study, and gives it the potential to make a significant contribution to establishing an academic literature on insider dealing, which is specific to the Jordan's legal framework.

1.9 Literature Review

The literature review, which forms part of this study, is based on a wide examination and analysis of primary sources (regulation and case studies of the law in action), and of secondary sources (scholarly literature and policy documents). It includes a preliminary bibliography for both primary and secondary sources.

1.9.1 Primary sources

Using these sources, the study will present the UK and Jordan legal frameworks on insider dealing and market abuse. Regarding UK regulation, the study will address early attempts in the UK to construct a regime against insider dealing, i.e. the CA of 1980, the provisions of which were re-enacted, with minor amendments, in the CA of 1985. The primary motive for prohibiting insider dealing was to ensure equality of market information for all investors, while legal liability was based on fiduciary duty.[91] This motive is apparent in the latest CJA of 1993, though there is one significant difference: it is still important, under the CJA of 1993, to maintain confidence in the integrity of the

[90] The first of only three articles published in this regard is: Al Omoush I, 'The prohibited dealing in securities based on confidential information which has influence on prices: 'Insider Dealing': a Comparative Study', (1997) 12 Mou'ta Journal for Researches and Studies 311.
[91] Hicks A, *Cases and Materials on Company Law* (6th edn, Oxford University Press 2008)

market, but it is no longer necessary for the accused insider to be connected with the source of information, or with the issuer of the affected securities, i.e. liability is not based on fiduciary obligation. This shift in the CJA of 1993 reflects the adoption of European Directive 1989,[92] which was also adopted by other EU countries, to ensure the integrity of Community financial markets and investor confidence.

This study will therefore examine the evolution of EU Directives, with respect to their influence on the UK prohibition regime, to illustrate their effect on UK regulation. The study will also discuss the justifications, and the consultation papers, prior to enactment of the FSMA 2000,[93] which gives power to the FSA to impose civil sanctions, including fines, on persons who engage in market abuse on certain designated markets.[94] The FSMA 2000 sets out a new framework for tackling not only insider dealing, but also market abuse. It covers anyone who deals in the market, whether authorised or unauthorised, and ensures more clarity in the market[95]. In recent cases the FSA has shown its willingness to take tougher measures, including use of its criminal prosecution powers, where it had previously only used preventative measures or civil actions.[96] Although the Financial Conduct Authority (FCA), the new UK financial regulator, replaced the FSA on April 2013, this study will focus on FSA enforcement actions, given the novelty of the FCA, which has yet to establish methods of enforcement which could be amenable to scholarly examination.

Primary sources used in the study describe important legal cases that reflect both historic and more recent attitudes to UK law. In these cases – such as *Bell & others v Lever Bros & others*[97] (1932) AC161, *Percival v Wright* [1902] 2 Ch 421,[98] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 387 and *Agip (Africa) Ltd v Jackson* [1992] 4

[92] Directive 89/592/EEC of the Council Coordinating Regulations on insider dealing, which was replaced by the Directive 2003/6/EC of the European Parliament and of the Council on 28th of January 2003 on insider dealing and market manipulation (market abuse).

[93] It was argued that the Criminal Justice Act 1993 was too narrow to cover all aspects of insiders' acts, some of which were civil. Also the experience showed how difficult it is to establish prosecutions under this act. See; Rider B, Adams C and Ashe M, *Guide to financial Services Regulation* (3rd edn, CCH Incorporated 1997)

[94] FSA CP 10 (n 19)

[95] The FSA CP 54, 27 July 1998. It is clear from the date of the paper that the UK took steps in regulating market abuse prior to the EU Directive 2003/6/EC http://www.fsa.gov.uk/pubs/cp/cp54_news/letter.pdf> Accessed 13/11/ 2009

[96] Mayfield J, 'The FSA approach to insider dealing', (2009) 159 New Law Journal 856

[97] This case showed the early English attitude, that is, a person is under a duty not to disclose any information he possesses during contract negotiations. See: Rider *et al*, *Guide to financial Services Regulation* (n 93) 219.

[98] This case is an example of the court's opinion that directors owe fiduciary obligation to the company, not to its shareholders, although courts in some circumstances have stated otherwise.

All ER 451[99] – the courts established that directors are under fiduciary obligation during their relationship with the company, and are not allowed to profit by virtue of that relationship.

The study also uses criminal cases of insider dealing contrary to the Criminal Justice Act (CJA of 1993) – such as: *R v Butt* [2006] All ER (D) 31[100] and *R v McQuoid* [2009] 4 All ER (D) 100.[101] These cases illustrate how, before there was statutory prohibition in financial regulation, the courts used fiduciary duty, under companies law, to prohibit insiders from taking advantage of their position in a company to secure personal gains.

More recent cases brought by the FSA, as part of its on-going drive to promote efficient and fair markets, and tackle market abuse,[102] are discussed. These include: the recent case of *Matthew Uberio* and his father Neel, who were found guilty of insider dealing[103]; *Andrew King*, whose case was the fifth insider dealing criminal prosecution to be brought by the FSA; as well as other cases.[104] The decisions of the *European Court of Justice* relating to insider dealing are analysed, such as the case of *Grongard and another* (C-384/02)[105]. Cases on market abuse will also be presented, for instance *Baker Tilly (a firm) v Makar* [2009] All ER (D) 198, and cases which were brought to the *Court of Justice of the European Communities*, such as *Iourgos Ikonomikon and another v Georgakis* (C-391/04).

1.9.2 Secondary sources

The UK now has a considerable body of scholarly research on the impact of insider dealing on financial markets. Several sources are examined and analysed: general sources on companies' law and the financial markets, and particular sources on insider dealing and market abuse. As regards the general sources, works by significant authors

[99] Rider *et al*, *Guide to financial Services Regulation* (n 93) 219
[100] The Court of Appeal sentenced the defendant, who worked for an investment bank and used confidential information in his dealing, to four years' imprisonment.
[101] The defendant passed information relating to a takeover to his father-in-law, who purchased shares based on this information. The defendant was sentenced to eight months' imprisonment.
[102] FSA CP 54 (n 95)
[103] They were found guilty on 12 counts of insider dealing at Southwark Crown Court <http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/149.shml> Accessed: 12/11/ 2009

[104] See the case of *Neil Rollins* 7th January 2009 <http://www.fsa.gov.uk/pages/Library/Communicatication/PR/2009/002.shmtl> Also, the FSA arrested on the 29 of July 2008 eight individuals, and executed search warrants in connection with a major on-going investigation into insider dealing ring. This operation involved 40 FSA staff <http://www.fsa.gov.uk/pages/Library/Communication/PR/2008/o82.shtml> Accessed: 13/11/ 2009
[105] The court ruled according to Article 3(a) of Directive 89/592/EEC, which precluded a person who received inside information in his capacity as an employee of a company from disclosing it.

has been reviewed such as: *Ben Pette,*[106] *Brenda Hannigan*[107] and *Janet Dine,*[108] as well as *Cases and Materials in Company Law by Len Sealy.*[109] As regards particular sources, major works by authors have been taken into consideration, such as; *Alistair Hudson, Michael Ashe, Julia Black, Alistair Darling* and *Barry Rider.* This study references a number of journal articles written by specialists in the financial markets, or by legal professionals such as *Paul Branes,*[110] *Stephen Bainbridge,*[111] *Campbell D*[112] and *Richard Alexander.*[113]

The thesis also presents the views of those scholars who argue that insider dealing should not be prohibited, such as: *Manne*[114], *Leland*[115], and *McVea H.*[116] In addition, the thesis reviews works of scholars who discuss EU Directives on insider dealing and market abuse, such as: *Emilios Avgouleas*[117], *Mathias Siems*[118] and *Brain Adungo.*[119]

1.10 Summary of Thesis Structure

Turning to the substantive chapters of the thesis, Chapter 2 tackles the financial regulator itself, in both the UK and Jordan, and sets out the general framework for the prohibition of insider dealing. It starts by considering the position of the financial regulator in the UK and Jordan, given the important role of regulators in ensuring compliance with regulation and sanctioning perpetrators. The establishment of financial regulators, and recent developments in light of new factors, is explained and assessed, and regulatory independence used as a Comparison Criterion.

The chapter then looks at the justifications for prohibiting insider dealing, the basis of prohibition initially, and how it has evolved. In addition, it looks at the different

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[106] Pette B, Lowry J and Reisbery A, *Pette's Company Law: Company and Capital Markets Laws* (3rd edn, Pearson Education Limited, 2009)
[107] Hannigan B, *Company law* (2nd edn, Oxford University Press 2009)
[108] Dine J and Koutsias M, *Company law (*6th edn, Palgrave Macmillan 2007)
[109] Sealy L and Worthington S, *Cases and Materials on Company Law,* (8th edn, Oxford University Press 2008)
[110] Barnes (n 17)
[111] Bainbridge S M, 'Insider Trading: An Overview' (n 6)
[112] Campbell D, 'What is wrong with insider dealing?' (1996) 16 Journal of Legal Studies 185
[113] Alexander R, 'Corporate Crimes: are the gloves coming off?' (2009) 30 Company Lawyer 321
[114] Manne H, *Insider Trading and the Stock Market* (Free Press 1966)
[115] Leland (n 5)
[116] McVea H, 'What's wrong with insider dealing?' (1995) 115 Journal of Legal Studies 390.
[117] Avgouleas E, *The mechanics and regulation of market abuse* (n 11)
[118] Siems M, 'The EU Market Abuse Directive: a case-based analysis', (2007) University of East Anglia (UEA), Norwich Law School WP Series http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066603> Accessed 11/12/2009
[119] Adugo B I, 'The new European Union and United Kingdom regime for regulating market abuse', (2009) University of Manchester WP Series http://papers.ssrn.com/sol3/papers.cfm?abstract_id1324678 Accessed 11/12/2009

explanations of prohibition used by scholars, and also the debate over the need to prohibit insider dealing at all. Chapter 2 looks at the discussion of theoretical aspects of prohibition in Western literature, while Chapter 4 substantively examines the legal regimes in both countries. The main purpose of Chapter 2 is to answer Research Question 1) - *Why was insider dealing prohibited in Jordan?* – (see Section 1.5 above)

Chapter 3 examines the disclosure regimes of the UK and Jordan. It explains the importance of the disclosure regimes in the UK and Jordan in controlling the timely flow of inside information through the regulatory channels. It argues that enforcing the disclosure obligation on issuers, functions as a precautionary measure in tackling the incidents before they happen. Timely disclosure not only controls the dissemination of inside information, but, among other things, it also ensures that issuers have implemented proper systems and controls to minimize any possible leakage. The focus on disclosure regimes emphasises the importance of transparency as a criterion, and the extent to which existing disclosure obligations in both countries foster and provide high levels of transparency.

Chapter 4 addresses the substantive prohibition regimes to counter insider dealing and market abuse in the UK and Jordan. Section 1 provides critical analyses of the UK criminal and civil regimes. It looks at the reasons behind creating two regimes to tackle market misconduct, the ambit of regulatory prohibition, the prohibited behaviours, and the regulatory requirements for each offence. It then identifies any weaknesses in the prohibition regime.

Section 2 of Chapter 4 scrutinises Jordan's regime. In addition to identifying the regime's scope and nature, it also assesses its clarity and effectiveness in providing sound regulatory prohibition, compared to the UK regime. Regulatory clarity is used to answer Research Question 2) – *Is the recently introduced Jordanian law effective?* – and determine whether problems in the drafting of regulation reflect a lack of skilled human capital – using the 'human capital' Comparison Criterion (see page 15).

Chapter 5 explores the reasons for lack of enforcement action in Jordan. The chapter is informed by the UK experience. Section 1 examines the UK financial regulator's enforcement process, as well as the problems encountered in its approach to enforcement, as exposed by the banking crisis of 2008. It looks at whether the regulatory failures can be attributed to external factors; whether they resulted from the regulator (structure or staff); or whether from drafting problems in the regulation itself.

After assessing the enforcement process in the UK, Section 2 shifts to exploring the problems of enforcement in Jordan. Key issues will be considered in assessing the Jordanian enforcement regime, such as regulator independence, staff professionalism, influences from senior market players…etc. All four Comparison Criteria (see page 15) are considered in assessing regulatory enforcement in the UK and Jordan. Section 3 sheds light on scholars' arguments in regard of the effective enforcement against insiders and abusers and whether this is best achieved through the criminal or civil prohibiton regime. The chapter answers Research Questions, 2) – *Is the recently introduced Jordanian law effective?*– and 3) – *After decades of prohibiting insider dealing, has the UK legal framework succeeded in tackling insider dealing and market abuse effectively? If so, has this been achieve through the criminal or civil regime? In other words, which regime provided better level of credible deterrence?*

Chapter 6, the final chapter, contains conclusions and recommendations, and suggests further areas for future research.

Chapter 2 The UK and Jordanian Financial Regulators and the Policy of Regulating Insider Dealing

Financial regulators are cornerstones for the success of any regulatory framework. As *North Douglas* asserted,[120] having a sound financial regulator capable of achieving the regulatory objectives – mainly market integrity and investor confidence – is vital. Acknowledging this was especially significant in the aftermath of the banking crisis in 2008.[121] However, equipping the financial regulator with the autonomy and necessary tools to conduct supervision and enforcement – to ensure compliance and to take enforcement actions – is not enough to guarantee regulator efficacy.[122] It is more important to ensure its financial and political independence.[123] Also, the chosen regulatory model might play a role in any regulatory failures, as in the case of the FSA.[124]

Section 1 looks at the creation and development of the financial regulator in the UK and in Jordan. It describes influential factors that led to the chosen model, and whether there are problems of structure or independence which affect regulator actions against insiders and abusers. The discussion highlights problems of regulatory transparency, which clarify the reasons for reform. The section concludes by looking at whether levels of independence differ between developed and developing countries, using Comparison Criterion (i) – the financial regulator's independence (see section 1.7).

The chapter then presents the legal and regulatory justification for prohibiting insider dealing. Section 2 looks at the genesis of prohibiting insider dealing in the UK and Jordan, and at whether they have implemented similar prohibition systems. Section 3 discusses theoretical justifications for prohibiting insider dealing, as presented by legal and economics scholars. The chapter concludes by answering Research Question 1) *Why was insider dealing prohibited in Jordan?*

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[120] North (n 54)
[121] G-20 Working Group 1, "Enhancing sound regulation and strengthening transparency", Final Report, 25 Mar 2009, p.45 At: http://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/20_010409.pdf Accessed 1/5/2013
[122] Carvajal and Eillitt, ' The challenges of enforcement in securities markets: Mission impossible' (n 31)
[123] Ibid
[124] Adair Turner Speech, then FSA Chairman, at the FSA Banquet at the Mansion House, 11 Oct 2012, London. Available at: http://www.fsa.gov.uk/library/communication/speeches/2012/1011-at.shtml Accessed 12/3/2013

2.1 Section 1: The UK and Jordan Financial Regulator - a historical perspective and underlying policy

Scholars argue that there is no ideal regulatory model for securities markets.[125] The evolution of different regulatory models throughout the world has been influenced by many factors – for example: the geographical location of the market; the types of listed securities; the diversity of financial services; and the size of investments at a national and international level.[126] Nonetheless, any regulatory model must meet certain requirements, primarily, that the regulator operates independently of national government and the private sector.[127] As *Carvajal and Elliott* argued in their global analysis of securities markets, political influence represents the greatest challenge to the strength of regulators.[128] The governments and decision makers of the UK and Jordan are mindful of the vital role financial markets play in the national economy[129] and this section will explore the rationale and reasons for regulatory development, and the extent to which formal financial policies in the UK and Jordan – both political and economic – have contributed to the shaping of their current financial regulatory models.

To start with, it is important to note that tracing financial regulator reforms, and the justification for them, was much more straightforward in the UK than in Jordan. For example, the justification for UK financial regulator reforms was presented in *HM Treasury* consultation papers, Parliamentary debates, prime ministers' speeches, official statements from decision makers, etc. By contrast, extracting the reasons for regulatory reform in Jordan was "*like looking for a needle in a hay stack*". This illustrates from the outset the variation in transparency levels between the two countries, which will be evidenced right across this study.

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[125] LIewellyn D, 'Institutional structure of financial regulation and supervision: the basic issues' (2006). A paper presented at the WB Seminar, Washington DC. At: http://siteresources.worldbank.org/INTTOPCONF6/Resources/2057292-1162909660809/F2FlemmingLIewellyn.pdf Accessed 5/10/2012; Mwenda K & Fleming A, 'International developments in the organizational structure of financial services' (2001). A paper presented at a seminar hosted by the WB Financial Sector Vice-Presidency, Washington DC. At: http://Inweb90.worldbank.org/eca/eca.nsf/abdff2b83e74f852567d1001a8ba/29e7611f0e618a528525689e006b1e16/$FILE/International%20developments%20in%20the%20organizational%20structure%20of%20financial%20services%20supervision.pdf Accessed 10/11/2012

[126] Killick M, 'Twin peaks - a new chimera? An analysis of the new proposed regulatory structure in the UK', (2012) 33 Company Lawyer 366

[127] Carvajal A & Elliott J, 'Strength and weaknesses in securities markets regulation: A global analysis' (2007) IMF WP/07/259. Available at: http://www.imf.org/external/pubs/ft/wp/2007/wp07259.pdf Accessed 24/9/2011

[128] Ibid

[129] This will appear in the discussion provided in this section

2.1.1 The UK financial regulatory model

The UK witnessed its third regulatory reform in April 2013.[130] The financial regulator, the Financial Services Authority (FSA), ceased to exist in its current form.[131] Two financial regulators replaced it in regulating market conduct: the Prudential Regulation Authority (PRA) – an independent subsidiary of the Bank of England (BoE), responsible for financial institutions that manage significant risk on their balance sheet – and the Financial Conduct Authority (FCA), the successor to the FSA in the area of business conduct across the financial industry.[132] Akin to the FSA, the FCA will protect and enhance market integrity and investor confidence in the UK financial system.[133] But what triggered this and earlier reforms, is discussed below.

2.1.1.1 Origins of the financial regulator – the pre-1980s era

London's leading role as a national and international trading centre emerged during the twelfth century.[134] Ever since, the *City*[135] of London has maintained its global prominence, through a process of trial and error, over the intervening centuries.[136]

The character and importance of the *City* has had a profound influence on the structure and evolution of the UK financial regulator. Before the 1980s, internal self-regulation by the *City*[137] upon the financial industry was the norm[138]. To *City* players, self-regulation meant, loosely, leaving everyone to regulate themselves according to their own speciality and interests, and subject only to authorisation

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[130] See HM Treasury website: <http://hm-treasury.gov.uk/fin_stability_reform_structure.htm> Accessed 12/12/2012

[131] HM Treasury website, ibid

[132] Killick, 'Twin peaks' (n 126)

[133] H M Treasury, 'A new approach to financial regulation', Feb 2011, para 4.7; statement by the Chief Executive designate of the FCA, Martin Wheatley, in 'Journey to the FCA', Oct 2012, p.8. At: <http://www.fsa.gov.uk/fca> Accessed 28/11/2012

[134] Gilligan G, 'The origins of UK financial services regulation', (1997)18 Company Lawyer 167

[135] The term 'City' refers to the financial community working in central London, rather than to a particular geographical area. It operates mainly in the 'Square Mile' in the very centre of London, however these boundaries have expanded eastwards due to the City's evolving financial role. Since 1991, another of the City's important locations has been Canary Wharf, where the Financial Services Authority (FSA) is located. For details see: Davidson A, *How the city really works: the definitive guide to money and investing in London's Square Mile* (2nd edn, Kogan Page 2008), p.4; Gieve J, 'The City's growth: The crest of a wave or swimming with the stream?', (2007) 47 Bank of England Quarterly 286

[136] Davidson, Ibid

[137] See previous section in this chapter

[138] Gilligan (n 134); Rider *et al*, *Guide to financial services regulation* (n 93) 114; Cane P, 'Self-regulation and judicial review' (1997) 16 Civil Justice Quarterly 324

from their professional or trade association.[139] As *Rider* said [140], although self-regulation bodies in the *City* were diverse in their structure and standards of success, they worked effectively, because of the homogeneous character of the *City's* occupants[141].

The Panel on Takeovers and Mergers[142] *(*the *Panel),* a salient example of a self-regulatory body, was appointed by the *Governor of the Bank of England* to police takeovers of public companies in the *City.*[143] In this, the *Panel* had an international reputation for efficiency, and had devoted considerable efforts to policing insider dealing, especially in the area of takeover bids.[144] But the efforts of the *Panel* in tackling insider dealing were confined.[145] In this, the *Panel's Code on Takeovers and Mergers*[146] lacked a statutory base, which meant that the *Panel* could not conduct investigations, in cases of suspicious insider dealing, unless its members and their clients were involved.[147] For the same reason, the *Panel* was unable to impose legal sanctions.[148] Finally, the *Panel* was not a regulator for all *City* transactions, as it operated only in the area of takeovers.[149]

[139] Gilligan n (134); Gower LCB, 'Big Bang and the City regulation' (1988) 51 Modern Law Review 1
[140] Rider *et al*, *Guide to financial services regulation* (n 93); Rider B, 'Self-regulation: The British approach to policing conduct in the securities business, with particular reference to the role of City Panel on Takeovers and Mergers', (1978) Journal of Comparative Corporate Law and Securities Regulation 319
[141] Rider *et al*, *Guide to financial services regulation* (n 93)
[142] The Panel, a non-statutory body, was set up by the BoE to regulate takeovers and mergers transactions in the UK. For more details see: Black J, 'Talking about regulation', (1998) Sep Public Law 77
[143] Morse G, 'The City Code on Takeovers and Mergers - self-regulation or self-protection', (1991) Nov Journal of Business Law 509; Morris S, *Financial services: regulating Business*, (2nd edn, FT Law and Tax 1995)
[144] Morse ibid; Morse G, 'Controlling takeovers - the self-regulation option in the United Kingdom' (1998) Jan Journal of Business Law 58; Rider B, 'Civilising the law - The use of civil and administrative proceedings to enforce Financial Services Law', (1995) 3 Journal of Financial Crime 11
[144] Rider, 'Civilising the law' ibid
[145] Morse G, 'The City Code on Takeovers and Mergers - self-regulation or self-protection' (n 143)
[146] Rider B, 'Policing the city - Combating fraud and other abuses in corporate securities industry', (1988) 41 Current Legal Problems 47
[147] Rider B, 'The control of insider dealing - Smoke and mirrors!', (2000) 7 Journal of Financial Crime 277; Rider, 'Civilising the law - The use of civil and administrative proceedings to enforce Financial Services Law' (n144); Rider B, *Insider Trading* (Jordan & Sons 1983)
[148] Morse, 'The City Code on Takeovers and Mergers - Self regulation or self-protection' (n 143); Cane (n 138)
[149] Ibid

These points demonstrate that self-regulation was inefficient in tackling insider dealing and malicious or abusive activities. Additionally, self-regulation was undermined by financial scandals, which weakened investor confidence.[150]

In general, the adequacy of the self-regulatory system was questionable. Those in favour emphasised its advantages, foremost of which was its ability to generate rules governing conduct on a contractual basis. This allowed more flexibility in application, and resulted in higher standards than could have been attainable by statute.[151] This rule-making was the defining characteristic of the *Panel.*[152] Those against the *Panel*, on the other hand, enumerated the disadvantages of self-regulation, which were that: regulators acted as 'judge and jury'; they could not deal with outsiders because they had no legal powers; and they lacked a clear authoritative voice to call for legislative intervention when it was needed, as was evident in cases of insider dealing.[153]

In supporting the arguments against self-regulation, the then *Department of Trade Inspectors' Reports* unveiled evidence of serious abuses in the market that had slipped through the regulatory net.[154] This raised the question of whether reform of the regulation itself was necessary, or reform of the regulatory model.[155] The *Jenkins Committee,*[156] which was asked to respond, recommended that prohibition of market misconduct be established on a statutory basis. However, the *Committee* did not advocate the creation of a statutory body (a regulator).[157] The *Committee's* opinion mirrored the *Panel's* call for its *Code* to be put on a legal basis (while also rejecting the establishment of a statutory regulator). The *Panel's* view was that a regulator would impede the flexibility and swiftness of financial services.[158]

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[150] Ferran E, 'Examining the UK's experience in adopting the single financial regulatory model' (2003) University of Cambridge, Faculty of Law; European Corporate Governance Institution (ECGI), http://ssrn.com/abstract=346120 (Accessed:15/10/2011)
[151] Rider B, 'The regulation of corporation and securities law in Britain - The beginning of a real debate' (1977) 19 Malaya Law review 159
[152] Cane (n 138)
[153] Rider, 'The regulation of corporation and securities law in Britain - The beginning of a real debate' (n 151)
[154] Ibid
[155] Ibid
[156] The Committee on Company Law, chaired by Jenkins (the Jenkins Committee) was cited in Rider ibid; Hannigan, *Company Law* (n 107)
[157] The Report of the Jenkins Committee, London: HMSO, 1962
[158] Rider, 'Regulation of corporation and securities law in Britain - The beginning of real debate' (n 151)

Although it could be said, therefore, that financial scandals triggered calls for a new regulatory model, they were not the only factors.

The early 1980s witnessed the evolution of the UK financial sector, and the gradual integration of financial services offered by: (1) the banking sector, monitored and supervised by the *Bank of England*; (2) the organised markets in the *City* (e.g. the *Stock Exchange* and *Lloyd's*); and (3) the rest of the financial sector (e.g. insurance companies, building societies...etc.) [159] This new trend towards integration was one of the driving forces behind the creation of a unified UK regulator, the FSA – which will be discussed later in this section.

Also, other contingent factors, occurring in the mid-1980s,[160] influenced significant changes to the regulatory structure.[161] These factors included:

1) changes in ownership structure, which required larger deal sizes;

2) the increasingly international nature of securities trading, [162] in which investments became more diversified, much larger, more interrelated and more international. [163] This very significant trend towards international securities trading, implementing neo-liberal theories and ideologies,[164] found itself faced with restrictive rules of trade, and professional bodies set up to protect the interests of their members.[165]

3) the information technology revolution – particularly the telecommunications revolution – which meant, for example, that shares in British companies could

[159] Blair M, *Blackstone's guide to the Financial Services and Markets Act 2000* (Blackstone Limited 2001) 2. In the 19th century the Bank of England had an informal role in the supervision of banks. In 1979 the Bank attained statutory powers through the Banking Act of 1979, which was a direct consequence of the secondary banking crisis. For details see; Lomnika E, 'Reforming UK financial regulation: The creation of a single regulator' (1999) Sep Journal of Business Law 480; Ferran, 'Examining the UK's experience in adopting the single financial regulatory model' (n 150)

[160] What was called the 'Big Bang' on 27 Oct 1986. See: Valentine S, 'The Stock Exchange and the Big Bang', (1988) 21 Long Range Planning 35; Rider *et al*, *Guide to financial services regulation* (n 93); Gower, 'Big Bang and City regulation' (n 139); Alcock A, 'A regulatory monster', (1998) JUL Journal of Business Law 371. Alcock argues that: "Big Bang... was to remove inappropriate protections (and so costs) for institutional investors and... to provide end-consumers with competitive products."

[161] Valentine, Ibid

[162] Ibid. Valentine states that: "The percentage of UK company shares owned by individuals was 66 per cent in 1957, whereas the proportion owned by institutions in that year was less than 20 per cent. By 1981, the personal sector's share was down to 28 per cent while that of the financial institutions... had risen almost 60 per cent"

[163] Gower, 'Big Bang and City regulation' (n 139)

[164] A detailed discussion on neoliberalism and its effects on UK financial policy is in Chapter 5, Sec.1

[165] Rider et al, *Guide to financial services regulation* (n 93); Gower, 'Big Bang and City regulation' (n 139); Valentine (n 160)

be traded on the *New York Exchange* as easily and swiftly as on the *London Exchange.*[166]

If London wanted to maintain its superiority, therefore, thorough reform of its financial regulatory structure (self-regulation) would be required[167]. This desire to maintain London's prominence as a global financial centre, while remaining committed to a '*gentlemanly*' system of self-regulation, contributed to the relaxing of rigorous financial regulation in the UK,[168] and the introduction of so-called '*light-touch*' regulation – which is discussed in Chapter 5 (Sec.1).[169]

2.1.1.2 Paving to reform

In July 1981, the Conservative Government of *Margaret Thatcher* appointed Professor *Gower*[170] to review investor protection,[171] and to consider the need for a new regulatory regime to control dealers, investment consultants and managers.[172] According to *Gower*, the review was influenced, *inter alia*, by financial scandals (the collapse of some major investment banks).[173]

Gower's innovative recommendation[174] was that the law must regulate investment markets and their participants.[175] His justification was that protecting investors could be best achieved through a regulatory system based on continuous supervision and the requirement to disclose information that might affect a company's future, its growth, or managerial performance.[176]

In addition, *Gower* proposed reforming the regulatory structure. He was in favour of establishing a US-style, Securities and Exchange Commission *(SEC)*, but knew

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[166] Davidson (n 135)

[167] Rider *et al*, *Guide to financial services regulation* (n 93)

[168] Tomasic R, 'Beyond 'light touch' regulation of British banks after the financial crisis' (2010). At: http://ssrn.com/abstract=1561617 Accessed 15/3/2011

[169] Chapter 5, sec.1

[170] The former Vice-Chancellor of Southampton University.

[171] This stemmed from financial scandals such as Signal Life in 1979, peaking in the collapse of the investment manager Norton Warburg. For more details see: Rider *et al*, *Guide to financial services regulation* (n 93)

[172] Rider *et al*, *Guide to financial services regulation* (n 93)

[173] Gower, 'Big bang and city regulation' (n 139)

[174] Gower's provisional views were published in a discussion document "green paper": 'Review of investor protection - A discussion document', (1982) HMSO, cmnd: 9125; Gower, 'Big Bang and City Regulation' (n 139); Morse, "The City Code on Takeovers and Mergers - self-regulation or self-protection' (n 143)

[175] Morse, 'The City Code on Takeovers and Mergers - self-regulation or self-protection' (n 143); Morris (n 143) 4

[176] Ibid

that it was impossible, given *City* political constraints.[177] In fact, the elite merchant banks and *London Stock Exchange* members denounced *Gower's* suggestion of regulator reform.[178] Their opinion was that the optimal regulatory system for financial services was that government should not intervene in the markets.[179]

In the face of this rejection by the elites, *Gower* reluctantly proposed a new securities regulator, comprising a wide range of self-regulatory authorities, within a statutory framework, all subject to governmental surveillance.[180] *Ferran* described *Gower's* proposal as a "political compromise designed to assuage the concerns of market participants.[181]"

It is evident that elite market players influenced government opinion on *Gower's* proposal, and led to its reshaping. This, arguably, raises questions about the independence of the regulator from economic forces in the market. In this regard, it should be noted that law and finance scholars[182]consider the influence of politics and market players to be of great significance in shaping regulatory enforcement policy, in respect of "law on the books".[183]

Despite the over-reaction to *Gower's* report – essentially a discussion paper between government[184] and the *City*[185] – the government *'White Paper'* adopted most of Professor *Gower's* recommendations,[186] but proposed a different institutional structure.[187] The *White Paper* described it as being "*self-regulation with a statutory body*".[188] The result was promulgating in the Financial Services Act of 1986 (FSA of 1986), which had to be enforced by *Self-Regulatory Organisations (SROs)* recognised by a designated agency.[189] This meant that any

[177] Ibid
[178] Gower, 'The Big Bang and City regulation' (n 139)
[179] Ibid
[180] Rider et al, *Guide to financial services regulation* (n 93) 124
[181] Ferran, 'Examining the UK's experience in adopting the single financial regulation model' (n 150)
[182] Siems M, 'Legal Origins: Reconciling law & finance and comparative law' (n 36)
[183] This is discussed within the topic of FSA enforcement actions in Chapter 5, Sec.1
[184] The Government proposal came in the white paper entitled, "Financial Services in the United Kingdom: a new framework for Investor Protection", Jan 1985, Cmnd. 9432
[185] The City committees' arguments concentrated on whether a new institutional structure was required. For details see: Rider et al, *Guide to financial services regulation* (n 93)
[186] The Government white paper (n 184)
[187] The Thatcher government was at that time advocating and advancing neoliberalism. See Chapter 5, Sec.1
[188] Gower, 'Big Bang and City regulation' (n 139)
[189] Ibid

SRO responsible for the conduct of business,[190] was subject to control by a private company limited by guarantee – the *Securities and Investment Board (SIB)*[191] – rather than being administrated by the government.[192] As part of the first UK regulatory reform, *SIB* was charged with recognising and regulating both *SROs*[193] and *Recognised Professional Bodies (RPBs)*[194], and with supervising their day-to-day conduct of business.[195]

This regulatory model, under FSA of 1986, was a '*Multiple Industry Focused Agencies*' (MIFA) model,[196] under which there existed a number of SROs, covering different sectors in the financial market, all under the supervision of the SIB.

Although the government attempted to introduce this regulatory model to protect investors,[197] critics[198] raised concerns about its efficacy.[199] The nub of industry concern was the existence of multiple regulators *(SROs*), which introduced uncertainties for the supervised entities.[200] The problem was that – because *SIB* was not a single, direct regulator for the majority of investment firms – those firms found themselves subject to different *SRO* rules when undertaking different activities (such as banking, insurance, securities……). Even if a certain level of cooperation between *SRO*s existed, therefore, there was a risk that rules might either overlap, or underlap.[201]

[190] SROs and their regulatory activities were recognized later under the Financial Services Act (FSA) 1986
[191] SIB was delegated regulated powers under the FSA 1986, see for example s. 8 (1) (2) and mainly s.114
[192] Blair, (n 159) 8, 9; Gower, 'Big Bang and City regulation' (n 139)
[193] The Investment Management Regulatory Organization (IMRO), the Personal Investment Authority (PIA), and the Securities and Fraud Authority (SFA). They were recognized by SIB under s.10 FSA 1986. See: Lomnika (n 159)
[194] The Accountants' and Solicitors' Professional Bodies, s. 18 of FSA 1986
[195] This was conducted through the SIB Rule Book (the first was published in Nov. 1987). It worth noting that although SIB was a private limited company (funded by the City with board members from securities industry practitioners) its Rule book had the force of law (though it did not take the form of instruments). See: De Reya B, 'Commercial, the regulation of financial services part 1- an overview', (1987) 84 Law society Gazette 1392; Lomnika (n 159)
[196] Killick, 'Twin peaks' (n 126)
[197] Carey P, 'Not so happy birthday', (1991) 141 New Law Journal 338
[198] Criticisms also pointed to the obscure wording of the FSA of 1986 and the complexity of applying it along with the SRO's rules. For more details see: Mair M, 'Professional in conversation with Michael Blair, Director of Legal Services to the Securities and Investment board' (1988) Law Society Gazette 85
[199] Blackmore R and Walmsly N, 'News analysis - Towards effective regulation", (1992) 43 Law Society Guardian Gazette 89
[200] Ferran E, 'Examining the UK experience in adopting the single regulation model', (n 150)
[201] Ibid

The failure of *SRO*s to control financial services that were moving towards integration,[202] coupled with financial scandals[203] which reflected the failure of *SRO*s to protect consumer interests,[204] prompted the reform of this regulatory structure. The intention to replace the threadbare system of self-regulation emerged in 1995,[205] however radical reform (the second UK regulatory reform) only came in with the new *Labour Government*[206]of 1997.

2.1.1.3 The emergence of a single regulator

The creation of a single regulator came in an announcement by the *Chancellor of the Exchequer, Gordon Brown*, in May 1997[207]:

> "*SIB will become the single regulator underpinned by statute. The current system of self-regulation will be replaced by a new fully statutory system, which will put the public interest first and increase public confidence in the system*."[208]

The *Chancellor* was keen to create a financial regulator capable of supervising and dealing with the integrated financial sector[209] in a way that maintained the international trading position of the *City of London.*[210] According to *Gordon Brown,* this was achievable by adopting a single super regulator model. Note that the Chancellor's desire to maintain London's financial position not only shaped his

[202] Ibid; Lomnika E (n 159)
[203] For example, the Maxwell affair, where the Investment Management Regulatory Organization (one of the recognised SROs under FSA 1986) failed to detect the theft of company's pension fund assets by its controller, Robert Maxwell. For details see: McMeel G, 'The consumer dimension of financial services law: Lessons from the pensions mis-selling scandal' (1999) Company Financial and Insolvency Law Review 29; Black J and Nobiles R, 'Personal pension mis-selling: the cases and lessons of regulatory failure' (1998) 61 Modern Law Review 789. Black and Nobile point out that the pensions mis-selling scandals illustrated "regulatory blindness… lack of awareness… [and lack of] communication and cooperation between different regulators"
[204] Ferran, 'Examining the UK's experience in adopting the single financial regulator model' (n 150)
[205] See Alistair Darling's speech, as Labour's spokesman on the City, quoted from Financial Services and Markets Bill 1998-1999, HC Library Research Paper 99/98 (24 June 1999) 17; Darling A, 'The regulation of the UK Insurance Industry' (1996) 4 International Insurance Law review 171
[206] Ferran, 'Examining the UK's experience in adopting the single financial regulatory model' (n 150)
[207] Ibid. Related discussions on this announcement can be found in the HL Select Committee Report, Monetary Policy Committee of the Bank of England (London, TSO, 1999) (HL 96, 27 July 1999); McDowell R, 'Financial Services Authority - progress or pragmatism?' (1998) 13 Journal of International Banking Law 123
[208] The Chancellor's statement to the House of Commons on the Bank of England, 20 May 1997
[209] Ibid; Arora A, 'Changes to the powers of the Bank of England' (1997) 16 International Banking and Finance Law 21
[210] The Chancellor reiterated this announcement and his vision of a single regulator model on several occasions. See for example: speech to CBI annual conference on 28 Nov 2005; the Mansion House speech on 21 June 2006.

choice of structural model, but also shaped the operation and approach to regulation of the regulator over the following years[211] as discussed later in this study.[212]

The *Chancellor's* vision was implemented in a report by *Andrew Large*, then *SIB Chairman*, in July 1997.[213] The report proposed super regulator combining the roles of: the *SIB*; the Supervision Division of the *Bank of England*; three *SRO*s;[214] the *Insurance Directorate of the Department of Trade and Industry;* the *Building Societies Commission;* the *Friendly Societies Commission; and* the *Registry of Friendly Societies.* Given this structural combination it is clear that the new regulator inherited many of the old regulator's deficiencies. Also, the political establishment remained committed to self-regulation.[215] This is discussed further in Chapter 5 (Sec.1), when describing the effect neo-liberal ideologies on the UK financial regulator and policies.

In October 1997, the government's ambitious proposal was launched with the renaming of the *SIB* to the Financial Services Authority (FSA).[216] The majority of the existing regulatory organisations were brought under the FSA structure;[217] however banking regulatory and supervisory responsibilities were not passed to the FSA until the promulgation of the *Bank of England Act of 1998.*[218]

The FSA integrated regulatory model was applauded worldwide, throughout the 1990s, as a result of its ability to accommodate the move towards integrated financial services.[219] However, deficiencies in its inherited structure were only acknowledged in the aftermath to the banking crisis in 2008, and were considered

[211] The Chancellor's statement to the HC (n 208)
[212] In Chapter 5, s.1
[213] The Chairman of the SIB's Report to the Chancellor on the Reform of the Financial Regulatory System (SIB, July 1997); Alcock , 'A regulatory monster' (n 160)
[214] The Investment Management Regulatory Organization (IMRO), the Personal Investment Authority (PIA) and the Securities and Fraud Authority (SFA) were recognized by SIB under s.10 FSA 1986. See: Lomnika (n 159)
[215] Some academics discussed the impacts of these factors, for example: Arner D, *Economic stability, economic growth and the role of law* (Cambridge University Publishing 2007); Campbell A and Cartwright P, *Banks in crisis - The legal response* (Ashgate Publishing 2002); Ferran E and Goodhart AE, *Regulating financial services and markets in the 21st century* (Hart Publishing 2002)
[216] Financial services (Change of Name of designated Agency) Rules 1997, SIB, 20 Oct 1997. Also see: Alcock A, 'The Draft Financial Services and Markets Bill' (1998) 19 Company Lawyer 258
[217] Davies H, 'Law and regulation' (2001) 3 Journal of International Financial Markets 169
[218] Scott D, 'The UK's Financial Services and markets Bill: the regulation of individuals' (2002) 2 Journal of International Financial Markets 13; Graham T, 'Financial Services and Markets Bill: Investigations and enforcement in the context of the financial crime objective' (2002) 2 Journal of International Financial markets 88
[219] For example this model was adopted in Germany and Iceland. For more details see: The Group of Thirty, 'The structure of financial supervision - Approaches and challenges in the global market place' (2008) Washington DC

one of the key factors behind FSA failures that led to the crisis.[220] Those structural deficiencies within the FSA were highly significant in terms of its approach to regulation.[221]

The creation the UK "super regulator" introduced by Gordon Brown,[222] with its expanded regulatory objectives [223] and powers, [224] fanned the debate among commentators.[225] Supporters of the single regulatory structure argued that it would facilitate the operation of financial groups across all sectors.[226] A single regulator would be more capable of providing efficiency gains. It would allocate resources, with appropriate expertise and experience, to improve business performance and outcomes at minimum costs.[227] For this reason, among others, the FSA adopted a risk-based approach, to ensure its efficiency.[228]

Proponents added that a single regulator would be more effective in achieving its objectives, because its structure reflected the integrated nature of the financial markets. [229] Ironically, in the aftermath to the banking crisis, this alleged effectiveness was considered one of its causes, as *Adair Turner*, then FSA Chairman, said in his *Mansion House speech* in 2012.[230]

Commentators in favour of the FSA model also argued that it would improve accountability, because "the more clearly the regulator's mandate and areas of responsibility are defined, the easier it should be for those who are affected by its

[220] See Turner Review, 'A regulatory response to the global financial crisis' March 2009
[221] Chapter 5, s.1 explains the reasons for the FSA's regulatory failures in the aftermath of the banking crisis.
[222] Although the FSA was created in 1997, it was fully entitled to its statutory powers after promulgating the FSMA of 2000. For more details see: Ferran, 'Examining the UK's experience in adopting the single financial regulatory model' (n 150)
[223] The FSMA Draft Bill demonstrated the FSA's main objectives: market confidence; public awareness; protection of consumers; and the reduction of financial crime. See: Draft Bill, Cll 2(2) and 3-6. Later; s.3-6 FSMA 2000; Alcock, 'The Draft Financial Services and Markets Bill' (n 216)
[224] A rule-based approach underpinned all aspects of the FSA's regulatory style, e.g. the High Level Principles in the FSA Handbook explained acceptable market practice and provided clarifications on compliance and enforcement. The FSA is entitled under Ptx Ch.1 of FSMA 2000 to issue secondary legislation (rules, guidance, a code of practice, etc.). For further information see, Georgosouli A, 'The nature of the FSA policy of rule use' (2008) 28 Legal Studies 119
[225] McDowell (n 207)
[226] Ferran, 'Examining the UK's experience in adopting the single financial regulatory model' (n 150)
[227] Ibid. The risk-based approach was one of the ingredients of the FSA's light touch approach and one of the reasons that led to FSA regulatory failures. See Chapter 5, s. 1
[228] FSA, 'The FSA's Risk-Assessment Framework' Ch. 2, paras 6-9, August 2006; Georgosouli A, 'The revision of the FSA's approach to regulation: an incomplete agenda?' (2010) 7 Journal of Business Law 599; Davies (n 217)
[229] Ferran, 'Examining the UK's experience in adopting the single financial regulatory model' (n 150)
[230] Adair Turner speech (n 124)

operations to hold it accountable.[231]" However it should be noted that the FSA's wide-ranging role and powers were criticised and raised concerns, early in the passage of the Financial Services and Markets Act (FSMA of 2000).[232]

Those against the FSA model warned of the risks inherent in it.[233] One of the most frequently raised concerns was for the quality of regulation and supervision that the FSA would provide, given the very wide range of financial service businesses within its remit, and the associated risks.[234] A single regulator might adopt a "one size fits for all" approach in its operations and supervision.[235] Indeed, in the aftermath of the banking crisis, this was added to the list of FSA regulatory failures and arguably affected its enforcement actions.[236] *Adair Turner*, then the FSA Chairman, in acknowledging this systemic failure, stated:

> *"The FSA was asked to do too much, combining in one organisation functions best kept separate. Good prudential and good conduct supervision requires different skills and approaches.[237]"*

Furthermore, it was argued that the failure to maintain market integrity and consumer protection could easily have been anticipated.[238] *Alcock* advanced this argument:

> *"By concentrating all financial services on the FSA, a single scandal in one small area of responsibility could, in future, destroy*

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[231] Ferran, 'Examining the UK's experience in adopting the single financial regulatory model' (n 150). The same point of view was in the Joint Committee on Financial Services and Markets' First Report, 29 Apr 1999, paras 99-146

[232] For more details see: Howard Davies, then FSA Chairman and Chief Executive, 'Building the Financial Services Authority: What's new?' Travers Lecture at London Guildhall University, 11 Mar 1999. Davis was responding to the HC's concerns and criticisms of the FSA's role. Bazely S, 'The Financial Services Authority, risk-based regulation, principle-based rules and accountability' (2002) 23 Journal of International Banking Law and Regulation 422

[233] Michael Taylor, a senior FSA official, proposed the "twin peaks" solution to overcome such criticism. The "twin peaks" meant dividing the single regulator into two commissions: one responsible for prudential rules and one for consumer protection and market conduct. For more information see: Taylor M, *Regulatory Leviathan - will super-SIB work?* (CTA Financial Publishing 1997) 42; Taylor M, 'Twin peaks: A regulatory structure for the new century' (1995) Centre for the Study of Financial Innovation, London at: http://hdl.habdle.net/10068/572554 (Accessed: 13/11/2012). This article is considered to be the origin of the twin peaks model.

[234] Alcock, 'A regulatory monster' (n 160)

[235] Killick, 'Twin peaks' (n 126)

[236] See Chapter 5, s. 1

[237] Adair Turner speech (n 124)

[238] Alcock, 'A regulatory monster' (n 160); Ferran, 'Examining the UK's experience in adopting the single financial regulatory model' (n 150); Georgosouli, 'The revision of the FSA's approach to regulation: an incomplete agenda?' (n 228)

the reputation of all financial services regulation in the United Kingdom.[239] ,,

Alcock was not mistaken in his concerns, as the credit crisis in 2008 showed. Deficiencies in the structure of the FSA contributed in failures in its supervision, and in its approach to regulation.[240] The banking crisis, among other factors, prompted the third UK financial regulatory reform.

2.1.1.4 Reappraising the FSA - the Twin Peaks model

Based on the previous discussion of the UK financial regulatory model, it appears that many factors have prompted reforms to the model, including: *SRO* inefficiency in tackling market misconduct; financial scandals; and recently the banking crisis. It could also be argued that the political climate contributed to those reforms and was probably the most influential. The detailed review of the UK reforms showed that each regulatory reform came with a new government: the *Conservative Government* in the 1980s, the *Labour Government* in the 1990s, and the current *Coalition Government* since 2010. Although abolishing the FSA was accelerated by the banking crisis in 2007- 2008,[241] the political context should not be overlooked. The calls for regulatory reform came in the *Conservative White Paper* in 2009, stating that the British regulatory system was flawed.[242] The then Shadow Chancellor *George Osborn* said:

"We will abolish the Financial Services Authority, and will create instead a strong…….powerful body able to stand for consumers and ensure they are treated fairly….[243] ,,

Although the proposed reform was not because of insider dealing and market abuse but, as *Alcock* pointed out in 1998,[244] a financial scandal in one of the financial sectors (banking sector) would destroy the reputation of the regulator. Along with other factors, structural deficiencies within the FSA, were said to be one of the

[239] Alcock, ibid
[240] Adair Turner speech (n 124)
[241] The banking crisis in the UK first revealed itself in 2007 with the Northern Rock Bank crisis. Then it spread through the banking system, for example, the acquisition of HBOS by Lloyd's TSB, the nationalisation of the Royal Bank of Scotland, and other collapses of financial institutions. For details see: Killick, 'Twin peaks' (n 126)
[242] The Conservative Party Policy Paper, 'From crisis to confidence - A plan for sound banking' 2009
[243] Ibid p.16
[244] Alcock , 'A regulatory Monster' (n 160)

causes of FSA failures that led to the banking crisis. The fact that the FSA was an integration of the old fragmented (self-regulation) structure, and never had a regulatory framework of its own,[245] was mentioned in the *Turner Review*.[246]

Turning to insider dealing, this inherited structure, and arguably the FSA light-touch approach to supervision and enforcement – which meant minimum intervention in the market[247] – had affected the FSA's ability to counter incidents of insider dealing. According to the FSA, insider dealing "*still appears rampant, and even controlling market abuse appears more aspirational than actual.*[248]"It should be said here that political policy not only impacted the creation of the FSA (the flipside of *Chancellor Gordon Brown's* reforming announcement in 1997[249]) but also impacted approaches to regulation and enforcement. The FSA light-touch approach mirrored *Gordon Brown's* vision of London's prominent financial role on a global scale. *Brown* advocated a light-touch approach as a way to attract international investment, at a time when US authorities were adopting a harsh approach to financial regulation.[250] To this end, it can be argued that the UK financial regulator had suffered from problems of independence.

Despite the FSA's internal reforms, and changes in its approach to supervision and enforcement[251] – which will be discussed in Chapter 5 (Sec.1) – shortly after the election of the current *Conservative-Liberal Democratic government (Coalition Government)*, the new regulatory structure was proposed.[252]

The *Coalition Government*[253] and *HM Treasury* declared their endorsement of the "Twin Peaks" regulatory model, replacing the unified FSA.[254] Interestingly, this

[245] Turner Review (n 220) n13, para 2.2; Ferran E, 'The break-up of the Financial Services Authority' (2010) University of Cambridge - Faculty of Law; European Corporate Governance Institute (ECGI) at: <http://ssrn.com/abstract=1690523> Accessed: 11/12/2010
[246] Ibid
[247] See Chapter 5, s. 1
[248] The FSA quotation was cited in Killick, 'Twin peaks' (n 126)
[249] The Chancellor's speeches (n 210)
[250] Ibid
[251] See for example: Hector Sants' speech, then FSA Chief Executive, at the FSA Annual Public Meeting, 24 June 2010. At <http://www.fsa.gov.uk/pages/Library/Communication/Speaches/2010/0624> Accessed: 1/11/2010. See also the FSA's approach to intensive supervision at http://www.fsa.gov.uk/pages/Library/Communication/Speaches/2010/518_ip.shtml Accessed: 1/11/2010
[252] Killick , 'Twin peaks' (n 126)
[253] George Osborne's speech at the Mansion House, 16 Jun 2010, At: http://www.hm-treasury.gov.uk/press_12_10.htm (Accessed: 10/9/2010)

model was known before the creation of the FSA, and had been proposed for the UK financial regulatory structure, but rejected. The geneses of the Twin Peaks models can be found in an article by *Michael Taylor*, published in 1995.[255] According to *Taylor,* the Twin Peaks model was proposed at the same time as the integrated model (FSA), but was rejected,[256] not for rational financial reasons but for political reasons. He said: "Labour [Party] distrust of the Bank of England, the Parliamentary timetable…[257]"

Therefore, the political climate was – and possibly still is – the most influential factor in regulatory reform.

Just as the creation of the FSA was advocated for the advantages it would bring, so *Taylor* made the case for the Twin Peaks model, as follows:

1) integration in the modern financial industry requires a regulatory structure that focusses on the objectives of regulation (unlike the FSA focus on outcomes[258]);

2) each regulator has specific objectives and a clear mandate (also in contrast to FSA objectives, which were described as very weak or woolly[259]);

3) the regulation of systemically important firms, and who regulates them, should be two sides of the same coin.[260]

These advantages prompt questions about the effectiveness of this regulatory model in preventing the UK from being exposed to another financial crisis, and about whether it is capable of countering insider dealing and market abuse more effectively than the FSA. Answering these questions is not as easy as it may seem and arguably only time will tell.

In fact, most of the financial regulatory models were found wanting during the banking crisis. This confirms that there is no ideal regulatory model, as the

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[254] HM Treasury Paper, 'A new approach to financial regulation, judgement, focus and stability' Jul 2010. The twin peaks model was adopted prior to the banking crisis in the Netherlands and Australia, see the G30 (n 219)
[255] Taylor M, 'Twin peaks - a regulatory structure for the new century' (n 233)
[256] Ibid
[257] Ibid
[258] Tomasic (n 168)
[259] Goodhart AE, 'Regulating the regulator: An Economist's perspective on accountability and control' in Ferran and Goodhart (n 215)
[260] Taylor M, 'Twin Peaks' Sep 2009, Financial World. At: <http://fwarchive.ifslearning.ac.uk/financial_world_/Archive/2009/2009_09sep/Features/Michael%20Taylor/17268.cfm> Accessed: 7/10/2012

International Monetary Fund (IMF) and the *International Organization of Securities Commissioners (IOSCO)* frankly admitted.[261]

As previously argued, although UK regulatory reforms were prompted by many factors, one common factor was arguably the most influential in each of the three reforms: the political climate and pressure from elite market players. In this regard the *World Development Movement* case study of the FSA model revealed:

> *"The FSA…….is almost wholly governed by present and past City actors…….it has not been shown to be independent of either the financial sector or the government……..FSA staff frequently swap positions from industry to regulator and back again…..*[262]*"*

This statement also causes us to question the independence from political and economic policy, of the new regulator, the FCA, and the extent to which current *government* political policy will impact FCA operations, and its approach to regulation. For any regulator to operate efficiently and effectively, it should be independent, not only financially, but also politically.[263] Although financial markets play a vital role in the economy of any country, and it is hard to separate them from politics, it is suggested that political influence be kept to a minimum.

To summarise, political influence, allied with influence from élite market players, has not only helped shape the regulator structure, but also its operations – as shown in Chapter 5 (Sec.1).

[261] The IMF concluded that the 2008 financial crisis did not show the superiority of any one model over another. See: IMF: United States Financial System Stability Assessment, IMF Country Report No 10/247, July 2010 p. 33

[262] The World Development Movement case study of the markets in the financial instruments directive, 'The Financial Services Authority: Watchdog or lapdog?', June 2012 at: <http://www.wdm.org.uk/sites/default/files/FSA-watchdogorlapdog.pdf> Accessed: 1/8/2012

[263] This is one of the challenges that face regulators worldwide, see: Carvajal and Elliot, 'The challenges of enforcement in securities markets: Mission impossible' (n 31)

2.1.2 The financial regulatory model in Jordan

While the UK was going through its second regulatory reform in 1997, Jordan created its current financial regulator, the Jordan Securities Commission (JSC). The creation of the JSC by virtue of the Securities Law of 1997 (SL of 1997) was considered one of the financial reforms in Jordan.

Reforms in the UK, as mentioned above, were triggered by financial scandals, London's prominence as a leading financial centre, global competiveness and finally the banking crisis in 2008. By contrast, the international reform programs, as will be discussed below, triggered regulatory reform in Jordan. This appeared from the *IMF*, *World Bank (WB)* and *OECD* assessments of Jordan's financial market.[264]

Any discussion of the financial regulatory model in Jordan requires first an understanding of Jordan's position in the Middle East and its natural resources, as they are arguably the hidden factors in financial reform.

2.1.2.1 General background – a case of political influence?

Jordan, like most Middle Eastern states, is a "*Rentier State*[265]", lacking oil and natural resources, except for small amounts of phosphate and potash.[266] Since its founding[267] Jordan has had to rely on "*strategic rents in the form of economic aid*[268]", not only for reform, but also to meet its general budget. This suggests that Jordan's economy is to a large extent vulnerable to oil prices volatilities and to the external conditions of financial donors or lenders, whether from neighbouring

[264] For example: Saadi-Sedik T and Petri M, 'The Jordanian stock market: Should you invest in it for risk diversification or performance?' (Aug 2006) IMF WP/06/187. At: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926242> Accessed: 10/1/2010; MENA-OECD Investment Program, 'Jordan national investment reform agenda' 19 Jun 2008. At: <http://www.oecd.org/mena/invetment/38148879.pdf> Accessed: 11/11/2010

[265] A rentier state is a non-oil-exporting state that either relies on non-productive resources or outside financial assistance. For more see: Shambayati H, 'The rentier state, interest groups, and the paradox of autonomy: State and business in Turkey and Iran' (1994) 26 Comparative Policies 307 At: <http://www.jstor.org/stable/422114> Accessed: 1/3/2013; Peters A and Moore P, 'Beyond boom and bust: Eternal rents, durable authorization, and institutional adaptation in the Hashemite Kingdom of Jordan' (2009) 44 Studies in Comparative International Development 256 At: <http://www.mcgill.ca/files/icames/Boom_Bust-2.pdf> Accessed: 12/2/2013; Muasher M, 'A decade of struggling reform efforts in Jordan - The resilience of the rentier system' (May 2011) Carnegie Papers, Carnegie Endowment for International Peace 1 At: http://carnegieendowment.org/files/Jordan_reform.pdf Accessed: 15/1/2013

[266] Ramachandran S, 'Jordan: Economic development in the 1990s and World Bank assistance' (2004) The World Bank Operations Evaluation Department (OED) At: <http://oced.org/countries/jordan/36488608.pdf> Accessed: 3/3/2013

[267] Klaifat (n 66)

[268] Shambayati (n 265); Muasher, 'A decade of struggling reform efforts in Jordan' (n 265)

countries (Gulf States), the US or international organisations (*WB, IMF*).[269] Jordan's macroeconomic imbalances had begun deteriorating during the 1980s, reaching a low point in 1989.[270] In order to overcome these financial difficulties Jordan requested loans from the *WB* and *IMF,* which were granted on condition that economic and political reforms were introduced.[271]

This way of conducting legal reform is considered to be a form of legal transplantation, as described by *Berkowitz et al* in their assessment of legal environments in transition countries.[272] In their study, Jordan was classified as a transition country that had voluntarily transplanted legal rules as a result of reform programs.[273] According to law and finance scholars, Jordan not only transplanted its legal system, as a result of its establishment[274] under colonization,[275] but also as a result of reform programs.[276] This clearly illustrates one difference between UK and Jordanian financial regulation. The UK created its own, whereas Jordan borrowed it as a result of reform reasons. The extent to which this transplantation has affected the quality of financial law, and its enforcement, is discussed in the following chapters.[277]

Although financial reform started in the late 1980s, it remained mostly on paper, with limited practical implementation.[278] Substantive reform came with the succession to the throne of King Abdullah II in 1999.[279] The King was keen to transform Jordan into "*an outward-oriented, market based economy, competitive in*

[269] Ramachandran (n 266); Alissa S, 'Rethinking economic reform in Jordan: Confronting socioeconomic realities' (2007) 4) Carnegie Papers, Carnegie Endowment for International Peace 1 At: <http://carnegieendowment.org/files/cmec4_alissa_jordan_final.pdf> Accessed: 13/3/2013
[270] Jaradat H, 'Jordan's economic crisis, challenges and measures' (2010) Paper presented at the third annual meeting of MENA-SOB. At: <http://www.oecd.org/gov/budgeting/46382448.pdf> Accessed: 14/2/2013
[271] Ramachandran (n 266); Alissa (n 269); Nazzal M, 'Economic reform in Jordan: An analysis of structural adjustment and qualified industrial zones' (2005) the Law and Development Organization. At: <http://www.lawdevelopment.org/articles/jordan.html> Accessed: 27/2/2013; Saif I, 'The process of economic reform in Jordan 1990-2005' (2007) Go-EuroMed WP 0709, The Political Economy of Governance in the Euro-Mediterranean Partnership. At: <http://www.go-euromed.org/> Accessed: 14/2/2013
[272] Berkowtiz *et al* (n 37)
[273] Ibid
[274] Ibid; Djankov *et al* (n 65)
[275] Berkowtiz et al (n 37); La Porta *et al*, 'Legal determinants of external finance' ; La Porta *et al*, 'Law and finance' (n 42)
[276] Berkowtiz *et al* (n 37)
[277] Chapter 4 (s.2) presents a substantive analysis of the Jordanian prohibition regime and Chapter 5 (s.2) its enforcement
[278] Ramachandran (n 266)
[279] Ibid

the global market place.[280]" In 2000 *King Abdullah II* emphasised his commitment to financial reform: "*We have taken the initiative to make free markets, the only norm of resource allocation.*[281]" His vision was to bring Jordan's economy up to international levels.[282] In this, policy makers considered the development of the financial market to be vital for increasing the growth of the national economy.[283] Bringing Jordan's emerging financial markets in line with international standards, therefore, was an essential step in attracting foreign investment.[284]

Thus, akin to the UK, promoting free financial markets and global competitiveness – one of the neo-liberal ideologies[285] – were Jordan's motivating factors for financial reforms.[286] Implementing globalization requirements in the financial regulation of both countries seems, therefore, to be a common base for financial reform.

Although the introduction of financial reform in Jordan was challenging and faced internal resistance,[287] the King reiterated his commitment to reform in 2012 by stating: "*Jordan's economic challenges are substantial. Economic reform is necessary……..it's a necessary pain….*[288]". This statement is very significant in terms of the enforcement challenges discussed in Chapter 5. That chapter attempts to link the rare cases of insider dealing and market abuse to these internal forces of resistance and opposition to reform.[289]

This study suggests that the promulgation of the SL of 1997, which introduced the JSC and the criminal offences of insider dealing and market manipulation, was part of a much wider programme of structural adjustment and financial reform in Jordan. The political agenda, to implement the requirements of international reform programs, was arguably the most significant factor in this wider programme. The

[280] International Business Publications (USA), *Middle East and Arabic Countries company laws and regulations handbook - Strategic information and basic laws* (Vol. 1, International Business Publications 2011) 143
[281] From the King's speech to the World Economic Forum, Davos 2000. Cited in the Jordan Times Newspaper, 31 Jan 2001
[282] MENA-OECD Investment Program (n 264)
[283] Ibid; Malkawi B and Haloush H, 'Reflections on the Securities Law of Jordan' (2008) 19 European Business Law Review 735
[284] MENA-OECD Investment Program (n 264)
[285] See chapter 5, s. 1
[286] This was discussed in the first part of this section.
[287] Muasher, 'A decade of struggling reform efforts in Jordan' (n 265)
[288] From the King's interview with the Agence France-Presse, "Jordan's economic reforms a 'necessary pain'", 16 Nov 2012
[289] See Chapter 5, s. 2

fact that the repealed SL of 1997 was a provisional law, and the current SL of 2002 still is, provides clear evidence of this political influence. Provisional laws,[290] as discussed below, illustrate how executive authority can bully the sovereign legislative authority into introducing laws. This political power, vested in the executive authority [291] (headed by the King as symbol of the country's sovereignty[292]), has its legal foundation in the Constitution of 1952.[293] However, this power should never undermine the sovereign legislative authority of Parliament, which regulates the conduct of state through promulgated law. [294] According to the Constitution of 1952, in cases where Parliament "is not sitting or dissolved", the government, with the approval of the King, is entitled to issue provisional laws, to cover matters that require action or urgent expenditure. Such provisional laws have the same force and effect as other law[295] until they are placed before Parliament at its next session, to be either approved or rejected.[296] In these exceptional and urgent circumstances, the executive authority can place itself above the legislative authority, and issue the necessary provisional law.

The theoretical basis for this legal exception[297] was to justify executive authority intervention in cases of emergency, where state interests are under threat of war or financial crisis[298] and prompt action is needed. The head of state can therefore use his sovereign powers, through the government, to respond to these exceptional cases with law-decrees[299]/ provisional laws.

It cannot be said that there was an emergency situation to justify applying this constitutional exception to the SL of 2002. Jordan's recent history, since the mid-

[290] The 1952 Constitution art 94(i)
[291] The 1952 Constitution art 26 1952 states: the "Executive power shall be invested in the King, who shall exercise his powers through his ministers"
[292] Schmitt C, *Political Theology* (3rd edn, University of Chicago Press 2005)
[293] The Jordanian constitution's relationship to the state of exception is akin to that of many European constitutions in the 19th and 20th century, such as France, Italy, or Germany. On these constitutions see: Agamben G, 'A brief history of the state of exception' (University of Chicago Press 2011). Available at: <http;//www.press.unichicago.edu/Misc/Chicago/009254.hmtl> Accessed: 5/4/2013
[294] The 1952 Constitution, Ch. 5 (The Legislative Power)
[295] The 1952 Constitution art 94
[296] Ibid
[297] Schmitt (292) xxxviii
[298] Humphreys S, 'Legalizing lawlessness: On Giorgio Agamben's state of exception' (2006) 17 European Journal of International Laws 677. Humphreys stated that this exception, "was used to deal with financial crises in Germany in 1923 and in France in 1925, 1935 and 1937, with union strikes and social upheaval in Britain in 1920…"
[299] Schmitt theory was invoked on an international level after 9/11. See: Huysmans J, 'The jargon of Exception - On Schmitt, Agamben and the Absence of the political society' (2008) 2 International Political Sociology 165; Humphreys (n 298)

1990s, did not witness any exceptional or emergency circumstances that required the government to urgently enact provisional laws. The SL of 2002 is merely a body of law that regulates the conduct of business in the financial market, not a matter that poses an imminent threat to the country's integrity. Also, it cannot be described as an urgent matter that required exceptional measures or unexpected expenditures – as the Constitution requires[300] – unless bowing to the *WB* and *IMF* pressures to conduct financial reform in exchange for loans, essential to support the budget of the country, is considered an urgent and exceptional situation. This argument is too weak to justify the use of such emergency powers, especially that, at least in the past 10 years, Jordan has witnessed excessive use of such provisional laws, to the extent that they have become the rule rather than the exception.[301] This brutal abuse of executive authority, using a Constitution exception to undermine the sovereignty of legislative authority, provides clear evidence of political influence.

Remarkably, this abuse[302] was not revealed, nor did it raise concerns, until the beginning of the Arab Spring.[303] The VICSS established this, when it said:

> "*In September 2011, the Vision Institute for Civil Society and Good Governance Studies initiated the first civil society dialogue on provisional laws in Jordan. This came in response to the growing debate questioning the constitutionality of provisional laws, amid public demands for political and legislative reform.*[304]"

In response to the debate over provisional laws, triggered by Arab Spring demands for reform, the Constitution of 1952 was amended,[305] specifically with regard to the use of the constitutional exception. The amendment now entitles the executive authority to issue provisional laws only when Parliament is dissolved (previously dissolved or not in sitting), and if the provisional law is not presented to Parliament

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[300] The 1952 Constitution art 94

[301] MP Abdulla Al-Nsour at the 2011 Parliament, currently the Prime Minister, stated that since 2003 the provisional laws totalled around 300, Dec 2011. At: <http://sadaalhajjaj.com/vb/showthread.php?t=21751> Accessed: 2/3/2013

[302] Currently less than 100 provisional laws are waiting to be placed before Parliament to be either terminated or converted to law. For more information see: The Vision Institute for Civil Society and Good Governance Study (VICSS), National Conference on Civil Society, Parliament, and Provisional Laws, 4 Jun 2012. All VICSS workshops on provisional laws are available at: <http://www.vicss.org.jo/GUI/News/ViewNews.aspx?gid=25> Accessed: 26/4/2013

[303] Ibid

[304] Ibid

[305] The provisions of the Constitution of 1952, as amended in Oct 2011, are available in Arabic at: <http://www.representatives.jo/constitution.shtm> Accessed: 4/4/2013

during its next two sessions, it is terminated.[306] The visible benefit of the constitutional amendment is termination of provisional law by lapse of time. Nonetheless, the SL of 2002 is still provisional law, and has never been brought to Parliament.

To summarise, a situation of excessive political power had existed, as a vehicle for the government to meet its international obligations, despite violating the requirements of the Constitution.[307] International political and economic pressure on Jordan, to implement financial reform allied and underpinned with misuse of executive authority to the constitutional exception answer Research Question 1) – Why was insider dealing prohibited in Jordan?

To understand Jordan's financial reform, it is necessary to examine the historical evolution of Jordan's securities market.

2.1.2.2 The development of the securities market - a historical overview

In the early 1930s, securities of public shareholding companies were traded, although the securities market was not established.[308] Stock transactions conducted by brokers and estate agents[309] formed the nucleus of an unorganised securities market. This situation prompted the government to set up an organised securities market.[310] As a result, during the years 1975 and 1976, joint action by the *Central Bank of Jordan (CBJ)* and the *World Bank's International Finance Corporation (IFC)* resulted in the formal launch of Jordan's first organised market, the Amman Financial Market (AFM).[311] Note that the establishment of this financial market, in

[306] The 1952 Constitution art 94 as amended in 2011 (in English) is at: <http://www.kinghussein.gov.jo/constitution_jo.html> Accessed: 1/3/2013

[307] See 'IMF mission reaches staff-level agreement on the completion of the first review under the stand-by agreement with Jordan' PR No 13/70, March 2013. Available at: <http://www.imf.org/external/np/sec/pr/2013/pr1370.htm> Accessed: 5/4/2013. The IMF thanked the government for its efforts in implementing policies recommended by the IMF to reduce its fiscal and external imbalances. The US State Department spokesperson, Victoria Nuland, also stated: "In the case of Jordan, you have a government that is wrestling with reform, trying to meet obligations for reform both to their own people and to the IMF", from her statement to Agence France-Presse, cited in: "US recommends Jordan's political economic reform", 19 Apr 2013, the Jordan Times Newspaper. Available at: http://jordantimes.com/articles/us-commends-jordans-political-economic-reform (Accessed: 19/4/2013)

[308] Malkawi and Haloush (n 283)

[309] Ibid; Al-Rimawi L, 'Jordan's recent attempts at modernizing its securities regulation corresponds to a wider regional setting' (1997) 18 Company Lawyer 282

[310] The need to establish a stock exchange was brought to national attention in the National Development Plan 1964. The ASE capital market profile is available at: <http://www.ase.com.jo/en/capital-markets-profile> Accessed: 12/9/2103

[311] The first outcome of those efforts was the promulgation of the Amman Financial Market Law, Temporary, no. 31 of the year 1976. See: Al-Rimawi (n 309); Capital market profile (n 310)

coalition with the *WB*, illustrates the early influence of international policy in setting up the financial market, just as later it influenced its reform.

During the same period Jordan had its first financial market legislation, the Amman Financial Market Law of 1976 (AFML 1976).[312] A year later, the Cabinet created the Amman Financial Market Administration Committee (AFMAC), the first financial regulator in the country. AFMAC had a dual function, as financial regulator and traditional stock exchange.[313]

At that time and in contrast to London's prominent financial role and the diversity of its financial services, the pioneer shareholding companies were: the Arab Bank (1930); Jordan Tobacco and Cigarettes (1931); Jordan Electric Powers (1938); and Jordan Cement Factories (1951).[314]

Despite this difference in the financial position and its influence on the regulatory structure between the UK and Jordan, a common regulatory objective can be seen: to regulate the issuance of securities in a way that provides a sound financial market.[315]

The AFM was reformed and renamed the Amman Stock Exchange (ASE) after the enactment of the SL of 1997. Since its establishment, the Stock Exchange has continued to develop and strengthen its role.[316]

2.1.2.3 The securities modernization regime

Jordan seems therefore, to have embarked on a comprehensive programme of financial reform, intended to underpin the private sector, increment and improve the domestic economy, and enhance securities regulation.[317] The legal framework for this was put in place with the enactment of the SL of 1997.[318]The SL of 1997 was intended to restructure the regulatory framework of the Jordanian capital market,

[312] Malkawi and Haloush (n 283)
[313] AFML 1978 (repealed) art 3. AFM had undertaken two tasks: creating a commission and an exchange at the same time.
[314] Amman Stock Exchange profile at <http://www.ase.com.jo/en/capital-markets-profile> Accessed: 1/2/2013
[315] AFML 1976 art 4. Also see: Capital market profile (n 310)
[316] Quoted from: Saadik and Petri (n 264)
[317] Capital market profile (n 310)
[318] Provisional Securities Law, no. 23 of the year 1997, was repealed by the Securities Act 2002

and provide an infrastructure that met international standards, primarily for transparency, efficiency and a sound market.[319]

As regards transparency, this was to be assured by providing a regulatory disclosure obligation – to be discussed in the next chapter.[320] As for transparency in the sense of why and under what circumstances the SL of 1997 was enacted, there has been no official announcement. This lack of regulatory transparency – reported in most of the *IMF* and *OECD* published assessments of Jordan's financial market[321] – is a key issue which must be addressed if the quality of JSC supervision and enforcement is to be enhanced. The dearth of government declarations, consultations or media conferences[322] made it difficult to establish underlying policy and rationale, with regard to financial reform. For this reason, external sources, such as the *World Bank (WB)* and *IMF* assessments, were the main source of information, along with articles addressing economic and political reform in Jordan. This situation highlights the different level of regulatory transparency between the UK and Jordan. The policy underpinning reform in the UK is officially announced, while in Jordan such regulatory transparency, at the time of writing this study, remains unachieved.[323]

Regarding the restructuring of financial institutions, an impressive level of restructuring was achieved in the separation between the traditional exchange role and the regulatory role.[324] Three bodies emerged from AFMAC to cover the two roles: the Jordan Securities Commission (JSC) with a supervisory and legislative role, and Amman Stock Exchange (ASE)[325] and the Securities Depository Centre (SDC)[326] with an executive role (listing securities, dealings and other activities in the exchange).

I. The Jordan Securities Commission (JSC)

The JSC is the most striking example of developments in the securities industry. It is entrusted with legal powers to regulate and develop the capital market in a way

[319] Capital market profile (n 310)
[320] Chapter 3, s. 1
[321] See for example: Saadi-Sedik and Petri (n 264); MENA-OECD Investment Program (n 264)
[322] MENA-OECD Investment Program (n 264); International Business Publications (USA) (n 280) 150 In this publication it was also highlighted that Jordan lacks regulatory transparency and that the government is slowly moving to foster transparency
[323] International Business Publications (USA) (n 280) 143
[324] SL 2002 arts 7-24
[325] SL 2002 arts 65-75
[326] SL 2002, arts 76-89

that ensures fairness, efficiency and transparency, and protects investors.[327] The legal powers entrusted to the JSC were presented in a non-exclusive list of twenty powers to satisfy its administrative needs.[328] In addition, the JSC has the authority to conduct investigations whenever law violations occur, and to impose sanctions.[329] To ensure the high performance of the JSC, the SL of 2002 stressed its financial and administrative independence.[330] However, based on the previous discussion, the independence of the JSC arguably can be questioned. If the country's general economy is subject to donor and lender conditions, JSC independence is put in doubt, not least because JSC commissioners are appointed by the Council of Ministers, based on the Prime Minister's recommendation, endorsed by a Royal Decree from the King.[331] Given this situation, it could be argued that national political policy might tend to shape the approach to regulation of the financial regulator (JSC). This issue is discussed further when trying to justify the JSC rare enforcement approach in Chapter 5.[332]

II. Amman Stock Exchange (ASE)

The ASE under the SL of 2002 enjoys administrative and financial autonomy[333]. The ASE was established in 1999 as a private company (non-profit)[334] and its members consist of authorised financial brokers and dealers[335].

The ASE is the only organised securities market[336] at the date of this study. The securities traded in the exchange are: equities (stocks) and bonds (corporate bonds, public entity bills and bonds, and Treasury bills and bonds).[337] There are clear differences between the UK financial markets (their size and operation) and the

[327] SL 2002 art 8(A) states: "The Commission in particular aims to achieve the following: 1. Protecting investors in securities; 2. Regulating and developing the capital market to ensure fairness, efficiency and transparency; 3. Protecting the capital market from the risks it might face." These objectives are an implementation of the International Organization of Securities Commissions (IOSCO) objectives for securities, at : <http://www.finrep.kiev.ua/download/ioscopd154_en.pdf> Accessed: 1/12/2011
[328] SL 2002 art 12
[329] SL 2002 art 17(A) & (B)
[330] SL 2002 art 7
[331] SL 2002 art10(B) & (C)
[332] Chapter 5, s. 2
[333] Dabit M, 'Jordan: financial regulation - foreign investors' (2006) 23 Journal of International Banking Law and Regulation 5
[334] ASE website <http://www.ase.com.jo/en/about-ase> accessed: 28/9/2010
[335] SL 2002 art 65(B)
[336] The ASE market is divided into the first market and the second market. All securities are traded initially in the second market. However, if the issuer of securities fulfils the regulation requirements its securities can be transferred to the first market. For more see Market segmentation <http://ase.com.jo/en/market-segmentation> Accessed: 1/9/2010
[337] < http://ase.com.jo/en/equities> , <http://ase.com.jo/en/corporate-bonds> Accessed: 1/9/2010

diversity of their listed securities – described in Chapter 4[338] – and the Jordanian financial market.[339] As regards size, the ASE market profile states that:

> *"[ASE] capitalization of more than JD21 billion, the ASE is one of the largest stock markets in the region that permits foreign investment. The exchange currently has 802,866 shareholders, 43.5% of the shares are held by Jordanian corporate and individual investor, foreign investors account for 49.6% of share ownership, and the government through the Jordan Investment Corporation holds 6.9%*[340]"

As regards issuers, only public shareholding companies' securities are permitted to be traded on the ASE[341] unlike in the UK. Such clear differences between the UK and Jordanian financial markets, among other things, justify their choice of the regulator structure as shown below.

III. The Securities Depository Centre (SDC)[342]

The SDC is a public utility institution with administrative and financial autonomy.[343] According to the SL of 2002, the function of the SDC is to register, deposit, clear and settle securities.[344] To carry out these functions, the SDC is legally empowered to draw up by-laws and instructions.[345] All securities transactions must be confirmed by the SDC (for example: sell/buy orders, price and quality). After the transaction is done, the SDC amends the list of equity holders for the issuer in question.[346]

To summarise, the key feature of Jordanian financial regulatory reform is the existence of three different institutions, splitting the functions of regulation and supervision. It will be apparent that the regulatory structure in Jordan differs from the one in the UK. While the financial regulatory model in the UK changed to the

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[338] Chapter 4, section 2
[339] This is clarified under the discussion of the prohibition regime in both countries in Chapter 4
[340] ASE profile at: <http://www.ase.com.jo/en/capital-markets-profile#3> Accessed: 28/3/2013
[341] Companies Law of 1997 art 95. Available in English at: <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwejor.htm> Accessed: 11/12/2009
[342] <http://www.sdc.com.jo/english> (Accessed:1/9/2010)
[343] SL 2002 art 76
[344] SL 2002, art 77 Also see: <http://www.sdc.com.jo/english/index.php?option=com_content&task=view&id=15> Accessed:1/9/2010
[345] SL 2002,art 83
[346] Malkawi and Haloush (n 283)

Twin Peaks model, Jordan adopted the institutional regulator model.[347] This model (the institutional regulator model) is a good example of a classical form of financial regulator which does not adjust well to moves towards integration in financial services.[348] One of the reasons for choosing the unified structure of the abolished FSA, was the move towards integration in financial services provided by firms in the UK. Yet, this is not the case in Jordan, where for every financial sector there is a separate financial regulator. Banks are under the supervision of the Central Bank of Jordan (CBJ), [349] the insurance sector is regulated through the Insurance Commission (IC), [350] and the Companies Control Department (CCD), [351] a department of the Ministry of Industry and Trade, is responsible of companies' registration, services and control.

It is clear then that the conglomerate regulatory structure is the distinguishing feature of the financial regime in Jordan, unlike in the UK where banking, insurance and securities services can be provided by one firm.

2.1.3 Concluding remarks

Citing and extracting reasons for regulatory reform was not a challenge in the UK, compared to Jordan. A suggested reason for this was that Jordan's financial reforms represent a case of legal transplantation.[352] Another justification could be that securities regulation in Jordan is, at the date of this study, provisional law. Thus no parliamentary debates are available to clarify why the prohibition of insider dealing was established. With regard to the regulatory model, it was highlighted that both countries have chosen different structures: the Twin Peaks model in the UK and the institutional model in Jordan.

The section explored the reasons that led to the current regulatory structure in both countries. Despite the announced reasons for reforms in both countries (financial scandals, the move towards integrated financial services, global competitiveness…etc. in the UK and the economic reform in Jordan), most likely

[347] This model is still adopted in China and Mexico. See: The G30 (n 219)
[348] The G30 (n 219) 24
[349] The Central Bank of Jordan Law of 1971 art 4. The CBJ is an autonomous corporate body, established in late 1950s, aiming at maintaining the safety of the banking system through its regulatory and supervisory role. <http://www.cbj.gov.jo> accessed: 27/9/2010
[350] IC was established in 1999, <http://www.irc.gov.jo/home.asp> accessed: 24/10/2010
[351] CCD became an independent department in early 2003. <http://www.ccd.gov.jo/english/inside.php?src=s1&id=5001> accessed: 30/10/2010
[352] Berkowtiz et al (n 37)

the hidden factor was public political policy. In the UK this policy – allied with the influence of elite market players, who favoured self-regulation – influenced the choice of the regulatory structure and any later reforms. In Jordan it was initially the conditions for granting loans from the *IMF* and *WB* that triggered economic reform, and led to the creation of the JSC. Having said this, it can be argued that issues of regulatory independence exist in both countries. Political and economic influence, discussed in this section, does not end with the choice of regulatory model – it manifests itself in the regulatory approach to regulation and enforcement, as Chapter 5 discusses.

This section also provided an answer of Research Question 1) – Why was insider dealing prohibited in Jordan? The imposed international financial reforms, along with the internal political pressure to bring Jordan's financial market up to international levels, were the true reasons for establishing prohibition of insider dealing in the SL of 2002.

2.2 Section 2: The Geneses of Insider Trading Prohibition

The difficulty of establishing substantive standards for financial firms and market transactions has refocused the attention of regulators worldwide on the issues of insider dealing and market abuse,[353] especially with the growth of internationally active companies, and the increase in foreign investment activities. Therefore, some degree of international cooperation is needed to tackle insider trading and market abuse, considering their threat to market integrity and investor confidence, and this is presently manifested in the work and initiatives carried out by the *International Organization of Securities Commissions (IOSCO).* [354] The previous section presented justifications of creating the UK and Jordan financial regulators and the influential factors of such evolution, enter alia, the necessity of tackling insider dealing that sought to hinder the regulator objectives in maintaining investors' confidence and market integrity[355].

This section explores the evolution of insider dealing prohibition and its historical development in the UK and Jordan. It covers only theoretical aspects of prohibition. The substantive legal regimes of the UK and Jordan are covered in Chapter 4.

2.2.1 The geneses of insider dealing prohibition in the UK

In the UK, decades ago, any individual who took advantage of his company's inside information was counted gifted or blessed.[356] Before 1980[357] there was no statutory ban on the practice, nor did the common law identify insider dealing as a proscribed practice.[358] Nevertheless, there were calls for legislative action to control

[353] Haines J, 'IOSCO to the FSA - new trends in regulating abuse of financial markets' (2005) 26 Company Lawyers 225

[354] In 1998, IOSCO adopted a comprehensive set of Objectives and Principles of Securities Regulation (IOSCO Principles) which are today the regulatory benchmarks for securities markets. Today the Organization aims to promote high standards of regulation to maintain just, efficient and sound markets. <http://iosco.org/about> Accessed: 10/11/2009

[355] Avgouleas (n 11) 196

[356] See for example; *U.S v. Carpenter,* 791 F.2d 1024 (2d Cir. 1986); *SEC V. Materia,* 745 F.2d 179 (2d. Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *U.S v. Chestman, 9*47 F.2d 551 (2d Cir. 1991), cert. denied, 112 S. Ct. 1759 (1992)

[357] McCoy K and Summe PH, 'Insider trading regulation: a developing state's perspective' (1998) 5 Journal of Financial Crime 311; Ashe M, 'The crime being something in the City- part 1' (2000) 150 New Law Journal 1344

[358] See the leading case: *Percival v. Wright* [1902] 2 Ch. 421. The *Court of Chancery* held that a company's director owed a fiduciary duty to the company, not to the shareholders. Thus he was not obliged to disclose the company's inside information before dealing. Also see: Alexander K, 'Insider dealing and the market abuse: the Financial Services Act 2000' December 2001 WP no. 222, ESRC Centre for Business Research, University of Cambridge, at <http://www.cbr.com.ac.uk/pdf/WP222.pdf> Accessed:1/12/2010

insiders who were unfairly privileged by their position.[359] Although these calls did not prompt the Parliament to take action until the late 1960s,[360] they were implemented in the *Jenkins Committee Report* recommendations.[361] For instance, the *Jenkins Committee Report* recommended prohibiting directors from purchasing their company's options on the basis of inside information, and requiring them to disclose any dealing in their company's securities.[362] These recommendations, which were later implemented in the Companies Act of 1967,[363] formed the basis for the prohibition on insider dealing in options. But this prohibition was rarely invoked.[364]

Despite the government's failure to develop restrictions on insider dealing before 1980,[365] two Self-Regulatory Organisations – the *City Panel on Takeover and Mergers (the Panel)*[366] and the *London Stock Exchange (LSE)*[367] – had established rules and guidelines that restricted insider dealing and tipping inside information.[368] As mentioned in the previous section, those rules and guidelines were never firmly enforced[369] and lacked statutory support,[370] as the *Panel* stressed more than once.[371] For this, *inter alia*, the *Panel* called for a legislative base to tackle insider dealing, and also favoured criminalizing this misconduct.[372] The *Panel's* calls were echoed in other self-regulatory bodies and influential organisations in the *City*, especially,

[359] S. 3 of this chapter will explain further the unfairness of insider dealing argument.
[360] Rider, 'The control of insider trading - smoke and mirrors (n 147)
[361] Report of The Committee on Company Law, Cmnd 1749, para 89, Chairman Jenkins. (London: HMSO. 1962). Cited in: Hannigan B, *Insider dealing* (2nd edn, Longman Group 1994)
[362] Rider, 'The control of insider trading - smoke and mirrors' (n 147). Rider stated that this requirement was recognised before the Jenkins Report.
[363] The Companies Act of 1967 ss 25, 27
[364] Rider, 'The control of insider trading - smoke and mirrors' (n 147)
[365] Alexander, 'Insider dealing and market abuse: the Financial Services Act 2000' (n 358)
[366] The City Code on Takeovers and Mergers, Rule 4.1. See Also Lord Alexander of Weedon's statement in the Second Reading of the Criminal Justice Bill, HL Deb 3 November 1992, vol.539, col.1363: "In the 1970s the Takeover Panel, in its non-statutory Code, outlawed insider dealing in connection with takeovers. The legislation of the 1980s applied the prohibition to insider dealing generally."
[367] LSE, 'Model Code for Securities Transactions by Directors of Listed Companies' (Yellow Book) 1987 at 5.43-5.48.
[368] Alexander K, "Insider dealing and market abuse: the Financial Services Act 2000' (n 358); McCoy and Summe (n 357)
[369] See the previous section
[370] In the previous section, the SRO's dominance over the financial market prior to and during the 1980s, and the problems accompanying enforcing their rules were discussed.
[371] See the discussion over the Panel's role in policing the City in the previous section under the origins of the UK financial regulator
[372] For information see: The Panel and London Stock Exchange Statement 1973/04, "Insider dealing", 02/02/1973. At: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/1973-04.pdf> (Accessed: 11/11/2012); Rider, 'The control of insider dealing - Smoke and mirrors' (n 147)

as *Rider* emphasised, in the face of a strong perception that insider dealing was a serious, widespread threat to investor confidence in the industry.[373]

By 1980, and after several failures of legislative attempts to prohibit insider trading,[374] it eventually became a crime in the UK,[375] under the Companies Act of 1980 (CA of 1980).[376] The geneses of prohibition can be found in the definition of an insider, in Section 37(1) of the CA 1980, as someone who is a director of a company or a related company. This targeting of directors brings us to the fiduciary theory. This theory originated in the US when the *Georgia Supreme Court* introduced the "minority" or "duty to disclose" rule, affirming that directors must hold the information they had obtained by virtue of their positions in the corporation, in trust for the benefit of the shareholders.[377] Thus, a fiduciary obligation exists, requiring directors to disclose material non-public information to shareholders before trading with them.[378] Furtherance of this claim can be found in the explicit connection requirement, an essentially condition for prohibition.[379] Being restricted to directors – while overlooking officers, employees (classic insiders) and those having a professional or business relationship with the company (constructive insiders), and shareholders (majority or controlling)[380] – detracted from the effectiveness of the prohibition regime.

Its narrow ambit was not the only deficiency in the prohibition regime: obstacles to securing evidence manifest themselves as well. Prosecutors in insider dealing cases were required to prove that the accused person was in a position that gave him

[373] Rider, 'Civilising the law' (n 144)
[374] The Companies Bill, 1973, HC Bill 52 (UK) and the Companies Bill, 1978, HC Bill 2 (UK). Cited in Loke A, 'From the fiduciary theory to information abuse: The changing fabric of insider trading laws in the UK, Australia and Singapore' (2006) 54 American Journal of Comparative Law 123
[375] Part V of the Companies Act 1980 imposed criminal sanctions on those convicted of insider trading, and following this Act insider trading was considered a crime for the first time in UK. See: McGuinness C, 'Towards the unification of the European Capital Markets: The EEC proposes a directive on insider trading' (1988) 11 Fordham International Law Journal 432
[376] The Companies Act of 1980 ss 68-73
[377] See *Oliver v. Oliver*, 45 S.E. (Ga.1903). The "fiduciary duty" rule states that the insider has a duty to disclose material information when he buys stocks from a shareholder.
[378] By the late 1930s the "fiduciary duty" rule prevailed and the older "majority" rule was no longer used by most of the US courts. See: Bainbridge S, 'The law and economics of insider trading: A comprehensive primer' (2001) University of California, Los Angeles (UCLA) School of Law at: <http://ssrn.com/abstract=261277> Accessed: 3/3/2010; Lake B, 'The use for personal profit of knowledge gained while a director' (1937) 9 Mississippi Law Journal 427
[379] Section 68(1) used 'by virtue of being connected with the company' which clearly reflects the fiduciary duty; Davies P, 'The European Community's' Directive on insider dealing: From company law to securities market regulation' (1991) 11 Oxford Journal of Legal Studies 92
[380] Loke (n 374)

access to confidential price-sensitive information, and to prove that he knowingly possessed inside information relating to his company.[381]

The insider dealing prohibition of the CA of 1980 was later consolidated in the Company Securities (Insider dealing) Act of 1985 (CA of 1985).[382] The prohibition under the CA of 1985 was significantly expanded to embrace persons (insiders) who had access to material non-public information by virtue of their position in the company (connected persons such as directors, officers, employees…[383]). Such persons were prohibited from tipping inside information, and from dealing in the securities of their company while possessing such information.[384] In addition, tipped persons were prohibited from dealing on the basis of that inside information.[385] The prohibition also encompassed persons possessing non-public information related to a proposed takeover of a company, from dealing in the price-affected securities using such inside information.[386]

Although the CA of 1985 was important in banning insider dealing, securing evidence was as challenging as under the CA of 1980. The prosecution would have to prove: the insider's connection with the company through his employment, business or profession[387]; that he dealt in securities while in possession of inside information; and that he knew it was inside information.[388] As for tippees, the prosecution had to prove they were tipped inside information from a person connected with the targeted company, and were aware of that connection.[389] The *Fisher case*[390] highlighted loopholes in the CA of 1985. In that case, *Fisher* was acquitted from two charges of insider dealing even though he was tipped inside information. The defendant contended that the CA of 1985 was concerned with dealings of closely connected persons with the company, rather than an outsider

[381] Rider, *Insider trading* (n 147)
[382] Pettet, *Pettet's Company Law* (n 106) 409
[383] Ibid; Rider, *Insider trading* (n 147)
[384] Rider B, Alexander K, Linklater L and Bazley S, *Market abuse and insider dealing* (2nd edn, Tottel Publishing 2009) 45
[385] Alexander K, 'Insider dealing and the market abuse: the Financial Services Act 2000' (n 358)
[386] Ibid
[387] CA of 1985 ss.1(1)(a), 9(a)
[388] Rider *et al*, *Market abuse and insider dealing* (n 384)
[389] CA of 1980 s 68(3). It was difficult in practice to prove the existence of awareness. See *R v. Kean and Floyd*: a junior analyst was informed about an intended sale of Intercontinental Hotels by his superior in order to prepare research data to show the impact of that intended sale. To do so, the junior analyst visited the dealing room and by mistake the information was leaked to a market maker who was employed by the analyst's company. The case was dismissed because of failure in proving awareness. The case was cited in Loke (n 374). See also: *R v. Fisher* (1988) 4 B.B.C. 360
[390] *R v. Fisher* ibid

who was given the information without requesting it.[391] In other words, *Fischer's* (tippee) liability was impossible to establish because the connectedness with the company was not proved.

Therefore it could be said that although insider dealing prohibition under the CA of 1985 provided a modest improvement in substantive terms (included classic and constructive insiders), [392] the connectedness requirement (or fiduciary duty) remained the essential requirement for insider liability.[393]

Because of these difficulties in proving the insider dealing offence, the CA of 1985 attracted criticism that pointed to the low conviction rate for insider dealing violations. This was due to the higher burden of proof required in the criminal procedures,[394] as well as the connection requirement.

The most noticeable regulatory reform of insider dealing prohibition came in the Criminal Justice Act (CJA of 1993), which illustrated the government's endeavours to adopt the EC Directive of 1989,[395] and the need to enhance the sanctions against insider dealing. [396] Although the scope of the CJA of 1993 was considerably extended – regarding the persons, markets and securities involved – critics contended that the criminal law was again the chosen method of preventing insider

[391] Lutz A and May P, 'Insider dealing - outside problems?' (1989) 7 International Bank Law 118
[392] Rider, 'The control of insider trading - smoke and mirrors' (n 147). The Act 1985 was expanded to cover persons involved in a corporate tender offer and to embrace secondary insiders (Ch. 60. S 1(2))
[393] The CA 1985, Ch.60, s.(1) defined an insider generally as a person connected with a company. See also: Loke (n 374)
[394] Rider, 'Policing the international financial market: an English perspective' (1990) 16 Brook. J. Int'l L 179; White M, 'The implications for securities regulation of new insider dealing provisions in the Criminal Justice Act 1993' (1995) 16 Company Lawyer 163. Interestingly the civil market abuse regime encountered the same hurdles, although it was created to overcome the challenges in proving the criminal insider dealing offence. See the discussion in Chapter 4, s.1
[395] Council Directive "Coordinating regulations on insider dealing" 89/592 (1989) O.J.L 334/30. The Directive was to be transformed into national law by 1 June 1992, Article (1) of the Directive. See also: Department of Trade and Industry (DTI), "The law on insider trading: A consultative document", December 1989, para 2.12. DTI indicated that implementing the Directive could be done just by amending the existing criminal law before June 1992. This clearly reflected the approach of using solely the criminal law to ban insider dealing, despite previous criticisms. Also see: Tradimas T, 'Insider trading: European harmonization and national law reform' (1991) 40 International & Comparative Law Quarterly 919
[396] See in this regard the Minister of State, Home Office, Earl Ferran's statement in the Second Reading of the Criminal Justice Bill at: HL Deb. 3 Nov 1992, vol.539, ccl. 374-88. The Directive was replaced by the Directive 2003/6/EC. OJL 096 of the European Parliament of the Council on Insider Trading and Market Abuse (Market Abuse Directive (MAD). For further information see: Wotherspoon K, 'Insider dealing - the new law: Part V of the Criminal Justice Act 1993' (1994) 57 Modern Law Review 419

dealing, and it proved to be insufficient.[397] The government's stance was not influenced by the Directive of 1989, which acknowledged member state discretion regarding the form and methods of prohibiting insider dealing.[398] Rather, it was its unwillingness to develop restrictions on insider dealing using the civil regime.[399]

Despite criticisms for criminalizing insider dealing, significant changes in the UK prohibition approach were introduced with the CJA of 1993 – mainly in the migration from companies law to capital market law.[400] In other words, insider dealing prohibition under the CJA of 1993 reflected a shift in underlying policy on prohibition, from being a breach of fiduciary duty by a corporate insider[401] to full knowledge of possessing inside information (access to information), regardless of how it was acquired.[402] This mirrored the Directive of 1989 prohibition policy: investors are placed on an equal footing and should be protected against improper use of inside information.[403]

Although the CJA of 1993 enhanced the efficiency of the prohibition regime, critics argued[404] that the failure to adopt civil liability/sanctions hindered the effectiveness of prohibition, as a result of difficulties in securing evidence under the criminal regime.[405] Also, it was argued that because the CJA of 1993 is confined to individuals, corporations and other legal persons cannot be charged for insider trading.[406] The discussion in Chapter 5 presents a contrasting argument that shows how prohibition under the CJA of 1993 can include legal persons.[407] To this end,

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[397] Ashe (n 357). See also: Lord Richard at the Second Reading of the Criminal Justice Bill, HL Deb, 3 November 1992, col.1881, reading part of a letter from the Stock Exchange: "The operation of the present insider dealing regulations… have been frustrated by the ambiguity in the legislation and the problems of satisfying the high proof required in criminal trials."

[398] The Directive 1989 art 8(2) and the Directive preamble reflected its underlying policy: "the smooth operation of the market depends to a large extent on the confidence it inspires in investors… that they are placed on an equal footing and that they will be protected against the improper use of inside information… Insider dealing is likely to undermine that confidence…" Also see: Tradimas, 'Insider trading' (n 395)

[399] Many arguments during the passage of the Bill raised concerns about inadequate consultations and the impact of the legislation on legitimate market practices. See, for instance, Baroness Mallalieu's argument in the Second Reading of the Criminal Justice Bill, HL Deb 3 Nov 1992, vol. 539, col. 1358

[400] Generally see: Davies (n 379)

[401] Pettet, *Pettet's Company law* (n 106)

[402] The CJA of 1993 ss.57(1), 75 (2) and the Directive 89 art 23(1)

[403] The Directive 1989 preamble, Recitals 9-10

[404] Rider, 'The control of insider trading - smoke and mirrors' (n 147)

[405] Filby M, 'Part VIII Financial Services and Market Act: Filling insider regulatory gaps' (2004) 25 Company Lawyers 363

[406] Rider *et al*, *Guide to financial services* (n 93) 605

[407] This is discussed as part of assessing the effectiveness of the civil market abuse regime in Chapter 5, s.3

the prohibition of insider dealing was based on the requirement of having access to inside information, which as previously argued was hard to prove.

Gaps in the CJA of 1993 were filled by the promulgation of the Financial Services and Markets Act (FSMA of 2000) which set out a new civil regulatory regime for tackling insider trading and market abuse, under Part VIII, as being a form of misuse of information.[408]

Insider liability, under the civil offence of insider dealing in the FSMA of 2000, is based on "parity of information" – providing equal access to information necessary for investor investment decisions.[409] This illustrates an important aspect of the market abuse regime – the legal duty of all regulated market investors to disseminate information that is vital for investor decisions.[410] Thus, a significant shift was made in the rationale for insider dealing prohibition, from "information access" towards "parity of information".

In 2003, and inspired by the UK civil regime, the EC Directive on Insider Dealing and Market Manipulation (Market Abuse) (2003/6/EC) (MAD)[411] was launched, to tackle insider dealing through harmonization mechanisms between the EU states. The civil offence of insider dealing, and the geneses of prohibition under MAD were akin to those under the FSMA 2000 regime.

To summarise, the UK had developed a prohibition ambit for the offence of insider dealing that was at first based on the connectedness requirement/fiduciary duty, then on access to inside information, and has now shifted to parity of information.

2.2.2 The geneses of insider dealing prohibition in Jordan

The regulatory prohibition of insider dealing in the UK had developed early, whereas Jordanian regulatory prohibition had a long gestation period. The previous discussions showed the endeavours to develop a theoretical and regulatory basis for prohibiting insider dealing in the UK. The same cannot be found in Jordan. The UK had developed its own securities regulation in conformity with market needs. Under this, prohibition of insider dealing was developed, based on its threat to market

[408] *R v. Fisher* case (n 389)
[409] Loke (n 374)
[410] Rider *et al*, *Market abuse and insider dealing* (n 384) pp.71, 72. This policy was later adopted by the IOSC in 2001, see: IOSC, 'Objectives and Principles of Securities Regulation' Madrid 2001
[411] MAD became effective on 12 April 2003 replacing the Directive 89

integrity and investor confidence. In this, the UK represent an example how developed countries can create their own legal rules and systems, while Jordan represents an example of a developing country as a recipient of legal rules and systems. [412] Added to this, the Jordanian securities market is fairly new in comparison with the markets of those developed countries. Jordan's first organised market, Amman Financial Market (AFM), was established in 1978,[413] and reformed into the Amman Stock Exchange (ASE) in 1999,[414] whereas the London Stock Exchange (LSE) was officially formed in 1773.[415]

The long experience of such developed countries in regulating market conduct and insider dealing, was inspirational in the development of new insider dealing regimes in developing parts of the world. For example, as discussed in the previous section, Jordan developed its securities regulation initially through reform programs, intended to bring its market up to the level of international markets by implementing globalization requirements. Such global standards were established and developed based on the experience of developed countries in regulating financial markets. In light of this, it could be concluded that capitalizing on the experience of developed countries explains the lack of a theoretical basis for insider dealing in Jordan, and the lack of judicial decisions relating to it. Nevertheless, this part of the section attempts to explain the geneses of insider dealing prohibition in relevant laws and in the SL of 2002.

Although the first recognition of an offence of insider dealing was in the SL of 1997, company insiders (the chairman of the board of directors, board members and general managers) were, in conformity with the Companies Law of 1962 (CL of 1962), under duty to declare, in writing to the board, any securities at their disposal or the disposal of their spouses and minor children and they were considered trustees of their companies.[416]

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[412] Berkowtiz *et al* (n 37)
[413] See Jordan Securities Commission official website: <http://www.jsc.gov.jo/public/english.aspx?site_id=1&Lang=3&site_id=1&page_id=2011&menu_id2=160> Accessed: 1/8/2013
[414] See ASE official website: <http://www.ase.com.jo/en/about-ase> Accessed: 1/8/2013
[415] See the official website of LSE at: <http://www.londonstockexchange.com/about-the-exchange/company-overview/our-history/our-history.htm> Accessed: 15/8/2013
[416] The first Companies Law in Jordan was enacted in 1929 after the British Companies Act. By the end of the Second World War, French influence on Jordanian law was manifest, displacing the British influence. However, share holding companies were regulated for the first time in the Act of 1962. See: Malkawi B, 'Building the corporate governance system in Jordan: a critique of the current framework' (2008) 6 Journal of Business Law 488

The rationale for the prohibition of insider dealing – which was included in the Civil Law of 1976 (CL of 1976)[417] and retained in all later companies law[418] – could be either based on 'fiduciary duty', 'misrepresentation' or 'misleading'.[419]

Taking fiduciary duty first, the provisions of the CL of 1976 consider company directors agents (trustees) who must work for their company's interest, and hold its information in trust for the benefit of shareholders[420]. For this reason, they were forbidden from taking part, directly or indirectly, in any transaction or contract with the company where there is "conflict of interests", or to use its information for personal gain. The Companies Law (CL) of 1997 applied, with some expansion, the same rationale for prohibition. For that reason, the chairman, any member of the board of directors, or any employee, is forbidden from participating in any contracts or dealings which result in conflict of interest. Also they are not allowed to practice their trade or business in the same activity area of their company.[421] The concept of fiduciary duty is thus at the heart of previous prohibitions, and serves to justify the prohibition of insider dealing.

Misrepresentation[422] is another possible rationale for the prohibition of insider dealing. Misrepresentation exists where one of the contracting parties uses fraudulent means (by saying or acting) to deceive the other party into giving consent which would not be given otherwise.[423] The essential elements if an act is considered to be misrepresentation are: (a) the use of fraudulent means; (b) the consent of the other party was acquired by deceit; and (c) gross cheating resulting from misrepresentation.

[417] Note that the Civil Law of 1976 was the first legislation governing all commercial and civil transactions in Jordan and is considered the general regulatory code for such transactions.
[418] The Companies Law of 1989 and the current Companies Law of 1997 extended insiders' declaration of their owned shares in any company and required them to declare in writing to the board any changes of ownership within two weeks of the member's knowledge thereof. See the Civil Law 1997 art 166(a)
[419] Civil Law 1976 arts 143, 144 and 145 which regulates deception between contractual parties; Siwar W, *Sources of obligations* (2nd edn, Dar Wae'l publishing 2000)
[420] Civil Law 1976 art 115 forbids the agent from being a party in a direct transaction with his principal. Also, Art 591 states that every partner holds the company's money in trust. In addition, Art 597 states that a partner is obliged to work for the benefit of the company as if he were working for his own benefit. (The translation of the Articles is the researcher's own, as the original drafting is in Arabic.)
[421] CL of 1997 art 148
[422] Civil Law 1976 arts 143, 144 and 145 specifically regulate deceit resulting between contracting parties.
[423] Civil Law 1976 art 143

The prohibition of insider dealing can also be justified on the basis of misleading. The CL of 1976 considers this to be the concealment of a fact or circumstance, misleading to a person who would not have made the contract if the fact was revealed.[424] Misrepresentation and misleading seem to be weak justifications, because of the impersonal nature of financial market transactions.[425] For this reason, therefore, prohibition of insider dealing cannot be based on deceit or fraud alone.

Fiduciary duty, therefore, can be used as a basis for obliging corporate insiders to protect the interest of the company whenever a conflict of interests arises, and can serve as justification for the prohibition of insider dealing. In that respect, protecting a company's interest means protecting shareholders' interests, who are themselves market investors. Although fiduciary duty was the initial justification for banning insider dealing in the UK, it fell short of encompassing all those possessing inside information. The fiduciary theory provided a sufficient base for prohibiting classic insiders (directors, employees…), but did not provide coherent justification for banning constructive insiders (persons with access to a company's inside information through their professional relationship with the company – lawyers, auditors, financial analysts….), nor for banning tippees or other outsiders. In this extent respect, fiduciary duty under the CL of 1976 and the CL of 1997 only provided justification for prohibiting classic insiders. For this reason, the focus must now turn to the SL of 2002, and its basis for the prohibition of insider dealing.

Although the prohibition ambit of the repealed SL of 1997 included insiders and tippees,[426] the definition of an insider again focussed on the fiduciary relationship. Article 2 of the repealed SL of 1997 defined an insider as any person possessing inside information by virtue of his position or job. This can be seen as mere reiteration of the fiduciary duty of company insiders, under the CL of 1997.

The offence of insider dealing was refined by the enactment of the SL of 2002, Article 108, which introduced the criminal offence, and referred to the offender by using the term "person" instead of "insider". This means that the legislator extended the prohibition ambit to include all those possessing inside information. This suggests that fiduciary duty is no longer the basis of prohibition; rather it is "parity of information". The emphasis on using "person", puts the emphasis on

[424] Civil Law 1967 art 144
[425] Bainbridge, 'The law and economics of insider trading: A comprehensive primer' (n 378)
[426] SL 1997 art 168

prohibiting persons possessing inside information from taking advantage of that information ahead of all market players. However, the SL of 2002 retained the old definition of insider, under the repealed SL of 1997. The problem with that, as discussed in Chapter 4 (Sec.2), is that the JSC interpretation of "person", using this definition, was to narrow the ambit of prohibition to classic insiders.

2.2.3 Concluding remarks

This section has shown how, in general but to different degrees, prohibiting insider dealing in the UK and Jordan stemmed from breaching a fiduciary duty, whether that duty was imposed explicitly or implicitly. The company directors and employees who have access to inside information through their relationship with the company, were considered fiduciaries / trustees, and should not therefore abuse their positions to secure personal gain. The geneses of prohibition in the UK moved from "information connectedness" (or fiduciary duty) [427] to "information access", as a result of implementing the Directive of 1989 in the CJA of 1993. This cast the (prohibition) net wider, to catch any person possessing inside information. With the promulgation of FSMA of 2000, which introduced the civil offence of insider dealing, a huge leap was made in the geneses of prohibition. Under the FSMA of 2000, the underpinning rationale of prohibition became "parity of information", the necessity of ensuring that investors have equal access to new information necessary for their investment decisions.

The rationale for the prohibition of insider dealing in Jordan was also based on fiduciary duty, under both the CL of 1976 and the CL of 1997 as previously discussed. Although the SL of 2002, which introduced the criminal offence, based prohibition on parity of inside information, the classic definition of insiders kept the focus mainly on corporate insiders. In other words, fiduciary duty remained, in practice, the basis for prohibition. This is more fully explained in the substantive analysis of the Jordanian prohibition regime, in Chapter 4.

In addition to the legal and regulatory justifications for prohibiting insider dealing in the UK and Jordan, as covered in this section, law and economics scholars have provided further justifications for prohibition, as illustrated in the debate over prohibiting insider dealing, in the next section.

[427] A sophisticated version of the fiduciary theory, see: Loke (n 374)

2.3 Section 3: The Legal and Economic Debate over Prohibiting Insider Dealing

The debate in the literature of law and economics scholars, over the merits of prohibiting insider dealing, has been long running. The SEC enforcement action in *Cady, Roberts & Co*[428] triggered the debate, and this was fuelled in the case of *Texas Gulf Sulphur.*[429] The SEC justified the prohibition of insider dealing as necessary to address the "inherent unfairness".[430] Also the normative premise on which the *Second Circuit Court of Appeal* built its decision on *Texas Gulf Sulphur* case, was that "*all investors trading on impersonal exchanges should have relatively equal access to material information.*"[431] The nub of the debate, conducted in the law and economics literature, revolved around whether insider dealing is economically efficient, and, if so, whether there is any need to regulate it.[432]

This section presents the scholarly arguments over prohibiting insider dealing. The theoretical aspects covered are all Western, as no similar justifications were found in the Middle East. The previous section highlighted how Jordan, an example of a developing country in the Middle East, implemented the international standards required of it. However, it did not develop any specific theoretical basis to justify the prohibition of insider dealing.

2.3.1 Opposing arguments for deregulating insider dealing

Manne[433] abruptly shifted the focus of the debate from the prevailing normative framework of fairness and morality surrounding insider dealing, to its economic efficiency and consequences.[434]. His article "*What's so bad about insider trading*" contended that the argument for prohibiting insider trading, to ensure full disclosure

[428] *Cady, Roberts & Co*., 40 S.E.C 907 (1961)
[429] *Texas Gulf Sulphur Co*., 401 F2d 833 (1968)
[430] Bainbridge, 'The law and economics of insider trading: A comprehensive primer' (n 378); Macy J R, 'From fairness to contract: The new direction of the rules against insider trading' (1984) 13 Hofstra Law Review 9. Macy states that the Rule 10b-5 was initially thought to be grounded on notions of "fairness" and "equity".
[431] *Texas Gulf Sulphur Co*., 401 F.2d 833 (1968)
[432] Beny L N, 'Insider trading laws and stock markets around the world: An empirical contribution to the theoretical law and economics debate' (2007) 32 Journal of Corporation Law 237
[433] Manne, *Insider trading and the stock market* (n 114)
[434] Brudney V, 'Insiders, outsiders, and informational advantages under the Federal Securities Laws' (1979) 93 Harvard Law Review 322

of all information related to corporate securities,[435] was fallacious. Fresh information, according to *Manne* is not valueless, or a 'free good'.[436] On the contrary, it is a valuable commodity that stimulates market competition.[437] This valuable information, when scarce, can increase stock prices, but is valueless once disclosed (once it assumes the character of a free good). *Manne* also emphasised that full disclosure serves only the wrong persons:

1) Short-term traders, who trade on fundamental factors, but sell or buy because of any recent changes in price, and value "technical factors".[438] For those traders insiders are competitors, so traders would profit more if insiders were kept out.

2) Speculators, who depend, when trading, on their ability to predict future price changes, rather than relying on fundamental factors[439]. Speculators favour abrupt fluctuations, resulting from full disclosure.

Manne, therefore, argued that prohibiting insider dealing seemed to encourage more gambling activities.

In *Manne's* second defence of deregulating insider trading, he argued that insider trading allows information to be rapidly incorporated in securities prices, which enhances the efficiency of financial markets.[440] To evaluate this defence, it is necessary first to briefly present the Efficient Capita Market Hypothesis (ECMH).[441]

[435] Manne H, 'What's so bad about insider trading?' (1967) 15 Challenge 14
[436] Ibid. According to Manne, 'free good' information is past financial data such as balance sheets, income statements, the position of the firm in the market, etc. Fresh information on the other hand involves new developments in the corporation and without them being generated, the corporation is stagnating.
[437] Ibid
[438] Manne, 'In defence of insider trading' (n 9)
[439] Manne H, 'Insider trading: Hayek, virtual markets, and the dog that did not bark' (2005) 31 Journal of Corporation Law 167
[440] Manne, *Insider trading and the stock market* (n 114)
[441] ECMH during the 1970s and early 1980s became one of the most widely accepted explanations of market efficiency. It was the SEC keystone for banning insider trading, particularly in mandatory disclosure under the Securities Exchange Act of 1934. See: Cunningham L, 'Capital market theory, mandatory disclosure, and price discovery' (1994) 51 Washington and Lee Law Review 843; Prazon M and Fatale M, 'Revising truth in securities: The use of the Financial Capital Market Hypothesis' (1992) 20 Hofstra Law Review 687

The ECMH is an empirical hypothesis which claims that market prices are quickly influenced by new information, and adjust accordingly.[442] According to the ECMH, the market is efficient if a securities price adjusts promptly to particular information in a way that makes it impossible for the average investor to profit from trading in it[443]. For example, if an investor decides to sell his shares in response to a "Toyota" announcement of defects in its cars, which will reduce its profits, he will find out that, by the time he calls his broker, the price of the stock has already declined. *Stout* similarly stated that: "*It is impossible for the average investor to beat the market by trading on public available information.*[444]"

The ECMH claims that the market is efficient, even if the value of information is only recognised by a small number of investors.[445] In this, *Fama*[446], *Gilson and Kraakman*[447] asserted that information influences price, through informed investor trading, and that less informed investors are then able to deduce information from the transactions of informed investors. In other words, *Gilson and Kraakman* argued that market efficiency depends on the arbitrage trading of minority investors to drive prices to their appropriate level. Following its development, the ECMH was empirically examined and analysed by researchers. Their findings showed that prices respond simultaneously, or within hours, to new information, and that this was easy for investors to understand (mergers, takeovers….). However, the ECMH did not provide an answer to what happened if the information was technical or difficult to understand.[448]

Further defects of the ECMH appeared in the examination by *Chang and Suk*[449] of the effects of secondary dissemination on stock prices, when information was published in the "Insider Trading Spotlight" column in the *Wall Street Journal*. Although the column contained information already disclosed through regulatory

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[442] Gilson R and Kraakman R, 'The mechanisms of market efficiency' (1984) 70 Virginia Law Review 549. The authors present the common definition of market efficiency, which is: "A market is efficient when prices at any time fully reflect all available information."
[443] Stout L, 'Stock prices and social wealth' (2000) Harvard Discussion Paper No.301, http://www.law.harvard.edu/programs/onli_center/papers/pdf/301.pdf (Accessed: 11/1/2010)
[444] Ibid
[445] Fama E, 'Efficient Capital Markets: A review of the theory and empirical work' (1970) 25 Journal of Finance 383
[446] Ibid; Gilson and Kraakman (n 442)
[447] Ibid
[448] Stout, 'Stock prices and social wealth' (n 443)
[449] Chang S and Suk D, 'Stock prices and the secondary dissemination of information', The Wall Street Journal's "Insider Trading Spotlight" Column' (1998) 33 Financial Review 115 at: <http://ssrn.com/abstract=90808> Accessed: 21/2/2010

channels, this secondary dissemination abnormally increased stock prices. Thus, *Chang and Suk* concluded that secondary dissemination affected securities prices more than the initial public disclosure, which was contradictory to the ECMH.

Based on this, it is arguable that the premise that market capability of correcting securities prices by reacting promptly to fresh information, is not sustainable. As *Chang* and *Suk* stated, markets prove that allowing time after dissemination of information is vital for securities prices to fully incorporate and adjust to new information. This justifies the use of "information not generally available" in the FSMA of 2002, when regulating the offence of insider dealing – which replaces the old term "inside information.[450]"

The ECMH continued to attract criticism, especially when the *Dow Jones Index of Industrial Stocks* mysteriously lost twenty three percent of its value in a single trading session (October 19, 1987).[451] *Stout* cited recent failures of the ECMH: "*In the spring of 2000, the Standard & Poors Index of 500 leading companies topped 1,500. By October 2002 S & P Index was hovering near 775, and nearly fifty percent decline in value*.[452]" It should be noted here that the belief in the ECMH legend, was one of the contributing factors in the recent UK banking crisis, as the *Turner Review Report* revealed in 2009.[453] The ECMH, as *Turner Report* stated, played a role in shaping the FSA's regulatory approach: "*that a key goal of financial market regulation is to remove the impediments which might produce inefficient and illiquid markets.*[454]"

Scepticism about the ECMH was illustrated in these incidents, and also expressed in *Manne's* second defence of permitted insider trading. Insiders, according to *Manne*, were capable, through their dealing, of increasing market efficiency. Thus, firms benefit from insider dealing as they depend on securities prices to support their investment and capital decisions. Therefore any increase in price efficiency will result in higher levels of economic output.[455] *Carlton* and *Fischel*[456]supported

[450] Discussion of this point will be in Chapter 4, s.1
[451] Stout L, 'The unimportance of being efficient: An economic analysis of stock market pricing and securities regulation' (1988) 87 Michigan Law Review 613
[452] Stout L, 'The mechanisms of market efficiency: An introduction to the new finance' (2003) 28 Journal of Corporation Law 635
[453] Turner Review (n 220) 39-41
[454] Ibid
[455] Hu J and Noe T H, 'The insider trading debate' (1997) 82 Economic Review 34
[456] Carlton D W and Fischel D R, 'The regulation of insider trading' (1988) 35 Stanford Law Review 857

Manne's argument by stating that investor uncertainty will be reduced by the increase in price brought about through insider dealing. Hence, the function of a security price, as a more complete and truthful signal of its underlying value, would be best achieved through the actions of insiders, which thereby enhance market efficiency.

Further support of *Manne's* argument was in *Engle,*[457] with his claim that insider dealing was good for the economy, and that any economic activity related to stock trading would be best resolved through common law tort of deceit, or by contract law, but not by banning insider dealing. *Engle* contended also that the ECMH,[458] the keystone of insider trading theory, and used by courts as a system to prevent market distortion, was empirically and demonstrably wrong. *Engle* justified this by pointing out that the distortion which courts aimed to prevent, was not distortion at all. On the contrary, prohibiting insider trading actually produced it.[459] *Engle* considered inside information to be rare, valuable information, and the function of any natural market was to link a company's profitability and fundamental economic value, to the price of its securities. Adding to this, *Engle* stated:

> "*If the presumption of ECMH (that information flow is perfect, instantaneous, and cost free) is true, then it would be impossible to defraud, and regulation would be unnecessary*.[460]"

Engle continued by pointing out that, in practice, there would be a delay of information flow for several reasons, such as communication, language barriers, culture barriers …etc. Thus, information flow is imperfect and consequently the ECMH is practically inefficient[461]. For this reason, prohibiting insider trading will not make it efficient.

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[457] Engle E, 'Insider trading: Incoherent in theory, inefficient in practice' (2007) 32 Oklahoma City University Law Review 37

[458] According to ECMH, capital markets reflect all information perfectly: a stock price is a precise reflection of all information related to that stock. For more details see: Stout, 'Stock prices and social wealth' (n 443)

[459] Engle (n 457)

[460] Ibid; Barry J F, 'The economics of outside information and Rule 10b-5' (1982) 129 University of Pennsylvania Law Review 1307; The FSA CP/10, part 2: Draft Code of market conduct (n 19) clarified that: "Not all designated markets provide the same extent of dissemination… to all market users on an equal basis". This statement reflects the reality of financial markets that trades on fundamentals alone is mere a module only.

[461] Engle (n 457)

A similar argument by *Welle*[462], pointed out that companies were used to handling risk successfully, and they can do this with inside information, using either trade secrets or contract law. Consequently, the regulatory prohibition of insider dealing was unnecessary.

Manne's third defence of insider dealing was in his article "*In defence of insider trading*".[463] In this article, *Manne* invented the "entrepreneurial reward theory" which was based on the assumption that insider dealing is the only effective compensation for entrepreneurial services and activities within large companies.

The entrepreneur, according to *Manne*, is a person who finds new products, or new ways to make or sell an old one; and can either be a corporate promoter, or perform the job of selecting and guiding managers. Unlike managers or other corporate employees, the entrepreneur's efforts cannot be correctly compensated, until the corporation realises the benefits of his work. In other words, the manager's function is simply to administer company business according to its policy; his wage can therefore be calculated in advance, equivalent to the market price of his managerial skills. However, the entrepreneur's efforts cannot be truly estimated unless his "new idea" is practically examined.[464] Therefore, any salary agreed in advance would be insufficient; the only way to fairly compensate him is by allowing an element of insider dealing – using the new idea invented, and price-sensitive information not yet made public, to deal in corporate securities. Using this method of compensation, the entrepreneur is motivated to do more for the corporate benefit. Therefore insider dealing is economically efficient.[465]

Manne[466] also added that the market was, at any particular time, influenced by a legion of new corporate managers (entrepreneurs) who generate fresh and imaginative, if untested, ideas. If they were subject to the same compensation as uncreative managers, they would lose the motivation to innovate.

[462] Welle E A, 'Freedom of contract and securities laws: Opting out of securities regulation by private agreement' (1999) 56 Washington and Lee Law Review 519
[463] Manne, 'In defence of insider trading' (n 9)
[464] Ibid
[465] Ibid
[466] Ibid; Manne, 'Hayek, virtual markets and the dog that did not bark' (n 439)

It should be said that the 'entrepreneur legend' was one of the neo-liberal ideologies that was endorsed in the UK, as Chapter 5 discusses.[467] In this, the FSA placed more weight on the senior management of issuers, in assessing their risks. This was one aspect of the FSA light-touch approach to regulation (minimum regulatory intervention), that arguably affected the effectiveness of FSA enforcement actions against insider dealing incidents.[468]

Manne's theory was refined by *Carlton and Fischer*[469], who agreed that advanced payment was prejudicial to the value enhancement potential of entrepreneurial activities. Their explanation was that, by virtue of engaging in insider dealing, the entrepreneur is able to revise his own compensation without further negotiations with the corporation.

These economic arguments of *Manne* triggered a debate and 'ruffled feathers' among scholars. His arguments provoked scepticism about the conventional view of morality in the stock market, and distorted the aims of securities regulation. In fact, the orthodox rationales underpinning the prohibition of insider dealing were based on fairness and equity.[470] Those rationales were first used in US court interpretations of Rule10b-5, when applying to cases of insider dealing.[471]

The problem with that economic debate, is that most of the arguments of law and economics scholars lacked any empirical evidence, and merely revolved around theories, hypotheses or court decisions. However, as the *Turner Review*[472] put it, the banking crisis in 2008 was arguably the newest empirical evidence on the failure of the ECMH, and refuted the arguments of its supporters. Also, the majority of scholarly argument has been restricted to the US, which raises the question of whether the US justifications, mentioned in this section, are appropriate in other jurisdictions?

[467] Chapter 5, s.1 highlights the effects of the neoliberalism in the FSA's enforcement policy and approach.
[468] See in this regard the discussion provided in chapter 5, sec.1 on the FSA's approach to regulation and enforcement.
[469] Carlton and Fischel (n 456)
[470] Bainbridge, 'The law and economics of insider trading: A comprehensive primer' (n 378)
[471] *Texas Gulf Sulphur Co.*, 401 F2d 833 (1968); Hu and Noe (n 455)
[472] Turner Review (n 220) 39-41

Opponents of insider dealing prohibition provoked further reactions from prohibition supporters. *Schotland*[473], in his reply to *Manne et al,* emphasised that insider dealing erodes public confidence in the financial markets, and is contrary to free, open, and healthy markets. In short, *Schotland* stated that, even if permitting insider dealing increased economic efficiency, ethical questions meant that any gains would be unfair to uninformed investors.[474]

Brudney supported *Schotland's* argument by stating that:

> "*The antifraud provisions (U.S securities laws) are said to serve, principally, a protective function – to prevent over-reaction by public investors – and only peripherally as an efficiency goal.*[475]"

2.3.2 Proponent arguments for regulation

According to *Bainbridge*[476], scholarly arguments for prohibiting insider dealing fall into two categories: noneconomic and economic. The noneconomic arguments are mainly based on the benefits of mandatory disclosure, and on fairness. The economic arguments are premised on: (1) the harm caused by insiders to investors and issuers; and (2) considering inside information as a property right.

2.3.2.1 The noneconomic arguments

I. Insider dealing and mandatory disclosure

These arguments emphasise that regulating insider dealing is necessary to protect the mandatory disclosure system. In this system, firms are subjected to regular disclosure of non-public information, to ensure that investors have equal access to information. This disclosure policy reflects the level of regulatory transparency – which is discussed in the next chapter.

Bainbridge and *Cox*[477]argued that prohibiting insider dealing is necessary to ensure the efficiency of the mandatory disclosure system. Specifically, timely disclosure of price-sensitive information, just as much as premature disclosure, threatens a firm's

[473] Schotland R, 'Unsafe at any price: A reply to Manne, insider trading and the stock market' (1967) 53 Virginia Law Review 1425
[474] Hu and Noe (n 455)
[475] Brudney (n 434); Beny (n 432)
[476] Bainbridge S M, 'The law and economics of insider trading: A comprehensive primer' (n 378)
[477] Cox J D, 'The insider trading regulation and the production of information' (1986) 64 Washington University of Law Quarterly 475

interest.[478] To explain, *Bainbridge*[479] argued that, even with mandatory disclosure rules, asymmetry between investors and insiders still arises. This is because mandatory disclosure allows firms to withhold certain material information from disclosure. To protect such investors from the effects of insider trading, immediate disclosure of material information is required.

In highlighting the benefit of mandatory disclosure, proponents emphasised that, although corporate disclosure is costly, adopting regulatory disclosure spontaneously enhances the accuracy of a firm's share price.[480] Conversely, *Manne* argued that firms can enhance the accuracy of stock prices, at no cost, though insider dealing.[481] By allowing insiders to trade using non-public information, the securities price adjusts to the news more efficiently than by banning insider trading. It also overcomes problems of premature disclosure and cost. Scholars, responding to *Manne's* argument, formed a consensus favouring traditional mandatory disclosure over insider trading[482]

Also in response to *Manne,* and to clarify how insider dealing misleads investors, *Goshen* [483] argued that only information traders – the so-called sophisticated professional investors (institutional investors, money managers and other market professional players) – and analysts (sell-side analysts, buy-side analysts, and independent analysts) would be adversely affected by insider trading.[484] When insider trading affects the price of securities, information traders cannot extract information from volume or price movement. Because they collect, analyse, and react to securities information they will always lose in the battle against insiders.[485] Accordingly, when insider selling is based on negative non-public information,

[478] Karmel R S, 'The relationship between mandatory disclosure and prohibition against insider trading: Why a property rights theory of inside information is untenable' (1993) 59 Brooklyn Law Review 149
[479] Bainbridge, 'The law and economics of insider trading: A comprehensive primer' (n 378)
[480] Beny (n 432)
[481] Manne, 'Insider trading: Hayek, virtual markets, and the dog that did not bark' (439)
[482] Karmel (n 478); Beny (n 432); Cox (n 477)
[483] Goshen Z and Parchomovsky G, 'The essential role of securities regulation" (2006) 55 Duke Law Review 711
[484] Ibid. Information traders, according to Goshen, are: "The traders who are willing and able to devote resources to gathering and analysing information… and who differ from: (1) short-term traders (liquidity traders) who do not collect and evaluate information, rather buying and holding a portfolio of stocks; and (2) speculators (noise traders) who follow fads, rumours and lack any rational strategy in their investment.
[485] Haddock D and Macy J, 'A Coasian model of insider trading' (1986) 80 North-western University Law Review 1449

causing a decline in prices, the information trader will analyse this as being under-valuation of the stock price, and buy it. The same is true of a rise in prices.

To summarise, scholars have shown that mandatory disclosure reduces the cost of investor research and passes this cost to the firm. For the firm, this is merely a by-product of managing the firm.[486] The point of arguments which favour mandatory disclosure is to place investors on an equal footing, regarding access to securities information. Thus, prohibiting insider dealing curbs corporate managers, and others having access to non-public information, from taking advantage of that information. This justifies the underlying rationale for implementing disclosure regimes in the UK and Jordan.

II. Insider dealing and fairness

Fairness can be seen as the flipside of the principle of 'equality of access to information', and many US courts have seen it as this.[487] Though many commentators endorsed the US court stance, the fairness justification remained vague and lacked a precise framework. *Bainbridge*[488] explains that notions of fairness are insufficient justification for prohibiting insider trading, because they lack rational standards.[489] Similarly, *Scott* states that: "…..*Judging by opinions and commentaries, unfairness is one of those qualities that exist in the eye of the beholder and elicit little effort at explanation.*[490]" Accordingly, it can be argued that fairness is something emotional and subjective – susceptible to uncertain definition, depending on personal opinion – rather than being a coherent norm. In that respect, basing prohibition on mere fairness is unreasonable.

Bainbridge provides evidence on why the "fairness" argument is unconvincing:

> "*A Harris poll found that fifty five percent of the respondents said that they would inside trade if given the opportunity. Of those who said they would not trade, thirty four percent said they would not do so only because they would be afraid the tip was incorrect. Only thirty five*

[486] Goshen and Parchomovsky (n 483)
[487] See for example the Court's decision in *SEC v. Texas Gulf Sulphur Co*., 401 F.2d (2d Cir.1968)
[488] Bainbridge S M, "The law and economics of insider trading: A comprehensive primer' (n 378)
[489] Ibid
[490] Scott K, 'Insider trading: Rule 10b-5, disclosure and corporate privacy' (1980) 9 Journal of Legal Studies 801

percent said they would refrain from trading because insider trading is wrong. Here lies one of the paradoxes of insider trading."[491]

It is clear that most people would like to use insider trading if they could be sure of the accuracy of non-public information; only those who could not be sure considered it unfair. Therefore, arguments about investor protection and maintaining investor confidence in the market, do not justify the prohibition of insider trading. Nevertheless, the UK and Jordan have endorsed the rationale of investor confidence when prohibiting insider dealing.[492]

2.3.2.2 The economic arguments

I. Insider dealing is harmful to investors and firms

Some proponents argue that insider trading harms investors economically, by causing them to trade at the wrong price. According to *Bainbridge*[493], this argument is unconvincing, because the investor who trades in securities contemporaneously with insiders, should claim for injury, on the basis that insider gain was his loss. The problem is that his claim would not be confined to that insider alone; rather it would extend to all purchasers at the same time, whether insiders or not.[494]

Other proponents justify prohibiting insider trading on the basis of specific harm caused to the issuer.[495] In order to benefit from inside information, the insider (corporate manager for instance) would delay transmitting that information, for example by taking action or impeding corporate plans. So by giving himself an incentive to use inside information, the insider injures his firm's financial position and reputation. *Macy* illustrated issuers' reputational injury with an example where the *Wall Street Journal* fired a *Mr. Winan,* one of the newspaper's most widely-read writers, because he used valuable stock tips, collected during his employment.[496] The rationale was that, if Journal readers thought that Journal

[491] Bainbridge, "The law and economics of insider Trading: A comprehensive primer" (n 378)
[492] This was highlighted in Chapter 1 and the previous sections in this chapter.
[493] Bainbridge, 'The law and economics of insider Trading: A comprehensive primer' (n 378)
[494] For similar justification see: Wang W K S, 'Trading on material non-public information on impersonal stock markets: Who is harmed, and who can sue whom under the SEC Rule 10-b-5?' (1981) 54 Southern California Law Review 1217
[495] Bainbridge, 'The law and economics of insider trading: A comprehensive primer' (n 378)
[496] Macy (n 430)

financial news was collected for the personal benefit of its writers, Journal credibility would decline; therefore, advertising incomes would reduce.[497]

A similar case took place in the UK[498] where two columnists of the *Daily Mirror News Paper* purchased shares using information that was about to be published in their column. Shortly afterwards they sold the shares to benefit from the increase in share price after the information was published in the column. The *Crown Court* ruled that tipping of shares in which the journalists had interest, created a conflict of interest and failure to disclose that interest.[499]

Bainbridge describes how the principal problem with the reputational argument of *Macy* and likeminded scholars, is:

> "…*the difficulty investors have in distinguishing those firms in which insider trading is frequent from those in which it is infrequent. If they are unable to do so [distinguish between the two], individual firms are unlikely to suffer a serious reputational injury in the absence of a truly major scandal.*[500]"

On the same subject of reputational damage, *Millett*[501] stated that equity in the commercial field deploys two principal concepts: the fiduciary and the constructive trust. Thus, equity forbids a trustee / the insider from making a secret profit (inside information) from his trust/the insider's company.[502] Therefore it could be argued that insider dealing causes damage to the firm, such as reputational damage. This damage, it is argued, is based on breaching the trustee's position (fiduciary duty)[503] by putting personal interest ahead of the interest of the company.[504] This argument justifies the concept of "conflict of interests", which was adopted in Jordanian companies law to justify prohibiting corporate insiders from entering into

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[497] Ibid
[498] *R v. Hipwell* [2007] EWCA Crim 562
[499] Ibid, the Court of Appeal ruled: "Value must… be viewed in context. A column which suggests that a given share is worth buying, when the author personally is about to sell, and asks his readers to evaluate the worth of buying the share on the basis of what he says… is calculated to mislead. Whether another paper says the same, at the same time, may be relevant evidence…"
[500] Bainbridge, 'Insider trading: An overview' (n 6)
[501] Lord Peter Millett's argument was cited in: Sealy LS and Hooley RJA, *Commercial law: Text, cases, and materials* (4th ed, Oxford University Press 2009) 30
[502] Ibid, 31
[503] The fiduciary duty was discussed in the previous section as being one of prohibiting insider dealing.
[504] An example of this is: *Boardman v. Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, [1966] 3 WLR 1009, 110 Sol Jo 853

contractual relations with their companies.[505] The trustee/fiduciary was the initial justification for prohibiting insider dealing in the UK and Jordan, as discussed in the previous section.

As for economic harm to a corporation resulting from delay in transmitting information, supporters of this argument criticised *Manne's* "entrepreneurial reward theory".[506] They argued that permitting insider trading only creates incentives for managers and entrepreneurs to delay the transmission of information to superiors.[507] Such delay will be maximised in large companies and enterprises, where information is transmitted up through many levels before it reaches senior managers. The more levels, the greater the possibility of leakage,[508] distortion, or delay intrinsic to the system.[509] Moreover, this delay in delivering information highlights the amount of fiduciary loyalty.[510] *Easterbrook* added that delay caused by insiders would probably make outsiders aware of the information before corporate decision makers.[511] Also, permitting managers and other corporate employees to trade ahead, may reveal the information prematurely, causing harm to the corporation.[512]

Cox[513], in challenging *Manne's* entrepreneurial theory, added that in practice it would be difficult to ensure that entrepreneurs were the only ones to benefit from the information they have generated. In short, insiders not only expose market investors to harm by depriving them equality of access to information, they also expose their corporations to losses.

II. Insider dealing and corporate right

Some proponents justify prohibiting insider trading on the basis of the property right. *Macy*[514]argued that the owner of inside information (the issuer) is the one

[505] See the geneses of prohibiting insider dealing in Jordan in the previous section.
[506] Manne, 'In defence of insider trading' (n 9)
[507] Bainbridge, 'The law and economics of insider trading: A comprehensive primer' (n 378)
[508] To control the possibilities of leakage or delay, and to identify the persons having access to inside information, the FSA imposed an obligation on issuers to hold an updated list of its insiders. This is not the case in Jordan. More elaboration will be in the next Chapter, "the disclosure regime"
[509] Haft R, 'The effect of insider trading rules on the internal efficiency of the large corporation' (1982) 80 Michigan Law Review 1051
[510] Beny L (n 432)
[511] Easterbrook F H, 'Insider trading, secret agents, evidentiary privileges, and the production of information' (1981) 1981 Supreme Court Review 309
[512] Bainbridge, 'Insider trading: An overview' (n 6)
[513] Cox (n 477)
[514] Macy (n 430)

who should be able to claim for damages resulting from insider dealing. It is his property right that was injured[515]. Confidential information belongs to corporations, and from a property rights perspective, insider dealing should be banned.[516]

Karmel[517] pointed out the weakness in *Macy's* property right argument, by contending that property right is a malleable premise that can easily be used by opponents to justify permitting insider trading. As long as the inside information is a property right, then its owner can use it freely, even in his trading in securities. *Karmel*[518] added that the notion of property rights totally ignores the public interest, while the purpose of securities regulation is to preserve fairness, honesty, and the integrity of public securities markets – which will only be achieved through the mandatory disclosure system.

2.3.3 Concluding remarks

Based on the foregoing arguments, it is clear that, although insider dealing is prohibited globally, there are still arguments favouring insider dealing on several counts. There is certainly no consensus on the merits of banning insider dealing. However, the economic argument of ECMH and the fairness argument, appear to be the most influential. The myth of ECMH and the ability of markets to correct themselves without any regulatory interference, had its impact on the UK regulator approach to regulation and enforcement. The FSA's light-touch approach is a good example of this, as Chapter 5 argues. With regard to fairness – the flipside side of investor confidence – it could be said that this was implemented in the regulatory objectives of financial regulators in the UK and Jordan. It was also advanced with the implementation of mandatory disclosure, which acknowledged the necessity of regulatory prohibition for the benefit of the market and investors. This explains the implemented disclosure regimes in the UK and Jordan, which the next chapter addresses.

[515] See the case of *Boardman v. Phipps* (n 504)
[516] Macy (n 430)
[517] Karmel (n 478)
[518] Ibid

2.4 Summary

This chapter described the evolution of the UK and Jordanian financial regulators, and set out their general framework for the prohibition of insider dealing. The chapter described the establishment of the financial regulator in the UK and Jordan, given their vital role in applying and enforcing the regulatory regime for prohibiting insider dealing and market abuse. An examination of the regulatory structure in both countries revealed the underlying issues, and the reasons for their creation and reform. It was found that many factors had influenced the creation of the UK financial regulator, and later reforms such as: the scandals of insider dealing; the failures of the SROs in tackling insider dealing; the integration of financial services; globalization; and, recently, the banking crisis in 2008.

By contrast, in Jordan, the establishment of financial regulation emerged from financial reforms influenced by *WB* and *IMF* reform programs. In spite of these differences, government political policy was equally influential in both countries. It was suggested that political policy, allied with the economic forces of elite market players, had an impact on the chosen regulatory model, as well as on later reforms. This impact also extended to regulator independence, influencing its approach to regulation and enforcement, as Chapter 5 claims.

As for the chosen regulatory structure, the chapter showed how both countries had adopted different regulatory models for different reasons, one of which was the different nature of financial services to be regulated. Integrated financial services in the UK explained the unified regulator model (the FSA), followed by the Twin Peaks model. In Jordan the institutional model was chosen, on the basis that each financial sector (banking, insurance, securities) has its financial regulator, however the integration in services is not recognised.

As part of the discussion about the evolution of the financial regulator in Jordan, Research Question 1) – Why was insider dealing prohibited in Jordan? – was answered. It was one the consequences of the financial reforms dictated by the *WB* and the *IMF*, if the country was to be granted loans.

The legal and regulatory geneses of insider dealing prohibition in the UK and Jordan were examined from a theoretical perspective. Both the UK and Jordan considered insider dealing to be a threatening to market integrity and eroding of

investor confidence. Initially, their common justification for prohibition was based on the fiduciary duty theory. The UK justification later developed, and is now based on parity of information – the need to give investors equal of access to information. Similar justification, arguably, existed in the Jordanian regime.

Discussion of financial regulatory models and the geneses of prohibition in both countries, revealed transparency problems in Jordan. In contrast to the UK, regulatory transparency with regard to providing official announcements, government declarations, consultations, Parliamentary debates…etc. did not exist in Jordon.

Chapter 3 The Disclosure Regimes of the UK and Jordan - a precautionary measure in tackling insider dealing

The nub of insider dealing prohibition is prohibiting those possessing inside information from taking advantage of that information ahead of market investors. This was seen by the UK and Jordanian regulators as an acute threat to markets' integrity and as eroding investors' confidence in the securities markets. Thus, to ensure that investors are placed on an equal footing in respect of having access to information necessary for their investment decisions, regulators put massive effort into controlling the dissemination of inside information and into preventing any possible leakage. This is ensured through the implementation of a disclosure regime. Arguably the disclosure obligation is at the front line in tackling insider dealing as it requires issuers both to identify their insiders and to control their inside information. Therefore, the more disclosure obligation is sound and properly enforced, the less the leakage will be and the fewer the incidents of insider dealing.

This chapter will examine the UK and Jordanian disclosure regimes and assess the levels of transparency provided.[519] To do this, the disclosure regimes of the FSA and the JSC will be analysed, presenting the ambit of these regimes, the imposed obligations, and both regulators' enforcement actions (disciplinary actions). Other forms of disclosure are excluded as the focus will be on only the listed issuers in the regulated markets. For comparison purposes, the regulatory transparency criteria will be used. The chapter aims at paving the answer of the second Research Question: *Is the recently introduced regime effective (in tackling the release of inside information to the market)?*

[519] Yu Chiu I H, 'Examining the justifications for mandatory disclosure in securities regulation' (2005) 26 Company lawyer 67

3.1 Section 1: The FSA/ FCA Disclosure Framework

Though the FCA[520] replaced the FSA, inter alia, as UK Listing Authority (UKLA),[521] it retained the FSA's disclosure regime in its Handbook[522] (any differences will be highlighted). Therefore, this section will cover the FSA's disclosure regime. The FCA has not yet, till the time of writing this study, issued any separate guidance or new technical notes.

When acting as securities regulator,[523] the FSA was referred to as the UK Listing Authority (UKLA)[524] in conformity with Part VI of FSMA 2000. The FSA regulated the disclosure of listed companies by putting in place and enforcing the Disclosure and Transparency Rules (DTRs), the Listing Rules (LRs) and the Prospectus Rules (PRs) which formed the "UKLA Rules".[525] These rules had replaced the old listing rules, "Admission of Securities to Quotation or Listing", that were established and enforced by the London Stock Exchange *(LSE).*[526]

Successful implementation of a regulatory infrastructure for disseminating inside information was critical for the FSA to meet its statutory objectives.[527] The FSA, through imposing a continuous disclosure obligation particularly on listed companies and their staff[528], aimed at protecting investors and fostering appropriate standards of transparency.[529] This approach by the FSA provided continuity of policy, since the old listing regime[530], stemming from Chapters 9 and 16 of the Listing Rules, also required on-going disclosure of price-sensitive information (PSI).[531]

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[520] See the FCA website at: http://www.fca.org.uk/ Accessed: 5/4/2013
[521] More details at: <http://www.fca.org.uk/firms/markets/ukla> Accessed: 5/4/2013
[522] The FCA Handbook at: <http://fshandbook.info/FS/index.jsp> Accessed: 5/4/2013
[523] FSMA 2000 Part VI ss. 72 and 73
[524] For more details see UKLA web page at: <http://www.fsa.gov.uk/pages/doing/ukla> Accessed: 2/11/2010
[525] These rules were part of the FSA Handbook and remained part of the FCA Handbook
[526] Those rules formed the UK listing regime from 1966 till 2000. For more details see: <http://www.fsa.gov.uk/library/policy/listing_rules> Accessed: 7/11/2012. Also see: FSA Discussion Paper (DP14), 'Review of the listing regime', 1 Jan 2002
[527] FSA statutory objectives were set in FSMA 2000 Part 1 ss. 2.2, 3, 4, 5: "1) market confidence, 2) public awareness, 3) protection of consumers, 4) reduction of financial crime."
[528] Marsh J and McDonnell B, 'Handling and disclosing inside information: A guide to the disclosure rules' (2007) 45 Compliance Officer Bulletin 1
[529] See UKLA web page (n 524)
[530] FSA DP14 (n 526) 23 at 4.15; the FSA Final Notice for Universal Salvage PLC, 19 May 2004. The FSA fined Universal and its former CEO £90,000 for delaying the announcement of inside information, which comprised a violation of LR 9.1
[531] For details about the old LRs and their application see: Marsh and McDonnell (n 528)

Those chapters were replaced by the Disclosure Rules of 2005 (DR of 2005) as a result of implementing the Market Abuse Directive (MAD).[532] In this regard, note that MAD's underlying policy of enforcing the disclosure obligation was merely a reiteration of old listing regime policy: maintain an orderly securities market that ensures investors' confidence. Thus, it can be said that the UK already had an established disclosure regime and that the LRs and DTRs were only subject to reform due to the implementation of further EU Directives that re-emphasised continuous disclosure requirements.[533]

Disclosure under DTRs will be covered in this section. The disclosure obligation under the Listing Principles (LPs) will not be included as no resemblance disclosure is required under the JSC disclosure regime. The LPs apply to listed companies[534] with equity shares[535] with a premium listing.[536] The JSC disclosure regime applies to any kind of listing.

3.1.1 The Disclosure and Transparency Rules (DTRs)[537]

The FSA used the DTRs to ensure prompt disclosure of inside information.[538] The DTRs[539] encompass issuers whose financial instruments are admitted to trading on a

[532] MAD art 6 sets out the disclosure obligations on all issuers whose securities are traded on a regulated market in an EEA member state.
[533] The Prospectus Directive 2003/71/EC was implemented in the Prospectus Regulations of 2005, available at: <http://www.hm-treasury.gov.uk/fin_eufs_pd.htm> accessed: 6/11/2010; FSA Consultation Paper 04/16, October 2004, "The Listing review and implementation of the Prospectus Directive", <http://fsa.gov.uk/pubs/cp/cp04_16.pdf> accessed: 6/11/2010. The Directive requires listed companies to submit an annual document that contains all regulated information that has been published. The Transparency Directive 2004/109/EC was implemented on 20 January 2007 by supplementing the Disclosure Rules with additional rules to become the Disclosure and Transparency Rules. The directive set out the requirements for periodic information, i.e. annual and half-yearly financial reports; quarterly interim management statements; and the notification of acquisition or disposal of major shareholdings. For details see: Shutkever C, 'The Transparency Rule in Practice' (2008) 23 Journal of International Banking and Financial Law 346; Marsh and McDonnell (n 528)
[534] LR 7.2.2G
[535] The LP glossary definition of equity shares is: "shares comprised in a company's equity share capital."
[536] In April 2010 the FSA reshaped the listing regime by offering companies a choice between a premium listing and a standard listing. The premium listing refers to what used to be known as a full listing. The standard listing refers to what used to be known as the old secondary listing (which was available only for non-UK companies). The policy underlying the reform is to ensure equal treatment for all listed companies, regardless of where they are incorporated. Significantly, premium listing demands higher standards from applicants, i.e. a three years' revenue-earning track record. For more see: Beavan R, 'Changes to the UK Listing Regime' (2009) 16 Company Secretary's Review 33; the UKLA CP 09/24, 2 December 2009 <http://www.fsa.gov.uk/pages/Library/Policy/CP/2009/09_24.shtml> accessed:1/11/2010
[537] The old Disclosure Rules were expanded, as mentioned, to implement the Transparency Directive 2004, see FSA CP 06/04, "Implementation of the Transparency Directive / Investment entities, listing review", 2006. <http://www.fsa.gov.uk/pages/Listing/Policy/CP/2006/06_04.shtml> accessed:6/11/2010
[538] The FSA stated that although the new rules expanded the scope of the old Listing Rules, they broadly followed the Listing Rules' concepts and operation. See: FSA and HM Treasury joint CP, "UK implementation of EU Market Abuse Directive (Directive 2003/6/EC)", 2004 at <http://www.fas.gov.uk/pubs/other/eu_mad.pdf> accessed:5/11/2010; Marsh and McDonnell (n 528)

regulated market in the UK (the main market of the London Stock Exchange) or who have requested an admission to trading.[540] Also they apply to the persons discharging the managerial responsibilities of those issuers (including directors and connected persons).[541] To this extent, the general ambit of the disclosure regime of the UK is akin to the Jordanian. However the detailed analysis of both regimes will highlight key differences, as will become clear after presenting the Jordanian disclosure regime.

The DTRs[542] oblige an issuer to notify, as soon as possible, Regulatory Information Services (RISs)[543] of any inside information that directly concerns the issuer, albeit not yet formalized.[544] For instance, if there is accurate information regarding a takeover bid but the price has not yet been set.[545] An issuer must also take reasonable care to ensure that the disclosed information is not misleading, false, or partially omitted in a way that might affect the accuracy of his statement.[546] Otherwise the issuer will be in a breach of his disclosure obligation, as in the case of the *Shell* Company.[547] Although the case was raised under the old disclosure regime, it is a good example of the same current obligation of prompt disclosure. Note that, in Jordan, the RISs are not recognised under the JSC disclosure regime where issuers' disclosures are made directly to the JSC. This could be because of the small number of listed issuers[548] in Jordan compared to the UK.[549]

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[539] Mainly DTR1.1.1 R
[540] The Alternative Investment Market (AIM) has not been a listed regulated market for this purpose since 2004. See FSA and HM-Treasury joint CP (n 538); Freshfields Bruckhaus Deringer guide, 'Release and control of inside information' Sep 2010 (here, and after, Freshfields guide) <http://www.freshfileds.com/publications/pdfs/sep10/28789.pdf> accessed:10/11/2010
[541] DTR 1.1.1R and DTR 3
[542] Precisely DTR 2.2.1
[543] The RISs are primary information providers that were approved by the FSA upon meeting required criteria. The glossary definition of RISs was at: <http://www.fsahandbook.info/fsa/glossary-html/handbook/clossary/R?definition=G1691> Accessed: 1/11/2012. Companies subject to DTRs and/or LRs are required to make announcements to investors via one of the RISs set out in the FSA list. The list can be found at: <http://fsa.gov.uk/pages/doing/ukla/ris/contact/index.shtml> Accessed: 6/11/2010. The FSA required criteria are at: <http://www.fca.org.uk/static/documents/fsa-ris-criteria.pdf> Accessed: 6/11/2010. Information about RISs is currently available on the FCA website at: <http://www.fca.org.uk/firms/markets/ukla/information-dissemination> Accessed: 5/4/2013
[544] DTR 2.2.1R and DTR 2.2.2R
[545] Marsh and McDonnell (n 528)
[546] Ch. 9 and 17 of the Old Listing Rules
[547] FAS Final Notice, Shell Transport and Trading Company Plc, 14 Aug 2004
[548] The number of listed companies by the end of 2012 was 243. See the ASE website at: <http://www.ase.com.jo/en/capital-markets-profile> Accessed: 11/9/2013
[549] The number of listed companies on the LSE main market is over 2,600. See the LSE website at: <http://www.londonstockexchange.com/companies-and-advisors/main-market/main/market.htm> Accessed: 11/9/2013

Although the DTRs require prompt disclosure, the information can be legally delayed if DTR 2.5.1R requirements are fulfilled. The following discussion will cover the substantive aspects of the disclosure obligation.

3.1.1.1 Disclosed information

Inside information, for the purposes of the DTRs application, is defined in Section 118 C(2) of the FSMA of 2000[550]. It is defined as: precise information not generally available, which relates directly or indirectly to the issuer, and which if made public would be likely to have a significant effect on the price of the issuer's securities. (The exact meanings of, and differences between 'precise' and 'significant' will be discussed later in Chapter 4 in connection with the criminal offence of insider dealing.[551])

The FSA in DTR 2.2.3G clarified that the first step in determining whether the information amounts to inside information or not must be through a reasoned assessment made by the issuer and its advisors.[552] In making that assessment, the issuer should take into account how a "reasonable investor" [553] might react towards this information, and whether his investment decisions relating to the relevant financial instrument might be affected by such information.[554] Note that the "reasonable investor test" is vital, not just in assessing the information's nature at the time, but potentially later on as well in proving the occurrence of abusive behaviour. In the context of proving abusive behaviour, the reasonable investor test has been given an evidential weight greater than the consideration of the information's effect on prices.[555] Further discussion of this test is provided in the next chapter.[556]

In applying the reasonable investor test, the FSA acknowledged that it is impossible to set a fixed standard for all situations as many factors may influence the reasonable

[550] FSMA 2000 s.118 C was amended by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 SI 2005, Number 381. There are three definitions of inside information under the new section, however for the purpose of this section, the definition under s.118 C(2) is relevant.
[551] Chapter 4, s.1
[552] DTR 2.2.7G states that: "An issuer and its advisors are best placed to make an initial assessment of whether particular information amounts to inside information."
[553] DTR 2.2.4G (2)
[554] DTR 2.2.5G, FSMA 2000 art 118 C(6) as amended by FSMA 2000 (Market Abuse) Regulations 2005 states that: "information would be likely to have a significant effect on the price if, and only if, it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions."
[555] *The Upper Tribunal case David Massey v FSA* (FIN/2009/0024)
[556] In chapter 4, s.1 under the civil market abuse offence.

investor's investment decisions.[557] The test should therefore be applied on a case-by-case basis when assessing whether particular information may have had a significant effect on a financial instrument's prices.[558] Note that in Jordan, the JSC disclosure regime implemented the reasonable investor test only indirectly, and less explicitly, by requiring issuers to disclose their 'material' information.[559] This test, however, was not discussed or explained by the JSC, in contrast to the FSA's approach with the DTRs.

In addition to the FSA's guidance on the DTRs, and other informal guidance relating to inside information[560], the then Committee of European Securities Regulator (CESR)[561] issued non-binding guidance to clarify the concept of "inside information" likely to have a significant price effect.[562] According to CESR guidance, the precise or significant nature of inside information depends on the information itself and the surrounding context, which vary from one case to another.[563] The CESR Guidance also included useful indicators to be used when considering what information would amount to inside information, such as pre-existing analysts' reports and how the issuer itself has previously dealt with similar events.[564] The FSA provided similar illustrations.[565]

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[557] Such factors, according to DTR 2.2.6G, could be: the aggregate of issuer activities; the financial situation of the issuer; the available information in the market regarding the issuer source of business; the reliability of the source of information; etc. The FSA provides guidance on how to identify inside information when applying the "reasonable investor test" in DTR 2.2.4G.

[558] DTR 2.2.4G (2) states that: "an issuer should be mindful that there is no figure (percentage or otherwise) that can be set for any issuer when determining what constitutes a significant effect on the price". See also the FSA Final Notice, Woolworths Group, June 2008, stressing that there exists "no percentage or other figure to determine whether there is a 'significant effect on price'"; FSA Final Notice, Photo-Me International, 21 June 2010, states that the "reasonable investor test" is not necessarily determined by calculating the particular profit impact."

[559] This was inferred from the statutory definition of "material fact" in the SL of 2002 art 2. In that definition, information is material if it is considered so by the reasonable investor.

[560] List! Issue No.9 (Newsletter), June 2005, "Dealing with inside information, Advice on good practice", UKLA Publications. <http://www.fas.gov.uk/pubs/ukla/list_jun2005.pdf> accessed:4/11/2010

[561] On Jan 2011 CESR became the European Securities and Markets Authority (ESMA). For more details see: "The New Architecture for the European Financial Supervision: from CESR to ESMA", Arp 2012. At : http://www.europaforum.public.lu/fr/calendrier/2012/04/seminaire-surveillance-financiere/index.html Accessed: 11/5/2012

[562] CESR Market Abuse Directive, "Level three - second set of guidance and information on the common operation of the Directive of the Market", July 2007, CESR/06-562b. (here, and after, CESR/06-562b Guidance) <http://www.cesr-eu.org/popup2.php?id=4683> accessed: 8/11/2010. This guidance could change due to the European Commission's (EC's) review of MAD. See EC "Public Consultation on a revision of the Market Abuse Directive (MAD)", 25 June 2010. (The consultation was closed on 23 July 2010.) <http://ec.europa.eu/internal_market/consultations/docs/2010/mad/consultation_paper.pdf> accessed: 8/11/2010

[563] FSMA 2000 s. 118 C(5) states that information is precise if it indicates situations or events that exist, or may reasonably exist, and is quite specific about the way that a conclusion can be drawn as to the possible effect of those events or situations on the price of relevant instruments.

[564] CESR/06-562b Guidance (n 562) para 1.14,p.6 and para 1.5,p.4

[565] List! Issue No.16, July 2007, UKLA publications, para 7.5 p.16. <http://www.fsa.gov.uk/pubs/ukla/list_jul07.pdf> accessed: 8/11/2010

3.1.1.2 Systems for the control and disclosure of inside information

The FSA stressed that the policy of identification, control and dissemination of inside information is the responsibility of the issuer's board of directors because they are best placed to assess what amounts to inside information.[566] In some cases, the responsibility may be delegated to a committee of directors who can react more promptly to inside information issues.[567] Understandably, the FSA wanted issuers to give immediate notice of inside information, without the delay caused by administrative procedures such as the notice required for a full board meeting.[568] In this context, the FSA will not accept excuses for delaying disclosure such as the difficulty of convening a full board meeting,[569] or the time required to prepare presentations to analysts, or to prepare for a press conference.[570]

Issuers are required to implement and periodically review systems and procedures to effectively control the dissemination[571] of inside information. Choosing those systems depends on the nature of the issuer and its type of business.[572] Issuers should use the systems as follows.

1) To determine what information is deemed to be inside information.[573] In this regard, an issuer must bear in mind that it is ultimately its decision whether information is inside information or not, and consequently if a disclosure obligation is due.[574] If it is difficult for the issuer to decide, professional advice from lawyers, financial advisors, auditors and public relation advisors[575], sought in a timely manner, will be vital.[576]

2) To identify the individuals responsible for dealing with information that could

[566] This perception of issuers, specifically senior management, was manifest in the FSA light touch approach and risk-based approach. In these approaches, minimum interference from the FSA occurred, as will be discussed in Chapter 5, section 1.
[567] List! Issue No.9 (n 560), para 2.2, p.3; DTR 2.2.8G
[568] Marsh and McDonnell (n 528)
[569] FSA Final Notice, Photo-Me (n 558): the FSA did not accept a director's failure to open his email attachment as an excuse for the company to delay disclosure.
[570] List! Issue No.16 (n 565) para 7.3, p.16
[571] The UK Corporate governance Code, June 2010, Provision C.2.1 states that "the board should, at least annually, conduct a review of the effectiveness of the company's risk management and internal control systems" at: <http://frc.org.uk/corporate/ukcode.cfm> accessed: 11/11/2010
[572] FSA CP 05/7, "The Listing review and Prospectus Directive", April 2005 <http://www.fsa.gov.uk/pubs/cp/cp05_07.pdf> accessed: 9/11/2010
[573] FSA Final Notice, Photo-Me (n 558) para 2.1, p.3; Burger R, 'Plugging the leaks' (2007)157 New Law Journal 1222
[574] Ibid
[575] Marsh and McDonnell (n 528)
[576] Johnson H, 'Disclosure obligations' (2009) 1 Company Secretary's Review 1; FSA Final Notice, Entertainment Rights, 19 January 2009. FSA stated that: "Entertainment Rights failed to take professional advice in a timely manner in relation to a disclosure obligation."

amount to inside information.

3) To report this to the company's decision makers to decide whether such information needs to be announced.[577]

4) To ensure that those employees having access to inside information are aware of their legal and regulatory duties; and of the sanctions imposed upon misuse or improper circulation of such information.[578]

The obligation to adopt systems and procedures to assess and release inside information is not recognised in the Jordanian disclosure regime. Although prompt disclosure is required, the mechanisms implemented arguably do not ensure timely disclosure. This is discussed in more details in the next section.

Thus, in the UK, an issuer's failure to identify or process inside information through the implemented systems constitutes a breach of DTRs.[579] Also, an issuer refraining from disclosing inside information because of a confidentiality agreement with a client also amounts to a breach of the DTRs.[580] Note that listed companies are required to promptly disclose inside information even if it is negative information. For example, withholding adverse performance figures because of positive expectations that the company will overcome or mitigate the negative impact [581] is not permitted by the FSA. [582] Nevertheless, there are cases where disclosure can be delayed as will be discussed hereunder.

3.1.1.3 Delaying disclosure

Because delaying disclosure is an exceptional situation, it must be justifiable and it is subject to the FSA's judgement.[583] A short delay may be acceptable if the issuer faced unexpected and significant events where a process of first clarifying the situation was

[577] The Association of General Counsel and Company Securities of the FTSE 100: Guidelines for establishing procedures, systems and controls to ensure compliance with the Listing Rules (hereinafter, GC100 guidelines), May 2007 updated January 2008. http://Idportal.precticallaw.com/jsp/binaryContent.jsp?item=40571392 accessed: 9/11/2010
[578] DTR 2.8.9R
[579] DTR 2.2.1R
[580] FSA Final Notice, Wolfson Microelectronics, 19 January 2009. The FSA stated that, "in any event, however, companies must not withhold price sensitive information due to confidentiality agreements with their clients."
[581] FSA Final Notice, Sportsworld Media Group, 29 March 2004
[582] FSA Final Notice, Entertainment Rights (n 576). The FSA said that, "offsetting negative and positive news is not acceptable. Companies should disclose both types of information". See also: List! Issue No.22, August 2009, para 10, p.5 <http://www.fsa.gov.uk/ukla/list_aug09.pdf> accessed: 7/11/2010
[583] DTR 2.2.9G (4) states that an issuer may consult the FSA in cases of doubtful delay.

necessary.[584] In such cases the length of delay must be proportionate to the circumstances. The FSA enforcement actions show that it has accepted delays of minutes and hours rather than days.[585] The decision to delay disclosure is the issuers' responsibility. As mentioned earlier, the FSA believes that issuers are best placed to assess and control their own inside information.[586]

In justifiable short delay situations, the issuer, in a preliminary announcement, must set out why a full statement cannot yet be drawn up, and include a guarantee to announce details as soon as possible.[587] Otherwise, if the issuer is unable or unwilling to make an announcement, a decision to suspend trading in its financial instruments may be appropriate.[588] Note that permission for a short delay does not cover, as previously stated, delay due to managerial difficulties or issuers' technical problems in announcing inside information.[589]

In addition to a justifiable short delay, the DTRs allow listed companies further opportunity to delay disclosure in certain circumstances to protect their legitimate interests[590], but only on condition that such delay must not be "likely to mislead the public".[591] A practical illustration of this situation is the case of *Northern Rock Bank (NRB).* In this case, the bank delayed disclosure of an imminent financial danger threatening the bank's financial position. The delay was due to the *NRB* negotiations with the *Bank of England (BoE)* on the possibility of implementing a lender-of-last-resort operation.[592] The issue was whether DTR 2.5 (permitting delay) would allow the *NRB* to delay disclosure. For approval to be given, delaying the disclosure could not be held to be misleading, and the confidentiality of *NRB* negotiations with the *BoE* had to

[584] DTR 2.2.9G (2)
[585] For example see: FSA Final Notice, Marconi, 11 April 2003. The FSA said: "The period of time which is reasonable for a listed company to take in making an announcement… regarding a change in its expectations, will depend upon all the circumstances relevant to the listed company's particular situation in which the change occurs". Though this case was decided under the old LRs, it will fall now under DTR 2R. See also, Freshfields guide (n 540)
[586] DTR 2.2.7G
[587] DTR 2.2.9G (2); Marsh J and McDonnell (n 528)
[588] DTR 2.2.9G (3)
[589] List! Issue No.16 (n 565) para 7.3, p.16
[590] DTR 2.5. The Disclosure Rule did not defined the "legitimate interests" but some demonstration was provided in DTR 2.5.3R: transaction negotiations and decisions or contracts made by an issuer but requiring an approval form from another issuer to become effective. CESR/06-562b Guidance, para 2.8, p.10 (n 562) provides examples of legitimate interests: where a contract was being negotiated, but had not been finalized, and the disclosure would jeopardise the conclusion of the contract, or threaten its loss to another party, and where the issuer needs to protect its rights in product development, patent, inventions, etc.
[591] DTR 2.5.1R (1); DTR 2.5.4G
[592] Starr T, 'Mad for it?' (2007)157 New Law Journal 1560

be ensured.[593] In the event, the confidentially requirement was not fulfilled. A day before the *House of Commons' Treasury Committee* held its meeting on the *NRB* request, the *BBC* 'scooped' the *NRB* financial difficulties and its negotiations with the *BoE*.

DTR 2.5.4 had posed another hurdle for the *NRB*. It states that any financial difficulty encountered by an issuer is not an acceptable justification for delaying disclosure. Since the prompt disclosure policy endorsed in the DTRs mirrored the MAD disclosure regime, MAD was blamed when the BoE did not bail out the *NRB*[594], as *Mervyn King*, then Governor of the *BoE*, declared.[595]

DTR 2.2.2R created further complexities. Under this rule the issuer is required to make a prompt disclosure if the "coming set of circumstances or the occurrence of an event[596]" is likely to have a significant effect on the issuer's securities price. An example of this in practice can be found the *European Court of Justice (ECJ)* judgement in the recent *Markus Geltl v Daimler AG case*[597] which mirrors DTR 2.2.2R. The *ECJ* in this case confirmed that information relating to intermediate steps, whether completed or expected, should be disclosed if it was sufficiently concrete to draw a conclusion that might significantly influence the relevant securities' price.[598] On the process of determining what could reasonably be expected, several academics have argued that even if the likelihood of the occurrence of an event (which might amount to inside information) was below 50%, it would be sufficiently concrete as long as there was a strong potential for it to affect the securities' price.[599] If the *ECJ* ruling were to be applied (retrospectively) to the *NRB* situation, prompt disclosure would have been required.

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[593] DTR 2.5

[594] MAD arts 6.1, 6.4. Two requirements under MAD should be satisfied to allow delay: (1) ensuring the confidentiality of inside information (2) where a non-disclosure decision would not be likely to mislead the public. For more details see: HC Treasury Select Committee Written Evidence, "Memorandum from the Tripartite Authorities", Jan 2008 at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasury/56/56we05.htm>Accessed: 5/11/2010

[595] Quoted from his statement to the House of Commons Treasury Select Committee (ibid) on 20 Sep 2007

[596] DTR 2.2.2 R

[597] ECJ judgment in *Markus Geltl v Daimler AG* C-19/11, Luxembourg, 22 Jun 2012 at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0019:EN:HTML> Accessed: 15/9/2012

[598] Ibid

[599] See: Olson J, 'European Court tightens disclosure rules' (2012) Harvard Law School Forum on Corporate Governance and Financial Rules, 1 Aug 2012 at: <http://blogs.law.harvard.edu/corpgov/2012/08/01/european-court-tightens-disclosure-rules/> Accessed: 11/12/2012. Olson stated that this concept, presented by the ECJ, was transplanted from the US securities law but has no basis in European law.

Because of these difficulties, the FSA in 2008 amended the Disclosure Rules (DR of 2005).[600] In the aftermath of the *NRB* nationalization, the amended DTRs allow a financial institution to delay disclosure if it is in lender-of-last-resort negotiation with a Central Bank and if confidentiality is ensured.[601] The FSA's justification was that immediate disclosure might damage the company's current financial position and thereby threaten its solvency.[602]

Based on this discussion, it appears that the FSA was in favour of keeping the options for delaying disclosure as restricted as possible to ensure prompt release of new information to the markets. In delaying disclosure, certain exceptional justifications are allowed, like negotiations with a Central Bank for liquidity support (as long as they are kept confidential[603]) or where public disclosure will seriously jeopardize the interests of the issuer.[604]

Arguably, in cases involving the financial difficulties of one of the elite market players, as the case of *NRB*, it would be difficult to ensure confidentiality. Delaying disclosure would probably allow leakage of inside information or at least generate rumours. Consequently, delay would have a more adverse effect on the relevant securities' price than if disclosure was made immediately. Thus, if investors' confidence and market integrity is to be maintained, disclosure of such financial difficulties should be prompt.

Turning to Jordan, although the JSC disclosure regime does not cover the situation of delaying disclosure of financial difficulties, the *Arab Bank* situation was an instructive practical example. *Arab Bank*, an elite market-player, was expecting to face financial difficulties after losing the lawsuit brought against it in the USA, New York, for financing terrorism. In the US court judgement, the bank was fined $1bn.[605] This case

[600] The FSA implemented DTR 2.2.5AR on 6 Dec 2008 stating: "An issuer may have a legitimate interest to delay disclosing inside information concerning the position of liquidity support by the Bank of England, or by another central bank, to it, or to a member of the same group as the issuer."
[601] DTR 2.5.1R
[602] See HC-Treasury Select Committee Reports, 2007-08. At: <http://www.publication.parliament.uk/cm200708/cmselect/cmtreasury/56/5602.htm> Accessed: 5/11/2010; FSA Handbook, Notice 83, December 2008; Starr (n 592). Starr discussed the difficulties encountered by Northern Rock Bank in delaying disclosure, due to FSA Handbook Guidance stating that financial difficulties are not an acceptable justification for delaying disclosure. See also: Freshfields guide (n 540)
[603] Required under DTR 2.5
[604] A resemblance situation exists under MAD art 6(2) stating that delay should be construed narrowly in situations where disclosure may seriously affect the issuer's interest. See Hansen J and Moalem D, 'The MAD disclosure regime and the twofold notion of inside information: The available situation' (2009) 4 Capita Market Law Journal 323
[605] The US Court of Appeal, Second Circuit, *Linde v. Arab Bank Plc*. 18 Jan 2013. See also: Frankel A, 'Arab Bank gambles on – and loses – bid to undo crippling sanctions' 18 Jan 2013, Thomson Reuters

was only the first of many to be brought to court. The JSC, in trying to protect the bank's financial position and reputation[606], did not require prompt disclosure to the industry. This concealment and delay in disclosure worsened the financial situation of the bank after rumours of the bank's problems became widespread among investors. This resulted in a severe decline in its securities' price. This case is an example of the undue economic influence of elite market players over the JSC, and discussed further in Chapter 5 (Sec.2).

It may be suggested, therefore, that concealing the financial difficulties of an issuer in either the UK or Jordan, even temporarily, might give rise to concerns about the regulator's transparency among ordinary investors.

In the light of this discussion and the sensitivity of the issue of delayed disclosure, the proposed new MAD II[607] will remove the discretion of issuers to delay disclosure. It will require them to inform the regulator without delay of their intention to delay.[608] It will be then the regulator's responsibility to decide whether delay is to be permitted or not, in contrast to the current situation. Currently, under MAD and DTRs (DTR 2.5.1R) issuers have discretion to delay disclosure subject to the FSA's hindsight.[609] However, in the UK, the new proposal will not affect existing discretion to delay disclosure. The UK has chosen not to opt into the proposed MAD II[610], considering that it can be merely recommended as good practice.

The final situation in which delaying disclosure is not permitted is where an issuer delays disclosure until Friday evening. "Friday Night Drop" occurs when most of RISs are closed for business, which means that the announcement will be sent out the following Monday morning. Arguing that the information was legitimately

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News and Insight. At: <http://newsandinsight.thomsonreuters.com/Legal/News/2013/01_-_January/Arab_Bank_gambles_on_–_and_loses_–_bid_to_undo_crippling_sanctions/> Accessed: 14/2/2013

[606] In addition, the Jordanian government from the beginning tried to intervene in the case, considering the importance of the financial position of Arab Bank to the national economy. For more see: Rubenfeld S, 'Jordan intervenes In Arab Bank terror finance lawsuits filed in New York' 3 Dec 2010, Wall Street Journal at: <http://blogs.wsj.com/corruption-currents/2010/12/03/jordan-intervenes-in-arab-bank-terror-finance-lawsuits-filed-in-new-york/> Accessed: 5/1/2011

[607] In December 2012 the Ministers of Justice adopted the EC Proposal for Regulation on Insider Dealing and Market Manipulation (market abuse) (MAD II), 2011/0295 (COD). The revised MAD II mainly proposed criminal sanctions for market abuse. Available at: <http://ec.europa.eu/internal_market/securities/docs/abuse/COM_2012_421_en.pdf> Accessed: 11/1/2013

[608] Proposed MAD II art 12

[609] Freshfields Guide (n 540)

[610] See: HC Hansard, 20 Feb 2012 at: <http://www.publications.praliament.uk/pa/cm201212/cmhansrd/cm120220/wmstext/120220m0001.htm> Accessed: 14/5/2012

disseminated to the public, but delayed because the RISs were closed will not be an acceptable excuse.[611]

In previous discussions it was mentioned that the issuer, in assessing the information, might consult other parties. This situation presents a case of selective disclosure as will be considered now.

3.1.1.4 Selective disclosure (disclosure to a third party)

The DTRs acknowledge that the financial environment and business relations between companies may involve selective disclosure of inside information (eg: to other group companies, to lenders, etc.).[612] As such, selective disclosure is legitimate if it occurs in the normal exercise of employment, profession, or duties.[613] Also, the issuer must ensure that the selective persons are under a duty of confidentiality, especially where delaying disclosure is permissible.[614] This duty may rise from an employment contract or agreement (with a lawyer, financial advisor, etc.).[615] Otherwise, disclosure via an RIS is required immediately or as soon as possible.[616] Obviously, selective disclosure should be used strictly where it is vital for the issuer's interests, and at the same time, is reasonable and justifiable.[617]

The case of selective disclosure is not recognised in the Jordanian disclosure regime. Even when dealing with situations that influence issuers' disclosure like market rumours and press speculations, the JSC gives discretion to issuers to deal with them without requiring prompt regulatory disclosure first. This is discussed under the Jordanian regime of disclosure.

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[611] UKLA Technical Note - Disclosure and Transparency Rules, 6 Oct 2010, p.5 at <http://fsa.gov.uk/pubs/ukla/disclosure_transparency.pdf> accessed: 8/11/2010. However, DTR 1.3.6R provides that, at a time where an RIS is closed for business, the issuer should distribute the information as soon as possible to: not less than two national newspapers in the UK; two newswire services operating in the UK; and to the RIS as soon as it opens.

[612] Marsh and McDonnell (n 528)

[613] DTR 2.5.6R

[614] DTR 2.5.7R (1)

[615] DTR 2.5.7G (2) gives examples of categories of recipients to whom an issuer may selectively disclose inside information. DTR 2.5.9G draws to the issuer's attention that the wider the group of recipients of inside information, the larger the chance of leakage.

[616] DTR 2.5.6R; MAD art 6(3)(a) also requires disclosure to be made, in the case of selective disclosure, either intentionally or non-intentionally.

[617] DTR 2.5.8G states that selective disclosure may not be justified in every case where a delay occurs under DTR 2.5.1R

3.1.1.5 Dealing with analysts and journalists (under embargo)

Issuers seek analysts' assistance, where possible, in forming a view of their activities and business prospects. Analysts also play a vital role in establishing the price accuracy of a stock, and in helping investors understand and value an issuer's securities[618]. Acknowledging that listed companies may divulge unpublished information when dealing with analysts, the FSA offered helpful guidance to help issuers avoid infringements of the relevant DTRs.[619]The FSA was aware that not all unpublished information conveyed to analysts is inside information. But if it is, it must be disclosed in compliance with the DTRs.[620] Otherwise, a case of market abuse might arise.[621]

It is therefore of great importance for issuers to set out policies and establish procedures to avoid such breaches[622]. For instance, when meeting with analysts the FSA advised that the meetings should be brief, and the extent and nature of the information discussed should be restricted. The FSA also recommended the attendance of more than one of the issuer's representatives and that accurate records of all discussions[623] should be held.

Another sensitive area for issuers is analysts' reports and whether they have to respond to them. The FSA allowed companies latitude to comment on those reports, albeit this does not mean that issuers are compelled to correct the material included in the reports. Sometimes, however, correction will be necessary if the incorrect information is likely to result in serious distortion of, or misapprehension in the market.[624]

From the above, it can be concluded that dealing with analysts is a sensitive area, given the possibility of inside information leakage. Despite this, the FSA was of a view that, with cautious and prudential measures in place, holding meetings with analysts, the press, or sometimes the public, would help the dissemination and absorption of market information and would also help in raising an issuer's profile[625]. These benefits were overlooked in the JSC disclosure policy. The JSC did not in fact consider dealing with analysts and how issuers should react to their reports.

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[618] Marsh and McDonnell (n 528)
[619] List! Issue No.9, section 4, p.4-6 (n 560)
[620] DTR 2.2.10G: Selective disclosure may take place when dealing with analysts
[621] Market Conduct (MAR) in FSA Handbook, MAR 1.4.2E (2) states that: "The following behaviours are, in the opinion of the FSA, market abuse (improper disclosure)… (2) selective briefing of analysts by directors of issuers, or others who are persons discharging managerial responsibilities."
[622] Marsh J and McDonnell (n 528)
[623] List! Issue No.9, section 4, p.5-6 (n 560)
[624] Ibid
[625] Ibid

A similar risky area for issuers is dealing with press speculation. The FSA clarified that issuers should not provide inside information to journalists and others under embargo (a sort of selective disclosure)[626], unless this information had already been disseminated via one of the RISs.[627] In relation to this issue in Jordan, the JSC does not require issuers to disclose inside information promptly via the JSC. Instead, issuers are urged to hold a press conference to deal with the speculation. Such a situation would arguably result in an increased likelihood of leaking inside information.[628]

3.1.1.6 Dealing with rumours

Rumours or unverified information are endemic in the market. They stem from many sources: wishful thinking, rumours to deceive, speculations, etc.[629]

The FSA recommended, in cases of rumour, merely adopting a "no comment" policy whenever the press were demanding issuers to comment on the rumour.[630] The same applies under the FCA's DTRs, but the difference is that the issuer is also required to carefully assess whether the rumour amounts to inside information.[631] This is because the FCA, like the FSA, considers the issuer and its advisors to be best positioned to assess and judge whether the information amounts to inside information.[632] In connection with this, the FSA has encouraged issuers to build up internal procedures and to provide written guidelines on the treatment of rumours[633], to ensure that their employees are "aware of the potential consequences of circulating false rumours"[634]

However, if quite unfounded information has had a deleterious effect on investors' confidence or the issuer's shares price, the FSA advised that a formal announcement would be the best practice[635]. In this situation, the FSA's view was that the decision to

[626] UKLA Technical Note - Disclosure and Transparency Rules (n 611)
[627] List! Issue No.9, section 4, p.5-6 and section 9, p.9 (n 560)
[628] See the discussion on this in the next section.
[629] Hansen J and Moalem (n 604)
[630] This meant that issuers should use this policy when they could delay disclosure by virtue of FSA DTR 2.5 and also when they were not in the possession of any inside information. List! Issue No.9, para 5.8, p.7 (n 560); FCA DTR 2.7.3 G states the same.
[631] DTR 2.7.1 G
[632] DTR 2.2.7 G
[633] Market Watch, Issue No.30, Nov 2008, p.3 <http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter30.pdf> Accessed: 31/10/2010. This approach is similar to the old listing rules (prior to 2005). For more see: McDonnell B, 'Handling and disclosing inside information: a guide to disclosure rules' (2011) 28 Compliance Officer Bulletin 1
[634] Market Watch No.30, p.4 Ibid. Mainly violation of Section 118 (Market Abuse) and 397 (Making Misleading Statements) of FSMA 2000
[635] List! Issue No.9, para 5.5, p.7 and para 5.4, p.6 (n 560) The announcement was to be made in conformity with FSA DTR 2.2.1 R. The obligation was imposed under the third set of CESR Guidance and Information on the Common Operation of the Directive [MAD], 15 May 2009

make an announcement should not solely be triggered by the reaction of the issuer's share price to a rumour. Other factors should also be considered[636]. In particular, if there was evidence that a breach of confidentiality might have occurred[637], the FSA would give the issuer latitude to use its own judgement[638] about a formal announcement. The FCA currently takes a different position. It urges issuers to make a disclosure as soon as possible in accordance with DTR 2.6.2 R.

From the previous discussion it is clear that the FCA takes a somewhat different approach when dealing with rumours and speculation that might amount to inside information. Arguably this approach could be a more effective in controlling possible leakage of inside information. Giving more latitude to the issuer to assess the situation, as under the FSA, could result in misjudgement or allow further leakage.

To minimize the possibility of inside information leakage and to ensure that it is only properly disclosed, issuers are not only required to adopt effective systems and procedures to control dissemination, but they are also required to hold insiders lists.

3.1.1.7 Insiders lists

The DTRs require issuers to provide details of persons who have access to inside information, whether regularly or occasionally, to preclude any possible leakage.[639] This stringent requirement, which arose from the implementation of MAD[640], obliged issuers[641] to draw up and maintain an updated[642] and comprehensive list[643] of employees and persons acting, directly or indirectly, on their behalf who have access to inside information.[644] The list should be provided to the FCA upon request.[645] Every insiders list must contain:

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[636] List! Issue No.9, para 5.9, p.7 (n 560)
[637] DTR 2.7.2 G
[638] List! Issue No.9, para 5.4, p.7 (n 560). Also CESR/06-562b Guide (n 562) provided a similar opinion to the FSA's
[639] DTR 2.8.1 R. Clear guidance about insiders lists can be found in: FSA Market Watch "Markets division: newsletter on market conduct issues", Issue No.12, June 2005, p.5 <http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter12.pdf> Accessed: 31/10/2010
[640] MAD art 6. The same is required under the proposed MAD II art 13
[641] FCA DTR 2.8.1 R, and previously the FSA DTR 2.8.5R, require an insiders list to be prepared by the issuer itself, or by persons acting on its account or on its behalf.
[642] FCA DTR 2.8.4R; FCA DTR 2.8.6G states that maintaining an updated list is solely the issuer's responsibility.
[643] FCA DTR 2.8.2 and previously FSADTR 2.8.4R
[644] In DTR 2.8.1R the FSA gave examples of persons who could be insiders. Also see: FSA, Market Watch "Markets division: newsletter on the market conduct and transactions", Issue No.24, Oct 2007, p.7 <http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter24.pdf> accessed: 31/10/2010. Also CESR/06-562b Guide (n 562) provided examples of possible insiders who may act on the issuer's behalf, such as: auditors, lawyers, accountants, investment banks, IT agencies, etc.

1) persons who have access to inside information (an issuer's employees and its principle contacts at other firms who act on the issuer's behalf[646]);

2) justification of why those persons are on the list;

3) the date of drawing up the list.[647]

An issuer may be exempted from maintaining a list of all individuals working for, or acting on behalf of, another company, if they are listed by that company and the issuer is sure (based on a contract or agreement) that the other company maintains an insider's list.[648] The issuer must also take all necessary measures to ensure that its insiders understand the legal and regulatory duties entailed on them, and are aware of the sanctions that may be imposed when a breach happens.[649]

From the previous discussion, it can be argued that the insiders list is a cornerstone in controlling any possible leakage of inside information. It will be of great help in identifying the person responsible in leakage cases where there are indications of involvement of the issuer's insiders. Such insider lists have a dual purpose: identification of insiders and raising awareness of legal duties and possible sanctions. In Jordan, the importance of holding insiders list is not recognised in the JSC disclosure regime, as will be shown in the next section.

The final aspect of the UK disclosure regime is the disclosure obligation imposed on the persons discharging managerial responsibilities.

3.1.1.8 Disclosure of Persons Discharging Managerial Responsibilities (PDMRs)

One of the DTRs more onerous disclosure obligations relates to PDMRs (included in insiders lists) and persons linked with them, regarding their transactions in the financial instruments of the issuer.[650] PDMRs and their connected persons are defined in the FSMA of 2000.[651] Nevertheless, the FSA tended to broaden the statute's scope to

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[645] DTR 2.8.2R
[646] DTR 2.8.7G
[647] DTR 2.8.3R
[648] DTR 2.8.8G
[649] DTR 2.8.9R
[650] DTR 3.1 reflects Clause 26 of the Recital-MAD. The Clause states: "The publication of those transactions, on at least an individual basis, can also be a highly valuable source of information for investors."
[651] FSMA 2000 s.96b as amended in FSMA regulation of 2005 states that, "'a person discharging managerial responsibilities within an issuer' means… a director of an issuer… [or] a senior executive…[who] has regular access to inside information…. [who] has the power to make managerial

include senior employees who are members of the executive committee of an issuer but are not board members.[652] Note in this regard the role of the financial regulator in expanding the statutory ambit, which is unfortunately something that the JSC did not do, although it has the mandate to do so.

The FSA added that "PDMRs might be persons employed by any company within the issuer's group" who regularly have access to inside information and make effective decisions in the course of the issuer's business and its development.[653] The same rationale is adopted by the FCA under DTR 2.8.7G.

The obligation on PDMRs of disclosure (but not that on connected persons) is common between the UK and Jordanian disclosure regimes. Arguably, the underlying rationale of this obligation in both countries is the fiduciary duty.[654] The DTRs require PDMRs and their connected persons to notify the issuer in writing[655] of all their transactions in the issuer's shares or financial instruments within four business days of the transaction day.[656] Thereafter, the issuer should notify an RIS of all its PDMRs' transactions as soon as possible, but no later than the end of the business day following its receipt of the PDMRs' notifications.[657] Additionally, the issuer should post PDMRs' transactions on its own website by the end of the business day following its sending of information to the RIS, if the information concerned amounts to inside information.[658] Since 2007[659] issuers are required to include in their annual reports and accounts all the interests in

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decisions. A person "connected" with a person discharging managerial responsibilities within an issuer means… a relative of a person discharging managerial responsibilities… [in] a body corporate"

[652] FSA, Market Watch, Issue No.12, p.8 (n 639)

[653] Ibid p.9

[654] The fiduciary duty was discussed in Chapter 2. s. 2

[655] DTR 3.1.2R, previously FSA DTR 3.1.3R; FCA DTR 3.1.3R lists the information that should be included in the PDMR's notification, for instance: the name of the PDMR, the reasons for requiring of him such notification, the name of the issuer, the type of the transaction, etc. See also: Balmforth B; Burton B; Cross S and Power D, 'Evidence on UK directors' compliance with disclosure timing regulation' (2007) 15 Journal of Financial Regulation and Compliance 381

[656] DTR 3.1.2R. However, a notification to the company and the FSA had to be made within two days under DTR 5.8.2R and DTR 5.83R; For more see: Freshfields Guide (n 540)

[657] DTR 3.1.4R (similar to FSA DTR 3.1.4R) Also the issuer is required to notify an RIS under the Companies Act 2006 s. 793 where the information relates to the interests of a director (or someone who is connected with him) in its shares. However, DTR 3.1.6R states: "If an issuer makes the appropriate notification to the RIS under DTR 3.1.4R (1)(a), a further notification is not required in the event of receiving information regarding the same dealing in a notification under Section 793 of the Companies Act 2006."

[658] FCA DTR 2.3, previously FSA DTR 2.3.2R

[659] As result of implementing the Transparency Directive (n 533)

their shares or any financial instruments held by the directors, i.e. PDMRs and their connected persons.[660]

The FCA's DTRs, like the FSA's DTRs, do not explain in detail what is meant by PDMRs' "own account transactions". However, it is possible to refer to the principles laid down by the FSA to help identify the meaning. Here the definition is given as: a "transaction which is the result of an action taken by PDMRs or otherwise taken under their consent; a transaction whose beneficiaries are mainly PDMRs and transactions having a material impact on PDMRs' interests in an issuer.[661]"

3.1.2 The FSA enforcement actions (Disciplinary actions)[662]

The FSA's enforcement actions in cases involving breach of disclosure obligations were not limited merely to its disciplinary regime. The FSA could have dealt with cases outside its administrative regime if the disclosure breach amounted to civil market abuse (improper disclosure offence) or, indeed, under the criminal regime of the CJA of 1993 if, for instance, the improper disclosure took the form of tipping inside information. However, the discussion here will focus on the FSA disciplinary process against breaches of disclosure obligation. Other enforcement actions under the civil market abuse regime and the criminal insider dealing of the CJA of 1993 is discussed later in Chapter 5 (Sec.1).

When the FSA doubted an issuer's compliance with one or more of the rules constituting the disclosure regime, it made a start on the case by conducting an informal investigation, requesting information or documents from the issuer in question which had to be provided by a fixed deadline.[663] Following the submission, the listed company would either hear nothing from the FSA, or would be subject to further (formal) investigation if there were a suspected breach of one or more of the disclosure rules. The formal investigation carried out by the FSA team might hold discussions with the company or its individuals and require documents. If the investigation results clearly proved the breach, the decision on whether an enforcement action should be taken or

[660] FCA DTR 1.1.1 R and DTR 2.4.8 R (previously FSA DTR 1.1.1R, DTR 1.1.2G). Also DTR 9.8.6R (1) requires the issuer to prepare an updated statement of the interests of any of its directors. (This is a new rule that was put in place on 6/8/2010 and updated on 1/4/2013)
[661] List! Issue No.11, September 2005, para 8.2, p.11.
<http://www.fas.gov.uk/pubs/ukla/List_sep05_noll.pdf> Accessed: 11/11/2010
[662] The FSA was granted this power under FSMA 2000 s.91
[663] List! Issue No.9 (n 560)

not would then be made by the Regulatory Decisions Committee (RDC).[664] If the RDC decided to take enforcement action, the issuer subject to the decision had twenty eight days to appeal to the Upper Tribunal (Tax and Chancery Chamber). [665] This Tribunal might either increase or decrease the sanction that was initially imposed (the amount of fine or the censure) by the FSA. However, if there was no appeal, a final notice would be published. The FSA would impose one or more of the following sanctions: (1) impose a fine; (2) suspend the companies' securities from trading; (3) publish a censure; or (4) issue a private warning. In addition, as mentioned earlier, the FSA would also bring cases of market abuse or insider dealing to court.[666]

[664] Woodcock Tony, 'Market practice as a defence in regulatory proceedings' (2010) 25 Journal of International Banking and Financial Law 91

[665] This was known as the Financial Services and Market Tribunal. Note that it is not an appellant body, but a tribunal of first instance, which will consider all evidence and give its own decision.

[666] See Margaret Cole's speech, then FSA Director of Enforcement and Financial Crime, FSA Enforcement Conference, 22 June 2010 at <http://fsa.gov.uk/pages/Doing/Events/pdf/enforcement.pdf> Accessed: 17/11/2010

3.2 Section 2: The JSC Disclosure Regime

Since the enactment of the first Securities Law (SL of 1997), the Jordan Securities Commission (JSC) has dedicated its efforts to ensuring equal access to the information necessary for investors' investment decisions.[667] Like the FSA, the JSC acknowledges that the disclosure obligation is vital for protecting investors, as well as ensuring fairness and transparency.[668] The regulatory framework of disclosure obligation was broadly covered under the Securities Law of 2002 (SL of 2002)[669] but it required detailed clarification. The JSC's Disclosure Instructions of 2004[670] were supposed to explain and demonstrate the application of those general rules and expand the detail in their requirements, but they did not, as will be shown. It is worth noting that the SL of 2002 and the JSC disclosure regime are not the first disclosure regimes in Jordan. That regime can be traced back to the Companies Law (CL) of 1997 and its precursors.[671] The following discussion will cover the disclosure regime under the CL of 1997, then the SL of 2002.

3.2.1 Disclosure under the CL of 1997

The disclosure regime under the CL of 1997 focusses on the financial position of a listed company,[672] its prospectus plans, and its decision makers (chairman, board members, and directors). Under the CL of 1997, the board of directors is required to prepare three financial reports.

1) The annual report on the company's activities, including forecasts for the following year, accompanied by the annual audited balance sheet (its profits, losses and cash flows).[673] The report has to be submitted to the Companies Controller within three months of the end of the fiscal year of the company[674].

2) The semi-annual report (every six months) including "the financial position of the

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[667] Al-Rimawi (n 309)
[668] Malkawi (n 416)
[669] Disclosure requirements are provided by SL of 2002 arts. 34-44
[670] Instructions for Issuing Companies' Disclosure, Accounting and Auditing Standards of 2004 (hereinafter, Disclosure Instruction 2004)
[671] Malkawi (n 416)
[672] The listed companies under the CL of 1997 are companies that issue securities (shares, bonds, etc.) and take the form of a public shareholder company, a private shareholder company, or limited partnership in shares. The full Act can be found at <http://mit.gov.jo/portals/0/tabid/502/companies%2Law.aspx> Accessed: 27/11/2010
[673] CL 1997 art 140(a) (Duties of the board of directors)
[674] Ibid. These reports should be sent to the Controller at least twenty-one days prior to the date of the general assembly meeting, CL of 1997 art 140(b)

company, the results of its operations, profit and loss account, cash flow, and the clarifications of the financial statements certified by the company auditors".[675] The Controller should be provided with a copy within sixty days of mid-year.[676]

3) A detailed report on the expenses, remunerations and privileges of the chairman and the members of the board of directors.[677] This report should be placed in the company headquarters at the disposal of the shareholders, at least three days prior to the meeting of the general assembly.[678] A similar obligation is imposed under the SL of 2002 and forms part of the JSC disclosure regime, as will be shown.

This sort of financial disclosure arguably differs in its sense and meaning from the disclosure of inside information. The latter focusses on controlling the timely on-going dissemination of new information that would be likely to affect the securities' prices once disclosed. The information in the financial reports is mostly old. It is based on an already past period of the company's financial activities and is likely to have little influence on the securities' prices. Therefore, it might be concluded that controlling and disclosing inside information falls outside the net of this annual reports obligation. (An important exception to this conclusion is discussed below in 3.2.2.)

The second type of disclosure, of inside information, can be found under the CL of 1997 in the disclosure obligation of the Persons Discharging Managerial Responsibilities in the company. Under this obligation they are required to provide written statements of their shares, and their wives' and children's shares, in their company and in any other company. The statement should be provided to the board of directors at its first meeting, and should be copied to the Companies Controller.[679] Obviously this disclosure aims at identifying persons who have access to inside information, either in their own companies or in other companies, where the owned shares in those companies might affect the discharging of managerial responsibly. Thus, it can be argued that this disclosure has, to a certain extent, a similar purpose to the PDMRs' disclosure required by the FCA.

However, there are key differences in the ambit of obligation. Under the CL of 1997, the obligation is limited to senior management in the company, and does not include connected persons or those representing them. Also, it does not include persons who

[675] CL 1997 art 142
[676] Ibid
[677] CL 1997 art 143
[678] Ibid
[679] CL 1997 art 138

have access to inside information by virtue of their positions or employment. Therefore, the effect of this disclosure on controlling inside information is arguably insufficient. This situation can be explained by the fact that the insider dealing offence is not expressly recognised in the CL of 1997. Rather, the underlying obligation represents a broad fiduciary duty on corporate insiders, which is at least a first step towards prohibiting insider dealing in Jordan.[680]

Significantly, the ambit of this obligation under the JSC disclosure regime remained the same, as will be shown. In fact, this old rationale of targeting classic corporate insiders (directors, board members, managers) had to a large extent affected the JSC's understanding and interpretation of the term "person" in the insider dealing offence. This led to a narrowing of the prohibition ambit of the insider dealing offence under the SL of 2002.[681]

The disclosure obligation of the CL of 1997 arguably aimed at prohibiting those having access to inside information from dealing on the strength of it to secure illicit gains. To this end, the CL of 1997 explicitly prohibits the chairman, any board member, the company general manager and any of his employees, and any related parties[682], from dealing directly or indirectly in the shares of their company on the basis of inside information acquired by their position or employment.[683] Also the company's external auditor and his employees, because of their also having access to inside information,[684] are prohibited from disclosing that information[685] or dealing on the strength of it.[686]

3.2.2 Disclosure under the SL of 2002 and the JSC Disclosure Instructions[687]

The SL 2002 provided for general disclosure obligations which, to a large extent, reiterated the CL of 1997 disclosure regime. One addition was in the preparing of annual and semi-annual financial reports that now had to be submitted to the JSC[688] and to the Corporate Controller.[689] This obligation, as previously argued, would not control

[680] See Chapter 2, s. 2
[681] See the next Chapter, s. 2
[682] CL 1997 art 148
[683] CL 1997 art 106
[684] CL 1997 art 193
[685] CL 1997 art 202
[686] CL 1997 art 203
[687] SL 2002 provisions and all JSC Instructions are available at:
<http://www.jsc.gov.jo/Public/english.aspx?site_id=1&Lang=3&Page_Id=1975&Menu_ID2=198>
Accessed: 20/11/2013
[688] SL 2002 art 43(A) and JSC Disclosure Instructions 2004 art 4
[689] CL 1997 art 140

the dissemination of inside information because the information in the reports would mostly be out of date. However, in the case of the report forecasts about expected projects or future agreements for the coming year, if these were definite enough and likely to happen[690] there might be a case of inside information. In such a case, the double submission of the financial reports to the JSC and the Controller would create chances for possible leakage of sensitive inside information. Part of this problem is to whom the annual report should be submitted first?

In addition, if the two submissions have to be made within a maximum of three months from the end of the company's fiscal year,[691] will this constitute timely disclosure? Arguably not, because three months is a long period in the context of a policy of timely disclosure designed to ensure prompt dissemination of inside information equally to market investors.

The lack of any memorandum of understanding between the JSC and the Controller in regard to submitting the annual reports[692] gives companies discretion to decide where to submit their reports first. For example, 'X', a telecommunication shareholding company, was to be granted a new 4G operation license from the government, and this was mentioned in its annual report under the future financial forecast for next year. This piece of information almost certainly constituted inside information, considering that negotiations were in the final stages. If the company opted to submit the report to the Controller first, then later to the JSC, and leakage of inside information happened, would the company nevertheless be legally liable for improper disclosure? It is difficult to answer "yes", as submitting the report to the Controller is required under the CL of 1997 and the SL of 2002.

Note that yet another organisation could be involved where the issuer is a bank. In this case, the submission of financial reports should be to the Controller, the JSC and the Central Bank.[693] The Central Bank requires submission to it first, and it could be

[690] JSC Disclosure Instructions 2004 art 4(B)(B)(15) specify, "Important prospective developments including any new expansions and projects; the Company's proposed plan for at least one upcoming year; and the Board of Directors' forecasts for the outcomes of the Company activities."
[691] JSC Disclosure Instruction arts 4 and 5; CL 1997 art 140(a)
[692] This overlap between the JSC and the Controller still remains, though it was brought to the attention of the JSC in 2004. See in this regard the World Bank, "Report on the observance of standards and codes (ROSC), corporate governance country assessment, Jordan 2004". At:< http://www.worldbank.org/ifa/jo_rosc_cg.pdf> Accessed: 11/11/2010 (hereinafter, WB Report on Jordan)
[693] Banking Law 2000 arts 68, 69. At: <http://www.cbj.gov.jo/pages.php?menu_id=123&local_type=0&local_details=0&local_details1=0&localsite_branchname=cbj> Accessed: 15/11/2010

difficult to ensure confidentiality or prevent leakage considering the possible problems in identifying and controlling who had access to inside information.

To sum up, the required disclosure of financial reports as mentioned falls outside the disclosure regime for inside information, yet company forecasts within the financial reports can amount to inside information. The submission to different departments arguably leads to leakage of that information. Finally, the timetables for submission do not ensure timely disclosure, which is one of the acute deficiencies in the JSC disclosure regime, as the discussion below will show.

3.2.2.1 Disclosure of senior management

Although this obligation was recognised under the CL of 1997, the JSC disclosure regime does not provide any further elaboration, or extend the classes of persons subject to disclosure. The JSC merely added that issuers must disclose any change of the share ownership affecting the management. The JSC considered this as a material fact[694] that required prompt disclosure.[695] This shows that the JSC recognises that major shareholders have influence over the company's management and investment decisions, and they might exploit the company's inside information for their own benefit. However, this recognition is triggered only when the shareholders happen to be members of the issuers' board. Overlooking major shareholders' impact on their companies if they are not in any managerial position is a critical deficiency in the disclosure regime, considering the personal nature of the securities market and its structure in Jordan. The *World Bank* Report revealed that the dominant structure of Jordanian listed companies is family ownership. Such an economic structure suggests that leakage of inside information could be both likely and possible on a large scale.[696] The situation requires a sound disclosure regime. It is worth remembering that investment decisions in Jordan are based mainly on friendships and family relationships rather than financial studies or analysis.[697]

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[694] The definition of material fact, and its difference from inside information, is discussed here and within the criminal insider dealing offence in Jordan. See Chapter 5, s. 2

[695] JSC Disclosure Instructions of 2004 art 8(A)(6)

[696] WB Report on Jordan (n 692).The report stated: "The listed sector is dominated by banks and insurance companies... family-owned business groups, centred around a bank, and including insurance, industrial [concerns]… Around 70 firms are supermajority owned, i.e. fundamental corporate decisions can be taken without the consent of majority shareholders".

[697] See: The Middle East and North Africa Corporate Governance Workshop, Focus group discussion, executive summary in collaboration with the Egyptian Ministry of Foreign Trade, Egyptian Centre for Economic Studies, Confederation of Moroccan Employers, Private Sector Task Force Corporate Governance in Lebanon, Jordanian Centre for Economic Development, Sep 2003 (hereinafter, MENA focus group discussion) At:

Arguably the JSC's focus on senior management relates to the orthodox origins of controlling insider dealing, when directors and senior managers were regarded as the company's trustees or fiduciaries.[698] At the same time, the SL of 2002's narrow definition of an insider (director, manager) [699] arguably has also influenced implementing this sort of disclosure and directing it towards senior managers and directors. This old-style understanding of insiders suggests that the decision makers and drafters at the JSC lack the required skills and experience in this area of market misconduct.

Berkowitz and Pistor et al, in their comparative-analysis of transition countries, drew attention to this problem. They found that developing countries like Jordan, which instituted reform programs and voluntarily imported legal rules in the "hope to increase the prospects of foreign investments[700]"; subsequently faced effectiveness problems. One of the reasons for this, as *Berkowitz and Pistor* emphasised, was the unfamiliarity on the part of domestic lawyers and legal institutions with the received legal rules.[701] In fact the human capital inefficiency will manifest itself more when discussing the prohibition regime in the next chapter, and the JSC's enforcement problems in Chapter 5.[702]

The conclusion from all this is that imposing the disclosure obligation on corporate insiders in the way it has been done in Jordan has provided neither effective nor transparent regulation. For an optimal level of transparency combined with prompt dissemination of inside information, the disclosure regime must target any person who may have access to inside information.

3.2.2.2 Notification of important changes

Before discussing this obligation, it is important from the outset to look at the nature of the information which is subject to disclosure obligation. The JSC Disclosure Instructions of 2004 obliged companies to disclose any material fact, but not inside information.[703] There is a critical difference between the two in regard to the implemented underlying test. For the information to amount to inside information it

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http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/MENA_Sep_03_Focus_Group_ExSummary.pdf Accessed: 18/7/2011

[698] See this in Chapter 2, s. 2

[699] This is discussed under the substantive analysis of the Jordanian prohibition regime in Chapter 4, sec 2

[700] Berkowtiz *et al* (n 37)

[701] Ibid

[702] In s. 2, under the JSC enforcement actions and policies.

[703] JSC Disclosure Instructions of 2004 art 8

should be of a kind that would be likely to affect the relevant securities' price when made public. On the other hand if the information was of a kind that an investor would be likely to consider in his investment decisions, it would be material.[704]

It is difficult, given the absence of explanation or guidance from the JSC (part of a wider lack of regulatory transparency) to understand why only material information should be disclosed. Considering that the insider dealing offence is based on inside information, not material, this poses a critical problem. A detailed discussion on this problem and its effect on the soundness of the prohibition regime will be found in Chapter 4.[705]

The JSC requires listed companies to disclose any emerging material fact [706] promptly[707], and thereafter to issue a public notice. These material facts are "any important changes that affect the company's assets, long and short-term obligations, capital structure, credit rating, major transactions and rescissions, and any change in the share ownership that may have influence on the control of the company.[708]" Also, the listed companies are required to notify the JSC swiftly of any important decisions that might affect the securities' price such as mergers, voluntary liquidation, and buy-back of their own shares.[709]

Moreover, any change in the board members or the formation of a new board should be notified urgently, with a statement attached that justifies that change. The statement should include the appointee's qualifications[710], if he was new to the company board or was appointed as a general manager, and if this change could have an effect on the securities' price. In the statement, the JSC requires the issuing company to provide details of the names, positions and qualifications of appointed or resigning senior executives, and details of management change within one week of their occurrence[711]. (The same period is required for the previous changes in material facts.) This sort of disclosure is in addition to senior managers' disclosure obligations mentioned earlier.

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[704] SL of 2002 art 2 (glossary definitions)
[705] Chapter4, s. 2
[706] SL 2002 art 2 states that a material fact is "any event or datum that, to a reasonable person, would have an effect on making a decision to buy, hold, sell or dispose of a security." A thorough discussion and examination of this concept will be in the next Chapter, s. 2
[707] Although JSC Disclosure Instructions of 2004 art 8 states "without delay and through any means that ensure the required swiftness", art 9(a) requires the statement or report to be provided within a week of its occurrence.
[708] Disclosure Instructions 2004 art 8(a)(b)(e)
[709] Ibid art 8(f)
[710] Ibid art 8(i)
[711] Ibid art 11

Yet all this focusses solely on traditional insiders (the board members). Under the UK disclosure regime it was shown that PDMRs' disclosure goes well beyond the ambit of JSC disclosure in this regard. While the JSC targets traditional insiders, the FAS had extended the meaning of PDMRs and their connected persons to include as an insider any employee who operates below board level with access to inside information and is able to make managerial decisions.[712]

Thus, the JSC is likely to be more concerned with job titles rather than considering the real substance of a role or the access it gives to information.[713] For these reasons, the JSC has overlooked persons connected to PDMRs[714] and persons who are acting on behalf of the company, for example lawyers, tax advisors, and IT agencies. This does not apply to auditors, who are prohibited to deal on the basis of inside information under CA 1997, as was mentioned.[715] The names and qualifications of existing board members, and any future changes, are considered to be material facts that should be promptly disclosed.

Targeting only these insiders suggests that the preparation and maintenance of updated insiders lists over a period of time is not recognised as important in Jordan, unlike the practice in the UK. Thus the JSC has a loose grip on the identity of issuers' insiders, and its narrow view does not promote effective identification of possible sources of leakage.

In addition to the material facts in regard to corporates' boards, the JSC requires prompt disclosure of any material information without delay, and the making of a public announcement on the emerging fact.[716] The crucial issue here is identifying the time of disclosure. If this disclosure through the JSC is on the same day as the public announcement by the relevant issuer, how is it possible to identify the exact time of the official disclosure?

Let us assume that the JSC for some reason delayed posting the inside information on its website, or faced technical problems, while at the same time the relevant company made its announcement at a press conference. This would result in disseminating the

[712] Market Watch, Issue 12 (n 639); List! Issue No.16 (n 565)
[713] Disclosure Instructions 2004 art 23 illustrate this theme: "A. The following persons of the issuing company shall be considered, not exclusively, Insiders ex-officio: 1. The Chairman of the Board of Directors of the issuing company, 2. The Members of the Board of Directors, 3. The General Manager, 4. The Financial Manager, 5. The Internal Auditor, 6. Relatives of the above-mentioned persons. B. The natural person representing any juristic person occupying such a position shall be considered an Insider."
[714] WB Report on Jordan (n 692)
[715] CL 1997 art 203
[716] Disclosure Instructions 2004 art 8

information to the public before its being disclosed through the regulatory channels. Thus, one of the people attending the press conference might possibly call his broker to place an order to buy shares in that company (if the inside information was likely to raise the share price) and thus get in ahead of market investors and thereby secure financial gain.

This situation poses the question whether the company and the person who bought shares could be accused of disclosure breach or insider dealing. According to the underlying policy of disclosure, that is, providing information to the market investors equally, the answer is likely to be "yes". However, the misconduct in this case was not intentional but resulted from a deficiency in the regulatory requirement. Consequently, it is highly recommended that making a public announcement should happen only after the JSC has disclosed the information to the market. In addition, sufficient time should be allowed between the JSC disclosure and the company's announcement to make sure that the market has absorbed the new information.

It is clear from the foregoing discussion that the JSC disclosure regime does not ensure timely disclosure. If the precise time of disclosing inside information cannot be identified, how is it possible to determine whether the offence of inside information has happened or not. As the *National Association of Securities Dealers (NASD)* assessment pointed out:

> *"Under current practice in Jordan, establishing the precise time at which the news becomes public is difficult. According to information we received, firms transmit material news to the JSC and/or Exchange, but may release this to the media prior to its arrival at either the Exchange or the regulator*[717]*."*

In the light of this, it could be suggested that the JSC should urgently amend the disclosure mechanism to ensure timely disclosure. The current disclosure regime, in contrast to the UK disclosure regime, does not provide the transparency aimed at by imposing disclosure. Also, in regard to the means of releasing the information, in contrast to the FSA's RISs, the JSC have not identified any particular means of release. If the JSC is in favour of being itself the only vehicle for disclosure, the disclosure

[717] Polansky S, Kulczak M and Fitzpatrick L, 'NASD Market Surveillance Assessment and Recommendations - Final report' 22 Oct 2004 At: <http:// pdf.usaid.gov/pdf_docs/PNADB391.pdf> Accessed: 5/4/2011

department staff must expand. With only a small monitoring team[718], the JSC cannot expect to be able to make a thorough assessment of disclosure content, nor expect to be able to ensure compliance with the disclosure standards.[719]

3.2.2.3 The disclosure system and control of inside information

The Disclosure Instructions of 2004 do not require issuers to establish internal procedures or systems to identify, control, and deal with inside information. They only require issuers to form an audit committee[720] composed of three non-executive board members, which among other things would be responsible for assessing inside information.[721] Such a committee is unlikely to be sufficient to tackle the problem as it would have no power to impose controls on persons who may have access to inside information. Also it would be unlikely to be effective, especially in critical cases that involve consulting third parties (lawyers, analysts, financial advisors, or even the JSC). It would also have difficulties in assessing whether information amounts to inside information or not.

The absence of any requirement on issuers to implement internal systems and procedures to identify and control inside information suggests that another important factor is being overlooked. That is the absence of understanding on the part of issuers' employees of the nature of inside information, and what improper behaviours amount to insider dealing and market abuse. The importance of such understanding is acknowledged in the UK disclosure regime, and is strongly recommended to Jordan. It is a cornerstone for enhancing awareness of the offence and thus for ensuring compliance with the disclosure requirements. In this regard, the JSC should require issuers to ensure that their employees are familiar with the offence. Also, the JSC should provide informal guidance to clarify the general disclosure rules, especially as the SL 2002 does not provide any explanatory appendices. In sum, the previous discussion is evidence of the inexperience and insufficient skills of the JSC's members in failing to provide an effective and transparent disclosure system.

[718] WB Report on Jordan (n 692). The report stated that the number of staff was eight: up to now the number has increased by just two.
[719] Ibid
[720] Disclosure Instructions 2004 art 15(4)
[721] Ibid.

3.2.2.4 Dealing with media speculations

From the outset it should be said that, unlike the UK financial media, the financial news in Jordan is restricted to the financial pages of daily newspapers. They report mainly the market index and any general financial news of issues, IPOs, acquisitions or mergers. Therefore, any piece of news 'scooping' a financial transaction is likely to be either mere rumour, or based on improper disclosure. To deal with media speculations, Article 9(3) of the Disclosure Instructions of 2004 states:

> *"The company shall promptly issue a public statement to confirm, deny or correct any news item about a material fact pertaining to the issuing company, which is published in the media, and shall provide the copy of such statement."*

Evidently, the Article places the responsibility on companies when dealing with the media, without a requirement to notify or consult the JSC first. Giving discretion to companies in this manner could result in premature disclosure that jeopardizes the interests of the company, or causes a leakage of material information. Nor have companies been trained or guided by the JSC on how to deal with such situations, which again highlights human capital problems in both the JSC and market players.[722] Although the disclosure regime in the UK allows similar discretion to issuers, the sensitivity of dealing with media speculation has been carefully considered. Issuers were guided by the FSA and advised on how to deal with journalists, where a "no comment" policy was the starting point[723], in contrast to the JSC that encourages issuers to make statements.

The JSC urges the involved issuer to make a statement that clarifies whether the media speculation amounts to inside information or not. In cases of unfounded or false information this policy can be justified, but in cases where the press speculation is true it cannot. This is because leakage of inside information has most probably happened, and prompt disclosure should be made to the JSC to control any further leakage of inside information. This shows the difference between the FSA/FCA and the JSC stance in this regard. Where prompt disclosure is required in the UK, in Jordan the JSC leaves issuers to deal with justified media speculations. This policy could arguably expand the leakage and disseminate inside information outside the regulatory channels.

[722] There is a skills problem among those discharging managerial responsibilities. This will be discussed in detail in Chapter 5, Sec. 2 within the discussion of the JSC enforcement actions.
[723] See s. 1 of this Chapter.

Additionally, in such a situation it would be challenging to identify the exact time of disclosure and thereafter to decide whether an insider dealing offence took place or not.

Considering these problems, the FSA/FCA way of dealing with justified journalistic and media speculation is optimal. A change in policy in Jordan would be particularly advantageous considering the size, structure (family oriented [724]) and nature of investment decisions (to a large extent based on personal connections)[725] of Jordan's financial markets. Therefore, it is to be highly recommended that the JSC should require prompt disclosure instead of the company making a public announcement. Otherwise, manipulators can take advantage of any time prior to the company's statement to deal on the basis of inside information.

3.2.3 The JSC enforcement powers

Similar to the FSA's situation, the JSC, in addition to dealing with improper disclosure cases under its disciplinary regime, has the authority to take actions against perpetrators using the insider dealing regime. The discussion here will highlight the JSC's administrative regime (disciplinary procedures) in cases of disclosure obligation breaches. Other enforcement actions will be discussed later in Chapter 5 (Sec.2).

In suspected cases of violating disclosure requirements under the SL 2002, the JSC would start by conducting an investigation, or holding a hearing, to determine whether a breach of disclosure existed or not. The authorisation for conducting the investigation should indicate the nature of the suspected violation and set forth the scope of the authority to investigate. Thereafter, a notice of hearing at a fixed date and time should be sent to the respondent, clarifying his right to present evidence[726]. Upon concluding the investigation, if the JSC found that the involved person had violated, or had taken preparatory measures to violate, any provisions of the SL of 2002 or the Disclosure Instructions of 2004, it could take one or more of these measures: (1) cease or suspend any activity relating to the securities or a specific security; (2) suspend the public offer[727]; (3) impose a monetary fine of no more than JD50,000.[728] The Board may publicize any violation, along with the subsequent measures that have been taken[729].

[724] WB Report on Jordan (n 692)
[725] MENA focus group discussions (n 697)
[726] SL 2002 art 21(a)
[727] SL 2002 art 21(b)
[728] SL 2002 art 22(a)
[729] SL 2002 art 20

Despite this power to publicize, disclosure breaches are published only very briefly in the JSC annual reports. They merely name the person or company that breached the disclosure obligation, then cite the number of the violated article and the JSC enforcement action (usually a fine). Thus, no investigation details or summary of the case facts or circumstances are mentioned to clarify how and why the action was taken, although this could be done according to Article 21(b)(1).[730] Therefore, the industry's awareness is simultaneously hindered from two sides: the lack of JSC guidance and technical notes on regulatory disclosure, and the lack of detail about enforcement actions from which the industry could learn.

Enhancing the industry's awareness of improper disclosure offences and other market misconduct is vital for ensuring ordinary market compliance with the regulatory obligations. This situation raises another aspect of regulatory transparency, specifically the lack of any guidance, consultation, or technical advice issued by the JSC[731]. Thus, it is difficult for the industry to clearly understand the disclosure obligations it must comply with and how to avoid future breaches. This lack of regulator transparency extends to JSC enforcement actions, as will be discussed later in this study.[732]

[730] These are published in the JSC Annual Report Appendices. The JSC's published Annual Reports for the years 2004-2010 are available in English at: <http://www.jsc.gov.jo/Public/english.aspx?site_id=1&Lang=3&Page_Id=1736&Menu_ID=252&Menu_ID2=245> Accessed: 1/4/2013

[731] International Business publication (USA) (n 280)

[732] See Chapter 5, s. 2

3.3 Summary

One of the justifications, as mentioned in the previous chapter, for prohibiting insider dealing was to ensure that investors are placed equally in regard to accessing market information. Enforcing disclosure obligation was considered to be the optimal way to control the timely dissemination of inside information. To this end, implementing the disclosure obligation will not merely ensure that insiders will not take advantage of inside information prior to market investors, but it will also underpin the market's transparency and integrity. For these reasons, this chapter made a careful scrutiny of the UK and Jordanian disclosure regimes.

The discussion showed the disclosure obligation is the first mechanism for tackling insider dealing. The more the disclosure regime is sound, the less the leakage of inside information, and the more investors' confidence in the market will grow. Critical analysis of the disclosure regime in the UK and Jordan showed that the UK has implemented a thorough and sound regime. The regulatory regime is supported by guidance, technical notes, examples, etc., to ensure the regulated issuers understand their disclosure obligations and what systems and controls they have to adopt to comply with the regulatory requirements.

In contrast, the disclosure regime in Jordan has critical problems, not just in its ambit and requirements, but also in the drafting of the disclosure regime itself. This points to inexperience and problems of professionalism in the JSC itself. Many loopholes were discussed: most serious was the lack of a precise, timely disclosure obligation which, in turn, will severely hinder any enforcement of the insider dealing offence. In general, the JSC disclosure does not provide the same level of transparency that the FCA provides. Suggestions to reform the Jordanian disclosure regime and enhance its effectiveness are provided in the concluding chapter.

Chapter 4 The Regulatory Matrix of Insider Dealing and Market Abuse in the UK and Jordan

One of the important elements for an effective prohibition regime is sound regulation.[733] The more the regulation is well drafted and capable of conveying what is regulated, the more compliance will be achieved and the more enforcement will be effective in punishing and deterring.[734] This chapter critically analyses the statutory prohibition, first in the UK, then in Jordan.

Section 1 examines the UK criminal and civil prohibition regimes. The examination starts with the criminal offence of insider dealing. This covers regulatory elements of the offence, and the regulatory prohibition ambit as regards prohibited behaviours and persons committing the offence. Problematic issues around securing evidence are highlighted, as well as how this has influenced the creation of the FSMA of 2000 civil market abuse regime. Critical analysis is used to explore the differences in prohibition ambit (prohibited behaviours and persons) under the civil regime, compared to the criminal regime. A comparison is also made between the civil regime under the FSMA of 2000, prior to, and post, implementation of MAD. The study considers, for example, whether this implementation enriched the UK original civil regime.

This critical review of the 'rich' UK experience, based on criminal and civil regimes, is used to inform and throw light on an examination of the Jordanian regime. The criminal nature of the Jordanian regime provides common ground for comparison with the UK regime. Having the UK regime in the background helps keeping the Jordanian regime in focus, as regards the prohibition ambit and the regulatory requirements for the offence. The study also looks at how the regime was presented in the SL of 2002: whether it was well drafted, and clear enough for both the financial regulator and industry. Regulation clarity is the key criterion used in the comparison, as well as whether issues of poor clarity have affected the efficacy of JSC staff (human capital).

The aim of this chapter is to answer Research Question 2): *Is the recently introduced Jordanian law effective?* The importance of this question lies in the effect an unclear regime can have on regulatory enforcement. Exploring this critical issue paves the way

[733] Carvajal and Elliot, 'The challenges of enforcement in securities markets: Mission impossible' (n 31)
[734] Ibid; Berkowtiz *et al* (n 37)

to answering subsidiary Research Questions, such as: why there has been no enforcement action against insiders and manipulators in Jordan.

4.1 Section 1: The UK Criminal Insider Dealing and Civil Market Abuse Regime

This section first examines the criminal offence of insider dealing under the CJA of 1993, then the civil offence of market abuse under the FSMA of 2000, both prior to, and post, implementation of MAD.

4.1.1 The criminal offence of insider dealing

The significant breakthrough of the CJA of 1993 was in establishing the liability of the insider dealer on access to inside information, instead of the insider's nexus with the company in question, as discussed earlier[735]. However, insider dealing retained its criminalized character, despite opposing voices from the *City* and the *LSE,* and Parliament calling for the inclusion of civil procedures and sanctions.[736] In this regard, *the Department of Trade and Industry (DTI)* believed such civil sanctions "in most cases to be wholly disproportionate to the damage done by the insider dealers."[737] Also the government provided another justification for rejection by stating that:

> *"…it was in the public interest to penalize individuals who conducted themselves in a particular way. That is the classic reason for creating a criminal offence. The government accordingly believes that the criminal law remains appropriate.[738]"*

Inside information is the nub of the offence, when a person is deemed to act knowingly on the basis of such information, whether as an insider or a tippee.[739] This section examines the statutory requirements of the crime: inside information, insiders and the prohibited acts. The general and special statutory defences in Section 53, 58 and Schedule 1 respectively[740] are not covered in the discussion, partly because the focus is on the statutory offence, and also because the SL of 2002 did not provide any defences for comparison.

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[735] The geneses of prohibiting insider dealing in the UK in Chapter 2, s.2

[736] Rider, 'The control of insider dealing - Smoke and mirrors' (n 147); Rider, 'Civilising the law - The use of civil and administrative proceeding to enforce Financial Services Law' (n 144); Ashe, 'The crime being something in the City - part 1' (n 357)

[737] Department of Trade and Industry (DTI), White Paper, Company Investigations, Aug 1990 (Cm. 1149) p.18; Wotherspoon (n 396)

[738] DTI White Paper (n 737) at 18

[739] Stallworthy M, 'Reforming insider dealing law in the United Kingdom' (1993) 4 International Company and Commercial Law Review 210

[740] The onus of proof is on the accused person to show that he is entitled to the benefit of the defence. For more details see: White (n 394)

4.1.1.1 Inside information

Section 56 of the CJA of 1993 defines inside information as meeting certain 'requirements' – specifically it is information that:

1) relates to particular securities or to a particular issuer of securities or to particular issuers of securities but not to securities in general;

2) is specific or precise;

3) has not been made public;

4) if made public, be likely to have a significant effect on the price of any securities[741].

Each of these requirements is now explored in turn.

I. The first requirement of inside information

This requirement clarifies that inside information can relate to a particular issuer or to a whole sector.[742] For example, if the government decided to make drinking alcohol illegal, this would amount to inside information *before* announcing it to the alcohol industry, even if it did not relate to a particular company in the sector. In addition, inside information is not confined to information about a company's current situation, but includes any information which may affect the company's financial prospects or business plans.[743] This may include information about a company's major clients, providers or competitors.[744] In any of those cases, information amounting to inside information should have a significant effect on the price of relevant securities.[745] Under the SL of 2002, inside information should have an effect on the price of relevant securities when made public, but the noteworthy point is that this effect should not be significant. In this, any slight change will fulfil the statutory requirement.

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[741] The section definition shows a high degree of assimilation of inside information characteristics mentioned in Directive 1989 art 1. However, the CJA 1993 definition expanded it to include "specific or precise", as opposed to "a precise nature" in the 1989 Directive. Note that FSMA 2000 adopted the same meaning of inside information that was introduced in CJA 1993.
[742] White (n 394)
[743] CJA 1993 s. 60(4) provides general coverage when stating that a company's business prospects fall within the first statutory requirement "relating to an issuer of securities".
[744] Welch J, Pannier M, Barrachino E, Brend J and Leoboer PH, 'Implementation of EU Directive (I) - Insider dealing and market abuse' Dec 2005, British Institute of International and Comparative Law at: <http://www.cityoflondon.gov.uk/NR/rdonlyres/3950D4A4-5792-412C-BA89-1B30827/0/BC_RS_eudirective_1205_FR.pdf> Accessed:4/1/2011
[745] CJA 1993 s. 56(1)(d)

II. The second requirement of inside information

The second requirement mandates that information be, disjunctively, of a '*specific*' or '*precise*' nature. Although the CJA of 1993 did not define the meaning of either term, [746] the Parliamentary debate during the passage of the CJA of 1993 provided clarification.[747] Note that the Directive of 1989 only used the '*precise*' requirement but the government added '*specific*'. The *Economic Secretary to the Treasury* justified this addition because of government concerns that "precise" alone might be interpreted too narrowly by the courts.[748] The government attempted to make it easier for the courts to identify what would be considered inside information, without the need to prove that the individual knew some or all of the details.[749] For instance, if a person knows that a merger between two companies is imminent but does not know the exact price of the transaction, his knowledge would be *specific* but not *precise*[750]. This regulatory approach encompasses any relevant inside information, with the exception of mere rumour.[751] The same approach can be found under the SL of 2002, which did not demand that information be *precise*.

III. The third requirement of inside information

The third requirement is that inside information can be used legally when made public.[752] The government was at first inclined to let courts interpret the phrase "*made public*", and considered issuing guidance to ensure proper interpretation.[753] This approach was not plausible for many in the City, nor for professional groups.[754] Substantive amendments were therefore made to the Criminal Justice Bill, in the *Sanding Committee,* [755]to clarify the meaning of *made public.*[756]

Under Section 58 of the CJA of 1993, information is *public* when:

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[746] McCoy and Summe (n 357)
[747] See for instance Mr Darling MP question to the Economic Secretary in the HC Standing Committee B, Fifth Sitting, 10 June 1993, col. 173
[748] Ibid cols.173-174
[749] Wotherspoon (n 396). See also *R v Cross* [1991] BCLC 125 at 132, the Court of Appeal realized the jury's confusion regarding the meaning of specific under the Act of 1985.
[750] Many examples were provided by Mr Darling to illustrate and clarify the differences between specific and precise at HC Standing Committee B (n 747) cols.174-175
[751] Ibid cols.173-174
[752] CJA 1993 s.58(2)(3) provides that when information is made public or may be treated as made public.
[753] See for example Earl of Caithness clarifying the Government intention at HL Deb 19 November 1992, vol.540, col.772
[754] Wotherspoon (n 396); Rider *et al*, *Market abuse and insider dealing* (n 384)
[755] See Mr Nelson discussing the Government amendments to clarify the meaning of made public, HC Standing Committee B (n 747) cols.182-183
[756] Now are provided under Section 58 of CJA 1993

1) It is published in compliance with the disclosure rules[757].

2) It is contained in public records[758] that can be inspected by the public, such as: company records, patent registers or in publications such as the Official Gazette.[759] If the information is published in an obscure publication or non-statutory register it would not be *made public.*[760]

3) It can be "readily acquired by those likely to deal" in the related securities.[761]

   It can be inferred that "*readily acquired*" means that information is already incorporated in securities prices, and thus not regarded as inside information. As for "*likely to deal*", it was argued that the phrase refers only to market professionals, like market makers,[762] as they frequently deal in the market. *Rider* gave a different opinion on "*likely to deal*" as referring to "the market in shares itself".[763] Arguably, *Rider's* opinion seems to be more coherent, considering the provision was not enacted only for market professionals, but rather for all possible dealers in the market.

4) It can be derived from information already made public.[764] Although this may seem tautological, the purpose of the statute was to protect legitimate practices in the market, such as those conducted by analysts or financial advisors who can put together public knowledge about a company and an industry in a way that reveals inside information.[765]

   In addition to these non-exhaustive[766] instances, Section 58 enumerates five circumstances, mostly akin to the situation of derived information, in which information is regarded as being public, even though it is not yet public.

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[757] Initially, disclosure was governed by the Listing rules Ch.9 issued by the Stock Exchange and now under DTRs as discussed in chapter 3, s.1.
[758] The phrase "by virtue of any enactment" was inserted to stress that s.58 will not cover publications in obscure records - "parish records" as the Economic Secretary to the Treasury Mr Anthony Nelson stated, HC Standing Committee B (n 747) col.183
[759] These example were provided by the Economic Secretary to the Treasury Mr Anthony Nelson, HC Standing Committee B (n 747) col.183
[760] Ibid col.183; Mr Nelson added: "publication in an obscure journal would not be considered to be "readily acquired by those likely to deal in securities…."
[761] CJA 1993 s. 58(2)(d)
[762] This rationale was underpinned by the debate in HC Standing Committee B (n 747) cols.187-188
[763] Rider *et al*, *Market abuse and insider dealing* (n 384); Alexander, 'Insider dealing and the market abuse' (n 358)
[764] CJA 1993 s.58(2)(d)
[765] Alexander, 'Insider dealing and the market abuse' (n 358)
[766] This was stressed in HC Standing Committee B (n 747) cols.180-182

Note that the statutory clarification of the requirement "made public" provides an example of regulation clarity which cannot be found, to the same level, under the SL of 2002 prohibition regime, as discussed later in this chapter.

Despite statutory clarification of "made public", this requirement would still allow insiders to deal on the basis of inside information[767], ahead of market investors. It would mean that they were not prevented from using the advantage of that information to secure gains.[768] In this, it is generally accepted that markets do not readily assimilate information once it has been made public. Markets take time to respond to new information[769] and adjust their securities prices.[770] Therefore the "made public" requirement may not support the underlying policy of prohibiting insider dealing (taking advantage of inside information ahead of investors).[771] Even if a person is accused of insider dealing on the ground that information was not widely disseminated, he can benefit from the statutory defences.[772] For this reason, using "information not generally available", as required in the civil insider dealing offence, seems optimal.[773] It allows markets time to incorporate new information into securities price, and gives investors sufficient time to recognise it.

IV. The fourth requirement of inside information

The final characteristic of inside information is its price-sensitivity[774]. Information is price-sensitive if it would be likely to have a significant effect on the price of securities if it were made public.[775] This vital feature of inside information is the key determinant for courts in insider dealing cases.[776] Courts may rely on price movement after proper

[767] White has the same opinion as the writer: "..it appears to allow insiders to deal as soon as information is made public…[to] allow insiders….to gain a "head start" over other market traders." White (n 394); also, the Economic Secretary to the Treasury confirmed that: "after the information has been released to the public, there is nothing to stop people from dealing." HC Standing Committee B (n 747) col.186
[768] CA 1985 dealt more properly with this situation. It prohibited insiders from dealing immediately using released inside information until the market absorbs and adjusts to that information.
[769] This in fact contradicts the ECMH, that contends that markets promptly react to any new information. See previous discussions over ECMH in Chapter 2, s.3
[770] Rider et al, *Market abuse and insider dealing* (n 384)
[771] Though Directive 1989 was given similar interpretation to the CA 1985, in requiring insiders to wait for the market to adjust to the new information, the wording of Article (1) allows immediate dealing. For more see Hopt K, 'The European insider dealing directive' (1990) 27 Capital Market Law Journal 51. Hopt based the aforementioned interpretation of the Directive 1989 on its Preamble that stated; "Investors are placed on equal footing."
[772] The person may use the defence set out in CJA 1993 s.53(1)(b): "..at the time he believed on reasonable grounds that the information had been disclosed widely enough…."
[773] See the discussion on this requirement in the 2nd part of this sec.
[774] According to CJA 1993 s. 56(2) price includes value.
[775] Ibid. The section used the same wording of Directive 1989 art 1
[776] Rider et al, *Market abuse and insider dealing* (n 384)

disclosure is made, and on the number of transactions of the affected securities prior to, and post, dissemination of inside information.[777] However, there is no theoretical percentage movement in price that can be applied in all cases.[778]

4.1.1.2 Insiders

The CJA of 1993 stressed that someone with direct access to inside information will be an insider even if no nexus with the concerned company exists.[779] The underlying prohibition policy, in this sense, has shifted from "abuse of confidence"/fiduciary duty, to "inequality of information".[780] The CJA of 1993 classifies persons (only individuals/natural persons[781]) who might commit the crime into:[782]

1) primary insiders, who knowingly possess inside information through being director, employee or shareholder of an issuer or have access to such information by virtue of their position; this wide range of individuals reflects the impact of the 1989 Directive on the CJA 1993;[783]
2) tippees, who knowingly acquire inside information from an insider.[784]

I. Primary insiders

A person has information as a primary insider if he has direct knowledge of inside information through being a director, employee or a shareholder of an issuer of securities, or any person has information by virtue of his employment or office, such as lawyers, bankers, auditors…etc.[785] Note that the CJA of 1993 applies for the first time to shareholders.[786] In addition, the CJA of 1993 is applicable to employees who would have access to inside information regardless of their position in the company.[787] Thus if

[777] See for instance *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897 at 931
[778] See LSE, Consultation Document on the Dissemination of Price Sensitive Information, Nov 1993, p.6
[779] Minister of State at the Home Office (Earl Ferrers); HL Deb 3 Nov 1992, vol.539, cols.1352-1353
[780] Alcock A, 'Insider dealing - an unholy mess' (1993) 143 The New Law Journal 21; White (n 394)
[781] CJA 1993 s.52
[782] Directive 1989 art 2 had its influence on CJA 1993 where both removed the need to show the connection between an insider and the affected company. This was thoroughly discussed in chapter 2, s.2 within the UK geneses of prohibiting insider dealing.
[783] Minister of State at the Home Office (Earl Ferrers), HL Deb 3 Nov 1992, vol.539, col.1353
[784] Section 57 of CJA 1993 s.57
[785] Ibid at(a)
[786] Including shareholders with insiders was in accordance with the Directive 1989 art (2)(1). Previously under CA 1985 they were insiders if they had a business or professional relation with the company.
[787] Davies, 'The European Community's Directive on insider dealing' (n 379)

a janitor at the CFO's office came across a financial report and read the confidential prospects of the company, he would fall within the primary insider scope.[788]

Also, the "by virtue" requirement is wide enough to encompass public servants whose official duties give them access to inside information.[789] What narrows the requirement is the way it is interpreted, which is to establish a business or professional relationship between the individual and the relevant issuer.[790] For instance, the taxi driver might overhear inside information in a conversation between two company employees, by virtue of his profession as a driver, however he cannot be a primary insider by any mean.[791]

II. Secondary insiders (tippees[792])

According to Section 57(2)(b), a secondary insider, or tippee, is someone who knows that he has inside information, directly or indirectly, from an insider. Thus, the example of the taxi driver may fall within the scope of tippee, if he knows that[793]: (1) it is inside information; and (2) the source of this information is an insider, whether he knows the identity of his informant or not.[794] Accordingly, tippee liability, under the CJA of 1993, exists immediately whenever he is aware that he possesses inside information from an inside source, whether this acquisition was passive or active.

To establish this notion, the CJA of 1993 eliminated the word "obtain", which was in the CA of 1985, and caused contradictions when interpreted by courts. For example, the *Crown Court at Southwark* ruled, in the *Fisher* case, that the word *obtain* meant secured, procured or acquired, not merely received. Therefore, *Fisher* was acquitted because he passively received a tip from an insider.[795] Nevertheless, when the *Attorney-General* asked for the opinion of the *Court of Appeal* on whether the word obtain might

[788] This was overlooked by the JSC since its main focus is on classic insiders, which resulted from the narrow definition of an insider under the SL 2002. For more details see s.2 in this chapter.
[789] Wotherspoon (n 396)
[790] See the Commission's proposal and amended proposal COM (87) 111 Final, Article 2 and COM (88) 549 Final, Article 1(1) May 1988. The Commission emphasized this interpretation when the phrase "in the exercise of" was replaced by "virtue" in the final text of the Directive 1989. For more see: Tradimas, 'Insider trading' (n 395)
[791] For further see: Wotherspoon (n 396)
[792] The term tippee was included in the Criminal Justice Bill in 1992, however, it was withdrawn due to strong opposition from the HL, see: HL Deb 19 Nov 1992, cols.756-767.
[793] Directive 1989 art 4 required "full knowledge of the facts" which might be problematic in application and difficult to prove, while CJA 1993 did not require the knowledge of all the surrounding or background details. See; Barnes P, Stock market efficiency, insider dealing and market abuse (Gower Publishing Limited 2009) 125
[794] DTI, The Law on Insider Trading: A Consultative Document, Dec 1989, para 2.28
[795] *R v Fisher* (n 389)

have a wider meaning,[796] both the *Court of Appeal* and the *House of Lords* held that no further effort is required than to have received the inside information.[797] A similar rationale was adopted under the SL 2002, that merely possessing inside information is sufficient, regardless how it is obtained.

To summarise: primary insider and tippee liability is based on knowing the nature of information, regardless how this it was acquired.[798]

4.1.1.3 The offences under the CJA of 1993

The offences are ultimately based on taking advantage of inside information while knowing its nature. Thus, a person is considered to have acted with full knowledge if he knew that the information was inside information, and he acquired it as an insider or as a tippee.[799] The prohibited conducts relate to the offences of dealing, encouraging and disclosing[800]. The CJA of 1993 reduced twelve offences in the CA of 1985 to just three, however they replicate the previous ones.[801]

I. The dealing offence

For the dealing offence to be established two requirements are essential: (1) the aforementioned insider requirement; and (2) dealing in securities on the basis of inside information (not made public and having an effect on the relevant securities price).[802] Thus the prosecution has to prove that the individual knew that his information was inside information, and that it was generated from an inside source.[803] This offence is akin to the insider dealing offence, under the SL of 2002, although broader in its ambit in regard of persons. The offence covers natural and legal persons, whether insiders or not. The SL of 2002 is narrower in the meaning of trading (buying or selling) and the covered securities (shares and bonds). This is covered in the next section.

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[796] Attorney-General Reference (No 1 of 1988)
[797] Attorney-General Reference (No 1 of 1988) [1989] 2 WLR 729 Lord Lowry clarified that "the wider meaning is the meaning which Parliament must have intended the word "obtain" to have in this Act.." See also: Tridimas T, 'The House of Lords rules on insider dealing' (1989) 52 Modern Law Review 851; Tridimas T, 'Acquisition of inside information and intelligent insiders' (1989) 10 Company Lawyer 156
[798] Pettet, *Pettet's Company Law* (n 106)
[799] Stallworthy (n 739)
[800] Directive 1989 encompassed detailed articles (Article 2(1), 3(a) and (b)) that similarly defined the offences under CJA 1993. Also see: Ashe M, 'The Directive on insider dealing' (1992) 13 Company Lawyer 15
[801] White (n 394); McCoy K and Summe (n 357)
[802] CJA 1993 ss. 52(1), 56(2) and 57(1) Also see: Rider et al, *Market abuse and insider dealing* (n 384)
[803] Wotherspoon (n 396)

The CJA of 1993 covers broad kinds of securities: shares, debt securities, warrants, depositary receipts, options, futures and contracts of differences.[804] Also government and local authority securities[805] were included, in line with the Directive of 1989[806]. The CJA of 1993 also expanded the definition of "dealing in securities", to cover any acquisition or disposal of securities,[807] including any agreement to do so, and pre-contact negotiations.[808] Note that the critical time the offence is committed is considered to be the time of the agreement, whether the individual was acting as principal or agent.[809] For example, if an agent, at the time of executing the securities transaction upon his principal order, possessed inside information, he would fall within the scope of the offence, even though he did not know the nature of the information nor personally gain from the transaction.[810]. For such cases the CJA of 1993 provides statutory defences.[811]

The scope of the dealing offence also embraces the situation where a person procures another person, directly or indirectly, to acquire or dispose of securities.[812] The CJA of 1993 provides non-exhaustive circumstances to illustrate procurement prohibition.[813] This sort of prohibition provoked discussion in the *House of Commons Standing Committee* during the passage of the Criminal Justice Bill. Specifically, the debate was over the phrase "a person who is acting at his (the procuring person's) direction"[814]. In responding to the debate over this case, the *Economic Secretary* provided an example to illustrate the rationale behind the prohibition:

> *"An obvious way of doing that is to be the sole shareholder of a company. As sole shareholder, one uses one's influence over the company to get it to deal in the shares. Any profit made or loss avoided would accrue to the company, but, as sole shareholder, one would benefit from the company's increased profitability.*[815]*"*

[804] CJA 1993 s.54 and Schedule 2
[805] Such as futures, depositary receipts and loan stocks or gilts issued by Central Government, local authorities and the Bank of England. See: Wotherspoon (n 396); Welch *et al* (n 744)
[806] Directive 1989 art 1(2)
[807] CJA 1993 s. 52(3)
[808] CJA 1993 s. 55(3)(b)
[809] Alexander, 'Insider dealing and the market abuse' (n 358)
[810] Rider et al, *Market abuse and insider dealing* (n 384)
[811] CJA 1993 s. 53(1)(c)
[812] CLA 1993 s. 55(1)(b)
[813] CJA 1993 s. 55(4) provides that a person is procuring an acquisition or disposal if the security is acquired or disposed by his agent, nominee or a person acting upon his direction.
[814] Rider et al, *Market abuse and insider dealing* (n 384)
[815] The Economic Secretary to the Treasury Mr Anthony Nelson, HC Standing Committee B (n 747) col.171

The Jordanian regime similarly recognises sole shareholders of companies, however this situation, and the possible effects on the company, were overlooked under the criminal insider dealing offence.[816] This is discussed in Section 2.

II. The encouraging offence

Section 52 of the CJA of 1993 prohibits an insider or tippee from encouraging another person to deal in securities on the basis of inside information, where the insider or tippee knows, or has reasonable reason to believe, that the individual receiving the tip will trade, either on a regulated market, or off-market through a professional intermediary[817]. Thus, the essential element of the offence is the imparting of advice in contravention of the disclosure rules[818] whether the recipient knew or did not know the nature of the information. This brings us to the disclosure offence, which is also recognised under the SL of 2002.

III. The disclosing offence

This offence is based on the disclosure of inside information, as opposed to proper disclosure in the course of the insider's employment, office or profession.[819] To prove the offence, it is enough for the prosecution to prove that the individual who disclosed the inside information was aware of its nature and source at the time of committing the illegitimate disclosure. It may be argued that this offence falls within the scope of the encouraging offence, if the recipient knew that it was inside information. Although this argument is understandable, what distinguishes the disclosure offence is that it does not require specific action by the recipient; the offence is committed simply by virtue of the improper disclosure. The improper disclosure offence is covered under the SL of 2002 but of a different nature. The offence is considered civil, as discussed later.

[816] This company is recognized under the CL of 1997 but the SL of 2002 did not consider the possible effect of this situation.
[817] CJA 1993 ss. 52(2)(a), 53(3)
[818] See the discussion over the disclosure regime in chapter 3, s.1
[819] CJA 1993 s. 57

4.1.2 Market abuse under FSMA 2000, prior to and post MAD

4.1.2.1 The regime and its reform in light of the EU Market Abuse Directive (MAD)

Critics argued that reliance solely on criminal law to regulate insider dealing was neither efficient nor effective, and that the use of civil sanctions would be more appropriate,[820] and that it would ease the evidential burden.[821] *Rider* clarified those criticisms by stating that the criminal justice system in the UK was insufficient, on its own, to provide enforcement in the market abuse arena.[822] Most insider dealing cases do not involve false or misleading statements, by word or conduct (fraud), to persons with whom the insider is dealing, especially when transactions take place on impersonal markets.[823] Thus, establishing insider liability under the traditional criminal system would be difficult.[824] In support of this argument *White* stated:

> *"Between the introduction of the offence in 1980 and the commencement of the new law in 1994 only 33 cases were brought, of which 18 have resulted in convictions. The cases involved 52 individuals, of whom 24 were found guilty. Yet over the same period there were 210 referrals by the Stock Exchange.*[825] "

In fact, the failure of a number of high-profile criminal trials, due to prosecution difficulties[826] paved the way for the introduction of the civil market abuse regime. Interestingly, the proposed civil regime was concerned only with the effect of improper behaviour in hampering market integrity and efficiency, regardless of perpetrator intention.[827] The government proposal for civil procedures of market abuse reflected government policy; markets must operate in an open and transparent manner to maintain

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[820] Rider, 'Civilising the law' (n 144); also see in this regard the discussion on achieving credible deterrence under the civil market abuse regime or the criminal in Chapter 5, s.3

[821] White (n 394)

[822] This issue is discussed further in Chapter 5, s.3

[823] Rider, 'Civilising the law' (n 144)

[824] Ibid. Some argued that insiders who abuse inside information were thieves. However, according to English law, theft provisions cannot be applied to stealing confidential information, see the case of *Oxford v. Moss* (1978) Cr APP R 183.

[825] White (n 394)

[826] See for example *Blue Arrow case: R v Coben* [1992] 142 NJL 1267 where the prosecutor failed to sustain convictions against directors' misconduct; *Saunders v United Kingdom* [1996] 23 EHRR 313, the failure to make allegations against *Ernest Saunders* in respect of improper behaviour related to takeover. Also see: Davies H, 'Are words still bonds: how straight is the City' (2 Nov 1998) Securities Institute Ethics Committee, 3rd Annual Lecture; Alcock A, Five years of market abuse' (2007) 28 Company Lawyer 163

[827] Standing Committee A, 19th sitting, 2 Nov 1999, col.673, Mr Allen-Jones described the proposed civil regime: "…it is concerned with market efficiency rather than moral culpability…..we want to be able to catch those who intended to abuse the markets, but in addition confidence in the markets can be affected by actions, regardless of the underlying intentions……"

market confidence in the UK financial system.[828] For this, the proposed regime empowered the FSA with the necessary powers to combat market misconduct.[829] The FSA was entitled to impose unlimited monetary sanctions, or other administrative penalties, on those (or induced others) engaged in market abuse[830].

Although the civil regime created by FSMA 2000 was claimed to have increased effectiveness and enforcement, and maintained investor confidence in market integrity,[831] it was not introduced to replace criminal sanctions against insider dealing and market manipulation.[832] Overall, the complementary nature of having criminal and civil weapons in the regulatory armoury was considered vital to the effectiveness of the financial regime.[833]

Regardless of the claimed advantages of the civil regime, it had a rough passage through Parliament.[834] Criticism centred on the lack of certainty in the general definition of market abuse behaviour, the sweeping civil sanctions, and the compatibility of the proposed regime with the *European Convention on Human Rights (ECHR).*[835] In his evidence to the Joint Committee, *Sir Sydney Kentridge* (the Treasury's legal advisor) justified the wide-ranging definition of market abuse behaviour, by explaining that: "the more you define, it has sometimes been said, the more loopholes there are.[836]"

The rationale was clearly to design a broad statute definition, which established a flexible, robust and effective regulatory system, proportionate to rapidly changing

[828] HM Treasury, 'Financial Services and Markets Bill: A Consultation Document, part 1: Overview of financial regulatory reform' (Jul 1998) para 15.1

[829] These powers include: investigation; criminal prosecution in the case of insider dealing; imposing civil fines; and seeking restitution orders. See: FSA, CP 17, Financial services regulation: enforcing the new regime, Dec 1998, s.115

[830] The rational was to empower FSA enforcement actions against perpetrators, whether they were authorized persons or not. Examples of such civil penalties are: unlimited fines, public censure, restitution…..etc. For further see: Filby (n 405); Pettet (n 106) 415

[831] These were assertions from HM Treasury and FSA in their Joint Consultation Document, 'UK implementation of the EU Market Abuse Directive (Directive 2003/6/EC)' (Jun 2004) (here and after HM Treasury and FSA joint Consultation on MAD). Also see: Avgouleas (n 11) 309

[832] Joint Committee on Financial Services and Markets Bill, First Report (14 May 1999) - Introduction. The offences of misleading the market and market manipulation were presented in s.47 of the Financial Services Act (FSA) 1986 and now under s.397 of FSMA 2000. Also see the statement of the Economic Secretary to the Treasury, Miss Melanie Johnson, Standing Committee A (n 827) col.652. Johnson was referring to the civil regime under SROs lacking effective statute enforcement powers. The civil regime had been proposed to enforce the civil procedures effectively, on a statutory basis.

[833] Mr Heathcoat-Amory, Standing Committee A (n 827) col.683

[834] See Standing Committee A (n 827) discussion on the Joint Committee on Financial Services and Markets Bill, Second Report (Jun 1999) cols.651-708

[835] These concerns were first raised in the Joint Committee on the Financial Services and Markets Bill First Report (n 832)

[836] Sanding Committee A (n 827) col.676

financial markets.[837] To achieve that flexibility, a level of openness in the regime was essential, to cover unexpected and unpredicted developments.[838] In this, the FSMA of 2000 merely created and defined the outer limits of the civil offence of market abuse.[839]The same flexibility rationale could be said to justify the broad framework of the SL of 2002. However, the role of regulators in the UK and Jordan, in elaborating and explaining the general ambit of prohibition, differ completely. The efforts of the JSC in this regard, are totally unlike those of the FSA, which, as will be shown, played a vital role in clarifying and detailing broad statutory prohibition.

The FSMA of 2000 was remodelled in 2005[840] following the implementation of the EU Market Abuse Directive (MAD).[841] Implementing MAD not only affected the FSMA of 2000 but also the FSA Handbook, specifically: the Code on Market Conduct (MAR), the Disclosure and Transparency Rules (DTRs) and the Listing Rules (LRs).[842] Nevertheless, the underlying policy of MAD – to ensure equal access to information for market investors, to maintain the integrity of the markets, and thus to enhance investor confidence in them – merely mirrored UK market abuse policy.[843]

In implementing MAD, the government had considered two main approaches:

1) retain the original offences of market abuse, which had wider scope than those under MAD;

2) mesh the original offences with MAD offences, to align with MAD requirements.[844]

The rationale was to maintain a more wide-ranging prohibition regime than required by MAD.[845] The Government's approach was strongly opposed, on the grounds that the UK should prohibit only what was required by MAD, and because MAD regime was

[837] The Economic Secretary to the Treasury, Miss Melanie Johnson, Standing Committee A (ibid) col.653; HM Treasury Memorandum to the Joint Committee on Financial Services and Markets Bill, 14 May 1999
[838] Swan E and Virgo J, *Market abuse regulation* (2nd edn, Oxford University Press 2010)
[839] Alcock, 'Five year of market abuse' (n 826)
[840] The implementation was through enacting: The FSMA 2000 (Market Abuse) Regulation 2005, SI 2005/381; FSA, Market Abuse Directive Instrument 2005, 17 Mar 2005; FSA, Market Abuse Directive Disclosure Rules Instrument 2005, 17 Mar 2005. For further details on the implementation, see HM Treasury and FSA Joint Consultation on MAD (n 828)
[841] MAD 2003/6/EC
[842] Reference to these effects will be clearer when discussing the market abuse offences. As for the DTRs and LR, previous discussion was made in chapter 3, s.1
[843] HM Treasury and FSA Joint Consultation on MAD (n 828) para.3
[844] Ibid para.3
[845] H M Treasury, Feedback Statement Following June 2004 Consultation on UK Implementation of EU Market Abuse Directive (2003/6/EC), para.4

specific (more detailed), in contrast to the UK's original broad regime.[846] Despite these arguments, the government kept the original offences, as it was mindful of the narrow scope of MAD, and the possible adverse consequences or risks of this narrowing.[847] Also the government wanted to give the original regime more time to prove its effectiveness, as MAD was being implemented just three years after the creation of the UK civil regime.[848]

In retaining the original regime, the so-called "super-equivalent" or "sunset" provisions (original civil offences) were meant to be temporary, for just three years at the time. Thereafter, they would have fallen away automatically unless legislation was introduced to retain them. Since implementing MAD, the life of these "sunset" clauses has been extended twice, and they only now expire on 31 December 2014.[849]

4.1.2.2 The Code of Market Conduct (COMC)/ FSA Code of Market Conduct (MAR)

In order to clarify and explain the general statutory prohibition, the FSA was required to produce a Code of Market Conduct, to illustrate what constituted abusive behaviour, by setting out the types of acceptable or unacceptable behaviours and relevant guidance.[850] Before doing this, the FSA had protracted consultations with the industry,[851] on a version of the Code, before the draft Bill was published and introduced.[852] In conformity with the FSMA of 2000 requirement,[853] the FSA Code of Market Conduct (COMC)[854] was eventually published, allowing the FSA some flexibility to adapt and

[846] Ibid para.6
[847] HM Treasury, Regulatory Impact Assessment, Feb 2005 para.31
[848] Ibid para.31
[849] The "sunset" clauses at the time of implementing MAD were supposed to cease after three years (2008), unless the Government extended their life; see: HM Treasury, "FSMA market abuse regime: A review of the sunset clause"- Consultation, Feb 2008. Following feedback on the consultation, which mostly supported retaining the super-equivalent provisions, the Treasury introduced Financial Services and Market Act (Market Abuse) Regulation 2008, extending the old regime to Dec 2009. The extension for only a year was because the Government was awaiting the outcome of the EU's review of MAD. But because this was delayed, the Government published the FSMA (Market Abuse) Regulation 2009, extending the old regime life to 2011. Then it was extended to 31 Dec 2014 by the FSMA 2000 (Market Abuse) Regulation 2011 (No.2928). Note that the UK chose not to opt into MAD II, as the Financial Secretary to the UK Treasury explained that the proposed criminal sanctions under MAD II were similar to what the UK already had. See his Written Ministerial Statement, 'Criminal Sanctions Directive on Market Abuse' 20 Feb 2012, HM Treasury at: <http://www.hm-treasury.gov.uk/d/wms_fst_200212.pdf> Accessed: 1/5/2013
[850] FSMA 2000 s.119(1) The Economic Secretary to the Treasury stressed that the FSA code will provide greater certainty to the primary legislation. Standing Committee A (n 827) col.653, 686
[851] FSA CP 10 (n 19)
[852] The Economic Secretary to the Treasury, Standing Committee A (n 827) col.653
[853] FSMA 2000 ss. 119-122
[854] The original Code (COMC) was substantially modified when implementing MAD, and is referred to now as MAR, part of the FSA Handbook.

amend its rules or guidance, in line with any changes in market practices.[855] This meant that the FSA was required to keep the Code up to date, while ensuring that it did not inhibit innovation[856].

The FSA COMC was substantially reformed after implementing MAD, and was renamed to Market Conduct (MAR), forming part of the FSA Handbook.[857] The MAR provided lengthier guidance material, examples of behaviour that did or did not constitute market abuse, and listed non-exhaustive factors[858] that should be considered when determining whether behaviour was abusive or not.[859] In an early case of market distortion, the FSA clarified that, even if the Code did not provide examples of distortion involving short selling, determining whether abuse had happened could still be on the basis of the statutory definition, market standards and the regular user test.[860] This stance of the FSA was challenged in the *Winterflood case*[861]. At the *Financial Services and Markets Tribunal (FSMT)*, the applicants contended that merely satisfying the statutory definition of market abuse is not sufficient and it is necessary to read the FSA Code with the statute. The *FSMT* defeated these allegations and confirmed that the Code's definition of what constitutes market abuse is not conclusive. The *FSMT* decision was affirmed in the same case by the *Court of Appeal.*[862]

It is important to note that, where the FSA described behaviour as being abusive, this would not be conclusive. Rather, it would still be open to the *FSMT* to take different action.[863] This was because the Code only had an evidentiary weight in determining whether or not an abuse had occurred.[864] On the other hand, if the Code expressly provided that behaviour did not amount to abuse, then this would be conclusive[865] (the Code's safe harbours).

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[855] This rationale was reaffirmed later in HM Treasury and FSA Joint Consultation Paper (n 828); Alcock A, 'Market abuse' (2002) 23 Company Lawyer 142
[856] The Economic Secretary to the Treasury, Standing Committee A (n 827) col.688
[857] Pettet (n 106)
[858] MAR 1.9 provides only some guidance and factors for the behaviour that may or may not amount to misleading
[859] MAR 1.1.6G, MAR 1.1.7G
[860] FSA Final Notice, *Evolution Beeson Gregory Limited*, 12 Nov 2004. FSA imposed a financial penalty for engaging in short-selling on AIM, without having a reasonable settlement plan, causing market distortion. (p. 1,2)
[861] *FSA v Winterflood Securities Limited,* FSMT Case no.66, 11 Mar 2010
[862] *Winterflood Securities Limited, Stephen Sotirious and Jason Robins v FSA*, Court of Appeal (Civil division) [2010] EWCA Civ 423, 22 Apr 2010
[863] Hayes A, Market abuse' (2010) 75 Compliance officer Bulletin 1
[864] FSMA 2000 s. 122(2)
[865] FSMA 2000 s. 122(1)

4.1.2.3 Key issues in the civil market abuse regime

Before analysing the market abuse offences, it is necessary to understand: the statutory requirements for behaviour to amount to market abuse; the reasonable investor test; the scope of the regime; and its nature (civil or criminal?)

I. The general statutory requirements for abusive behaviours

According to Section 118 (1) of the FSMA of 2000, prior to implementing MAD, any behaviour amounting to market abuse had to satisfy three conditions:

1) behaviour (whether committed individually or jointly) taking the form of one or more of the statutory abusive behaviours;

2) behaviour relating to qualifying investments traded on a prescribed market;

3) behaviour likely to be regarded by the regular user of the market as a failure of the perpetrator to observe the standards of market behaviours.

After implanting MAD the FSMA of 2000 retained the same requirements with more expansion and some differences.[866] The obvious first difference was the narrow scope of the abusive behaviour required for the new offences, by which positive action only was needed – specifically in the case of insider dealing (acquiring, disposing or the attempt to do either).[867] On the other hand, behaviour under the original regime encompassed action or inaction[868] (refrain from taking required action), whether intentionally or recklessly.[869] From this, it is clear that the *intention* requirement was omitted, which constituted an impediment to proving criminal insider dealing cases.

This regulatory stance was not welcomed during the passage of the Bill, and faced considerable opposition.[870] The concern was that, without requiring *intention*, some

[866] The amended section 118 FSMA 2000 (Market Abuse) Regulation 2005
[867] MAD art 1
[868] FSMA 2000 s. 118(10) and after implementing MAD s. 130A(3). FSA Code (MAR 1.2.6 E) makes it clear that FSA will consider whether a person was under legal or regulatory duty to act, or was reasonably expected that he would act, before deciding that the omission amounts to market abuse. See for more: Hopper M, 'Market abuse' (2005) Compliance Officer Bulletin 1
[869] *R v Rigby, Bailey and Rowley* [2005] EWCA Crim 3487 (the first criminal offence of market abuse under s.397 FSMA 2000) The two defendants were convicted for recklessly making misleading statements to the market about turnover, and received sentences of 18 months for the first defendant and 8 months for the second. See also FSA Press Release, 8 Aug 2005, at http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/091/shtml Accessed:11/12/2010; Pettet (n 106)
[870] Join Committee on Financial Services and Markets Bill, First Report (n 832) at VI Market abuse. Also see for example, Appendix 14, Memorandum by the Association of Private Client Investment Managers and Stockbrokers (APCIMS) presented to the Joint Committee, 29 Mar 1999, para 4.1

legitimate practices that might have negative impacts on the market, could be considered market abuse.[871] In disregarding these concerns the *Economic Secretary* explained the government's point of view, that "market integrity may also be affected by people acting without due care and attention.[872]"

With regard to the required information, the new offences relied on the existence of "inside information", [873] whereas the original offences were based on *relevant information not generally available* (RINGA). The use of RINGA, as will be shown, has a broader scope than inside information. To be more specific, it does not need an insider, nor does it need to have significant effect on the relevant security's price when it is made public[874].

Although the original offences do not employ the *price-sensitivity* test, they use the *regular user test*. In that test, the *reasonable investor test* was given more evidential weight in proving the offence of misuse of information, than the significant effect of the information on relevant securities prices upon disclosure.[875] Note that the Jordanian prohibition regime has adopted both tests, the price-sensitivity and the regular user test, as discussed in the next section. However, whereas the adoption of the regular user test was debated and justified in the UK, in Jordan, adoption, along with price-sensitivity, was merely inferred from the statutory definition of inside and material information. Thus, it was never clear why two different tests were implemented. This is further evidence of the lack of transparency and clarity in the Jordanian prohibition regime, and also raises concerns about whether drafters had sufficient experience in dealing with market misconduct.

II. The regular user test[876]

The overarching standard in determining whether behaviour amounted to market abuse, under the original offences, was the "regular user test". A regular user "…*in relation to a particular market, means a reasonable person who regularly deals on that market in*

[871] Appendix 14, Memorandum by the Association of Private Client Investment Managers and Stockbrokers (APCIMS) presented to the Joint Committee, 29 Mar 1999, para 4.1; Appendix 9, Memorandum from the London Investment Banking Association (LIBA) to the Joint Committee, May 1999, para 6; Appendix 4, Memorandum from Herbert Smith to the Joint Committee on Financial Services and Markets Bill
[872] The Economic Secretary to the Treasury, Standing Committee A (n 827) col.655
[873] MAD art 1
[874] HM Treasury, Market Abuse Directive Transposition Note, at: <http://www.hm-treasury.gov.uk/d/MAD_tn240205.pdf> Accessed:8/4/2011
[875] *David Massey v FSA* Upper Tribunal (n 555)
[876] This test remained effective only for the original market abuse offenses

investments of the kind in question.[877]" In clarifying and justifying the rationale for this test, the *Economic Secretary*[878] said that the regular user is not an actual user, but, rather, an objective user who is familiar with the market in question.[879] Thereby, in situations where the actual user might tolerate the misuse of information, the regular user in the test would not. In explaining this philosophy of the test, the FSA clarified that the behaviour must be in conformity with market standards that aim to promote fairness and efficient operation.[880]

Those standards, as the FSA argued,[881] differ from one market to another, from time to time, and form case to case, depending on the case circumstances[882]and investments concerned.[883] The *Financial Services and Markets Tribunal (FSMT),* currently the *Upper Tribunal (Tax and Chancery Chamber),* in the case of *FSA v Arif Mohammed,* confirmed this approach[884]. The *FSMT* stated that it did not need expert evidence to determine whether or not a regular user was satisfied, rather the presented case facts were the basis of its decision, that an abusive behaviour existed (misuse of information).[885] In all cases involving the regular user test, the alleged abusive person has the right to apply for *FSMT* and court review.[886] In addition, the person may use the defence, provided in the FSMA of 2000, that he believed on reasonable grounds that his behaviour did not amount to market abuse, or that he took reasonable precautions and exercised all due diligence, to avoid behaving in a way that amounts to market abuse.[887]

[877] Originally in FSMA 2000 s.118(10) and now in s.130A(3) and in MAR 1.2.20G, MAR 1.2.21G
[878] The Economic Secretary to the Treasury, Miss Melanie Johnson, Standing Committee A (n 827) col.655
[879] In MAR 1.2.2 (Revoked 30 June 2005). The Financial Service and Markets Tribunal (FSMT) stated: "…the behaviour concerned must….be likely to be regarded by a user of the market as a failure to observe the standard of behaviour reasonably expected of a person in his position…." Quoted from: *FSA v Arif Mohammed*, FSMT Case no.012, Mar 2005, p.11
[880] MAR 1.2.10 (Revoked 30 Jun 2005)
[881] MAR 1.2.10 (Revoked 30 Jun 2005)
[882] This issue was raised at the Sanding Committee A (n 827) by Mr Howard Flight posing that: "The problem is that the standards of behaviour referred to are not defined…" col.656
[883] An example of the FSA regular user test is FSA Final Notice, *Evolution Beeson* (n 860). In applying the regular user test, FSA stated: "…….that the regular user in this case should be given the attributes of the average investor in AIM….." p.7. Accordingly, the regular user in this case is an average investor while in other cases he might be of high qualifications.
[884] *FSA v Arif Mohammed*, FSMT (n 879)
[885] Ibid p.16
[886] FSA, Market Conduct sourcebook (Specialists topics and frequently asked questions), Feedback of CP 124, June 2002; *Winterflood Securities Limited, Stephen Sotiriou, Jason Robins V FSA* (n 862)
[887] FSMA 2000 s. 123(2)(a)(b) FSMA 2000; FSA Final Notice, Harrison, 8 Sep 2008

III. Scope of market abuse

Unlike the criminal offence of insider dealing, the civil offence of market abuse applies to both natural and legal persons (companies, business entities…etc.),[888] whether authorised or unauthorised.[889] Also, the regime applies to behaviour which occurs in relation to qualifying investments traded on prescribed markets, whether that behaviour was committed:

1) inside the UK, in relation to qualifying investments traded on markets located in the UK;

2) outside the UK, but in relation to qualifying investments traded on a market within the UK.[890]

The *Treasury*, in conformity with the FSMA of 2000,[891] prescribed as qualifying investments, all investments of a kind which is admitted to trading under the rules of any prescribed market.[892]

Implementing MAD[893] meant that a wider range of financial instruments were included: transferable securities (shares, bonds and any securities giving the right to acquire shares or bonds); units in collective investment undertakings; options; futures; equity swaps; forward interest rate agreements; derivatives on commodities and financial *contracts for difference*[894]. Also abusive behaviours amounting to one of the new offences after implementing MAD, were expanded to be either in relation to qualifying investments, or to "related investments".[895] The added "related investments" are defined as investments whose price or value depends on the price or value of the qualifying investments.[896]

[888] FSMA 2000 s. 118(1) FSMA; FSA Final Notice, *Evolution Beeson* (n 860) The case was the first time that FSA took action against a regulated company; Hopper (n 868)
[889] Alexander K, 'Insider dealing and market abuse' (n 358)
[890] Originally FSMA 2000 s.118(1)(a) and after MAD s.130A(1)
[891] Originally FSMA 2000 s.118(3)
[892] FSMA 2000 (Prescribed Markets and Qualifying Investments) Order 2001 s. 5
[893] Ibid as amended by FSMA 2000 (Market Abuse) regulation 2005; s. 5 states: "…qualifying investments in relation to the markets prescribed by article 4, all financial instruments within the meaning given in Article 1(3) of Directive 2003…." MAD art 1(3) was amended by the Markets in Financial Instruments Directive 2004 "MiFID".
[894] Rider *et al*, *Market abuse and insider dealing* (n 384) 74; Hayes (n 863)
[895] FSMA s. 118(1)(iii)
[896] FSMA s. 130A(3); Rider *et al*, *Market abuse and insider dealing* (n 384) 74

A practical illustration is the *Shevlin* case.[897] *Mr. Shevlin* made trades in contracts of differences (qualifying investments) that referenced the share price of *Body Shop International plc*, a company whose shares were traded at the relevant time on the *London Stock Exchange*. Though the contracts of differences were not themselves traded on the market, their price depended on the *Body Shop* share price. The FSA Found *Mr. Shevlin* guilty of market abuse, as his trades were based on inside information that he acquired through the course of his employment at *Body Shop*. Another example is the FSA enforcement action against *Jabre.*[898] *Mr. Jabre*, a fund manager for *GLG*, who, on behalf of *GLG*, short-sold ordinary shares of *SMFG* (a Japanese bank) on the basis of confidential information. The FSA found that *Mr. Jabre* was in breach of Section 118 of the FSMA of 2000, even though his trades occurred on the *Tokyo Stock Exchange,* because *SMFG* shares at the relevant time were quoted on the *London Stock Exchange's SEAQ International Trading System* (related investments). However, *Jabre* appealed to the *FSMT*, contending that the term "qualifying investments" applied only to shares actually traded on the *London Stock Exchange (LSE)* – the UK market – not on shares of the same kind traded outside the UK. Furthermore, he added that his conduct on the *Tokyo Exchange* had no effect on the shares listed on *LSE*. The *FSMT* rejected *Jabre's* allegations, stating that the abusive behaviour "does not require the identification of any particular shares as being qualifying investments to which the behaviour relates"[899]. Further, the *FSMT* clarified that Section 118(1) of the FSMA of 2000 requires the qualifying investments to be "admitted to trading" not "traded on" a prescribed market, therefore *SMFG* shares were "admitted to trading" on *LSE.*[900] The *FSMT* concluded that as long as the underlying policy of prohibiting insider dealing is its effect on reducing confidence in market integrity, *Jabre's* insider dealing in *SMFG* securities, whenever it occurred, destroyed confidence in the global market for *SMFG* securities.[901]

This broad scope highlights a key difference between the UK prohibition ambit and the Jordanian. The prohibition regime under the SL 2002 merely covers the abusive behaviours relevant to securities traded on the ASE, regardless of any related securities[902]. Also, and in contrast to the UK's wide range of financial instruments, the

[897] FSA Final Notice, *John Shevlin*, 1 Jul 2008
[898] FSA Final Notice, *Philippe Jabre*, 1 Aug 2006
[899] *FSA v Philippe Jabre*, FSMT Case no.36, 10 Jul 2006, para.15, p.8
[900] Ibid paras.20-25, p.7
[901] Ibid paras.30, p.8
[902] This is discussed in the next section

only securities traded on the ASE are shares and government bonds, as discussed in the next section.

As for the markets in which the abusive behaviour may take place, the FSMA of 2000 entitled the *Treasury* to prescribe markets to which Section 118 (market abuse behaviours) applies, and to determine the qualifying investments which are to be traded on those markets[903]. Accordingly, the *Treasury* prescribed[904] the markets to include all markets (regulated or not) established under the rules of the UK Recognised Investment Exchanges (RIEs)[905] and the OFEX market.[906] For the new market abuse offences, the prescribed markets include: all markets established under the rules of the UK RIEs; the OFEX [907] ; and all regulated markets based in European Economic Area (EEA) countries.[908] Note that, at a domestic level, the old UK regime is broader, given the types of markets (regulated or not) covered by prohibition. The kind of markets covered within the prohibition ambit raises another difference between the UK prohibition ambit and that of Jordan. The fact that Jordan has only one organised, regulated market reflects the narrow ambit of the Jordanian regime.

IV. Market abuse regime: civil or criminal?

Although market abuse was proposed as a civil regime, its nature has been debated ever since its passage into law. This is an important issue, considering its influence on the FSA's enforcement actions, and the level of effectiveness of the FSA regime in tackling insider dealing and market abuse.

The FSMA of 2000 was the first legislation to come before the Parliament since incorporating the European Convention on Human Rights (ECHR*)* into the UK Human Rights Act (HRA) 1998.[909] Section 19 of the HRA of 1998 requires ministers to declare the status of any new regulation (civil or criminal), to determine whether it is fully

[903] Originally under FSMA s.118(3)
[904] FSMA 2000 (Prescribed Markets and Qualifying Investments) Order 2001 "as amended" , s.4(1)(2)
[905] Ibid s.4
[906] FSA's list of RIEs at <http://www.fsa.gov.uk/register/exchanges.do;jsessionid=a39631a3aa9a404efd34d20922b> Accessed: 5/4/2011. UK RIEs, for example, include LSE; London International Financial Futures and Options Exchange Administration and Management; the London Metal Exchange Ltd…etc.
[907] OFEX (now PLUS Markets Plc) is the UK's independent public market for small companies, and based on quote-driven trading (platform)
[908] Regulated markets for the new offences have the meaning in Article 1(13) of the Investment Services Directive 1993/22/EC "IDS Directive". A list of EEA regulated markets can be found at <http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_072/c_07220040323en00030007.pdf> Accessed: 21/3/2011)
[909] Alcock, 'Market abuse' (n 855)

compliant with the ECHR. This was a crucial challenge for the government during the passage of the Bill. The nub of the contentious argument was whether the new regime, specifically its procedures, met the requirements of Articles 6 and 7 of the ECHR. Before going any further, it is essential to highlight the requirements of both of these articles.

Article 6(1) which applies to civil and criminal procedures, states that: "*everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*." The FSMA of 2000 seemed to fulfil this ECHR requirement. The right of full hearing before the *FSMT* is granted in any disciplinary case amounting to market abuse.[910]

This was not the only problem though. *Lord Lester*, the then *City* legal representative, contended that the nature of FSA disciplinary procedures was criminal, as it was not an independent and impartial tribunal.[911] The government opinion[912], however, was that the disciplinary regime is limited to authorised persons and contains categories of employees who are part of a regulated community. Thus, the FSA's disciplinary actions are essentially protective, rather than punitive.[913] Note that the credible deterrence approach to enforcement, adopted by the FSA in the aftermath to the banking crisis, and now by the FCA, suggests otherwise, and emphasises the punitive nature of disciplinary action.[914]

The debate, thereafter, centred on the remaining requirements under Article 6 and 7 of the ECHR. The remaining requirements in both articles, relevant to criminal proceedings, require that a defendant:

1) be assumed innocent until proved guilty and ensure a privilege against self-

[910] FSMA 2000 ss. 127, 133

[911] See: Lord Lester of Herne Hill QC and Javan Herberg (Joint Opinion), "In the matter of the Draft Financial Services and Markets Bill", Annex C, 27 Oct 1998, at.39, presented to the Joint Committee on Financial Services and Markets Bill; Advice by Lord Lester of Herne Hill QC and Monica Crass-Frisk, (Joint note of evidence), "In the matter of the Draft Financial Services and Markets Bill", Annex D, 7 Apr 1999, presented to the Joint Committee on Financial Services and Markets Bill.

[912] The Economic Secretary to the Treasury, Ms Patricia Hewitt, in the examination of witnesses by the Joint Committee on Financial Services and Markets Bill, 19 May 1999, (question 1). The Economic Secretary stated: "……[I have] no doubts that the disciplinary regime…..meets the Convention requirements already. They are not criminal either for domestic or Convention purposes…….they are concerned with protection of consumers and….apply to a regulated community."

[913] Memorandum from HM Treasury, "Part V, VI and XII of the Bill in relation to the European Convention on Human Rights", presented to the Joint Committee on Financial Services and Markets Bill, 14 May 1999.

[914] Further discussion on the credible deterrence approach is provided in Chapter 5, s.3

incrimination[915];

2) be able to foresee the legal consequences of his action, which means that the offence must be clearly defined;[916]

3) be represented (by lawyers) and independently; also legal assistance should be provided "when the interests of justice require";[917]

4) be informed promptly and in detail about the nature and cause of the accusation against him – and, additionally, should have adequate time and facilities for the preparation of his defence;[918]

5) be permitted to examine his witness and cross-examine those against him on the same conditions[919].

These requirements raised concerns about the impact of the ECHR on the proposed regime. The Joint Committee clarified that, although the draft Bill classified market abuse as civil, such classification under domestic law was not conclusive for the ECHR.[920] Many areas in the Bill seemed to violate the ECHR, such as:[921]

(a) the presumption of innocence might be infringed if the standard of proof before the *FSMT* was to be interpreted as *balance of probabilities*[922] (as the FSA contemplated), rather than proof according to criminal standards or high-level standards;

(b) the very general definitions of market abuse behaviour, provided under the Bill, contradicted the certainty requirement under the ECHR;

(c) the unlimited fines were sufficiently extreme for the offence to be treated as a criminal not civil offence (considering the procedural guarantees in the ECHR)[923].

In the face of such arguments, the government reluctantly accepted that the market abuse regime might be treated as criminal under the ECHR[924], and significant amendments[925] were made to improve the Bill's compliance with the ECHR.[926]

[915] ECHR art 6(2). This protects a person, *inter alia*, from providing answers under force. For further see: Lord Lester and Herberg (Joint Opinion) n (n 911)
[916] ECHR art 7(1)
[917] ECHR art 6(3)(c)
[918] ECHR art 6(3)(a)(b) ECHR
[919] ECHR art 6(3)(d) ECHR
[920] Joint Committee on Financial Services and Markets Bill, First Report (n 832)
[921] An exhaustive discussion on this can be found in: Lord Lester and Herberg (Joint Opinion) (n 911)
[922] FSA Memorandum on Financial services and Markets Bill, presented to the Joint Committee on Financial Services and Markets Bill, Appendix 4, 12 Mar 1999
[923]Joint Committee on Financial Services and Markets Bill, Examination of witnesses, questions 2 and 3, 19 May 1999

But for the unlimited fines, and the view that they were deterring rather than punitive, the case for treating market abuse as criminal rather than civil, would have remained in doubt[927] – as would the whole market abuse regime. With this in mind, the effectiveness of the civil regime in achieving credible deterrence is to be questioned[928].

The first case to challenge the nature of the regime at a domestic level was the *FSMT Davidson* and *Tatham* case.[929] Though the case did not involve a market abuse offence, the *FSMT* confirmed that market abuse proceedings are criminal for the purposes of ECHR.[930] This opinion was based on three criteria: (1) the classification of the offence in domestic law; (2) the scope of the offence, and whether it applies generally or specifically to certain groups; and (3) the nature and size of the penalties.[931]

As for the first criterion, the *FSMT* stated that, although the market abuse regime was not classified as criminal at a domestic level, the court retained its right to determine its nature for the purposes of the ECHR. For the second criterion, the *FSMT* found that market abuse regime was not limited to certain group within the population. In applying the third criterion, the *FSMT* concluded that penalties were of a criminal nature, in light of the ECHR, as they were not imposed for a disciplinary matter. Also, the size of penalties was clearly of a punitive and deterrent nature, rather than compensatory.[932] The *FSMT* concluded that, in light of Article 6 of ECHR requirements, the market abuse regime "opt to be regarded as criminal."[933]

This perception was reaffirmed by the *FSMT* in the case of *Arif Mohammad.*[934] Although the *FSMT* in *Arif Mohammad* agreed with the FSA that the burden of proof

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[924] Memorandum from HM Treasury, 'Part V, VI and XII of the Bill in relation to the European Convention on Human Rights' (n 913)
[925] The Economic Secretary to the Treasury, Standing Committee A (n 827) cols. 653-654
[926] Joint Committee on Financial Services and Markets Bill, Second Report (n 834)
[927] Joint Committee on Financial Services and Markets Bill, Examination of witnesses, question 3, 19 May 1999
[928] An assessment of the effectiveness of the civil regime in achieving credible deterrence is provided in the next chapter, s.3
[929] *FSA v Paul Davidson and Ashley Tatham*, FSMT Case no:31, Feb 2006
[930] Ibid
[931] Ibid p.40. It was suggested that this is a direct consequence of the overlap between civil and criminal insider dealing, under CJA 1993. Insider dealing is of a criminal nature because it is based mainly on fraud; therefore the resultant sanctions have the same nature. For further information see: Coffey J and Pinto T, 'The compatibility of the Financial Services and Markets Act with the Human Rights Act 1998' (2001) 12 International Company and Commercial Law Review 50. On the other hand it was argued that the market abuse regime is civil as long as sanctions do not include the penalty of imprisonment, and unpaid fines amount to civil debt. See on this: Eadie J, 'Market abuse and the European Convention on Human Rights' (2001) 3 Journal of International Financial Markets 74
[932] *FSA v Paul Davidson and Ashley Tatham* FSMT (n 929) p.41,42
[933] Ibid at para 50
[934] *Arif Mohammad v FSA*, FSMT (n 879)

should operate on a "sliding scale", it clarified that the more serious the case, the more "cogent the evidence needed to prove it.[935]" The *FSMT* opinion gave strength to the arguments for criminalizing the market abuse regime, in compliance with the ECHR, and was widely applauded by academics.[936]

Based on this discussion of the market abuse regime and the *FSMT* stance, it is suggested that enforcing this civil regime would no less challenging than enforcing the criminal regime. This is discussed further in the next chapter.[937]

4.1.2.4 The offences - a substantive analysis

The analysis now considers the market abuse offences presented under Section 118 of the FSMA of 2000. The discussion starts with the original offences, then the new ones after implementing MAD. This is to compare the flexibility and breadth of the old regime, with the new offences – which seem merely to reiterate the old offences, yet add new complications of proof.

Section 118 of the FSMA of 2000 enumerates seven types of abusive behaviour:[938]

1) civil insider dealing;
2) improper disclosure;
3) misuse of information*;
4) manipulating transactions;
5) manipulating devices;
6) disseminating false or misleading information;
7) misleading behaviour* and distortion*[939].

In addition to those primary offences, there is one secondary offence: the encouraging offence.[940]

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[935] Ibid
[936] See for example: Eadie (n 931); Coffey and Pinto (n 931); Page A, 'The Financial Services and Markets Act and the European Convention on Human Rights' (2000) 2 Journal of International Financial Markets 199; Stones R, Regulating financial services: the human rights dimension' (2000) 11 International Company and Commercial Law Review 12
[937] Chapter 5, s.1
[938] As for the original offences, intent is not required. However FSA enforcement actions showed that intent to commit market abuse is a relevant factor in mitigating the potential penalty. See for example: FSA Final Notice, *Darren Morton and Christopher Parry*, 6 Oct 2009. FSA believed that neither of them knew they had received inside information and it would therefore have been improper to proceed. Thus their penalty was only public censure.
[939] The three asterisked offences were in the original UK regime (the sunset clauses).

I. Misuse of information[941]

Under this offence, behaviour should fulfil two conditions: the behaviour must be: (1) "based on" information which is (2) "not generally available".

(1) "Based on": the meaning of "based on" was raised in the *Arif Mohammed case*[942]. The *FSMT* based its interpretation on the FSA's Code,[943] which stated that information of concern must have "material influence" on the decision to engage in dealing. The *FSMT* confirmed that such information "must be one of the reasons for dealing, but not the only reason.[944]" In line with this, the FSA's Code states that a degree of certainty is required.[945]

Note that the "material influence" on the investment decisions disregards the significant effect of information on the securities price in question.[946] Arguably this test is easier to be proved than the "significant effect on prices", required in criminal insider dealing cases. The vital issue is proving the importance of information for the reasonable investor's investment decision[947]. In confirming this, the *Upper Tribunal* in the *David Massey v FSA*[948] case, interpreted the price effect of non-public information as a mere condition. In that information would not be considered having a significant effect on the relevant securities price if this effect would not have influenced the reasonable investor's decision[949]. Thus, in misuse offences, the prosecutor needs mainly to show the materiality of information for the reasonable investor's decision, regardless of the need to prove price movements in the affected securities.[950]

(2) The relevant information is "not generally available". Note that the FSMA of 2000 did not use the term "inside information", which is the most essential in the criminal offence of insider dealing. Accordingly, without the need to fulfil the statutory requirements of inside information, information "not generally available" will be having

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[940] FSMA 2000 s. 123(1)(B)
[941] Originally FSMA 2000 s.118(2)(a) FSMA and now s.118(4)(a)(b)
[942] *FSA v Arif Mohammed*, FSMT Case (n 879) 15
[943] MAR 1.4.4 (Revoked 30 June 2005) and currently MAR 1.5.5E which provides facts to be taken into account regarding "based on".
[944] *FSA v Arif Mohammed*, FSMT Case (n 879) 61
[945] MAR 1.5.6(1)E
[946] MAR 1.4.9 (Revoked 30 June 2005) used to set factors to be considered when deciding whether information was relevant, such as: being specific and precise, material, current, reliable. Currently MAR 1.5.6 E provides that the main factor is the extent to which information is reliable
[947] FSMT confirmed this in: *FSA v James Parker*, FSMT Case no.37, May 2006, p.39,41
[948] *David Massey v FSA* (n 555)
[949] Ibid p.4
[950] See for example the Irish case of *Fyffes Plc v DDC Plc* [2005] IESC 3, Supreme Court

wider scope than inside information.[951] In addition to this advantage, information not generally available provides support for the underlying policy of prohibition: equal access to information.

The CJA of 1993 wording, as previously mentioned[952], permits dealing on the basis of inside information once it has been disclosed. This allows the person possessing inside information to profit from his deal, ahead of market investors, as markets need time to incorporate new information into securities prices.[953] RINGA provides better protection for investors, as it makes dealing illegitimate, even though the inside information was disclosed, as long as it is not generally available for investors.

If RINGA does not allow prompt dealing, when would dealing be permitted? The answer depends on when the information is considered generally available. The FSMA of 2000 expressly states that information that can be obtained by research or analysis conducted by, or on behalf of, users of the market is to be regarded as being generally available for them.[954] In addition, the FAS's Code listed factors to be considered for determining when information is generally available, such as the observation of public events and diligent research.[955] The *FSMT* adopted the same rationale for the meaning of "generally available": that the information is widely known to those using the market.[956]

It can be concluded that the first market abuse offence, "misuse of information", requires merely a behaviour that is based on RINGA, whether the abuser profited from it or not, and whether it had a specific effect on prices or not. In this sense, the offence is broad enough to embrace both: a) insider dealing as a civil offence, and b) improper disclosure[957] – which were both added to the market abuse regime after implementing MAD. Note that the flexibility of "misuse of information", because of RINGA, is not provided under the Jordanian prohibition regime. The regime recognises only inside

[951] Marsh J, 'UK legal and regulatory developments: implementation of Market Abuse Directive' (2005) 11 Derivative Use, Trading and Regulation 162
[952] In the first part of this section
[953] CJA 1993 s.58
[954] FSMA 2000 s.118C(8)
[955] MAR 1.4.4(2), MAR 1.4.5, MAR 1.4.8 (Revoked 30 June 2005). Currently in MAR 1.5.4 E
[956] *FSA v Arif Mohammed* (n 879)
[957] See FSA enforcement action under the original regime, for example FSA Final Notice, *Michael Davies*, 28 July 2004. Davies acquired non-public (inside) information in the course of his employment and traded upon it. Thus, the case is an example of using the misuse offense to tackle insider dealing. Another example of using the same offence to tackle improper disclosure is: FSA Final Notice, *Jason Smith*, 14 Dec 2004. Smith, as Finance Director, disclosed information which was likely to be regarded by regular user of the market as information which was not generally available. Also look at FSA Final Notice, *Arif Mohammed*, May 2005

information as a statutory requirement for the insider dealing offence – akin to the CJA of 1993.

II. False or misleading impression

The offence exists when behaviour is likely to give a regular user a false or misleading impression as to: a) the supply of, or demand for, qualifying investments, or b) the price or value of those qualifying investments.[958] This offence has parallels in the SL of 2002, however it is of a criminal nature.

In the FAS's original Code, four types of behaviour were defined under this kind of market abuse[959]:

1) Artificial transactions: the abusive behaviour here is based on the "principle effect."[960] In this, artificial transactions take place where a person knew, or could reasonably be expected to have known, that his principle effect, falsely, would, or would be likely to, inflate or depress the apparent supply, demand, price or value of an investment.

2) Artificial course of conduct: this behaviour is similar to the previous one, but covers any course of conduct other than transactions (for example the underlying commodity movements).[961]

3) Disseminating information: here the person disseminates false or misleading information, in order to create a false or misleading impression, while knowing, or being reasonably expected to have known, the true nature of the information.[962] As *Alcock* emphasised, this an odd definition, since it is difficult to envisage how dissemination can have the purpose of creating a false or misleading impression if the person did not actually know the nature of information that he disseminated.[963]

4) Disseminating information through an accepted channel: this occurs when information is disclosed through one of the RISs, in compliance with DTRs, but is false or misleading information. In this, a positive obligation of taking reasonable

[958] Originally FSMA 2000 s.118(2)(b), now in s.118(8)(a)
[959] MAR 1.5.8 and MAR 1.5.22; Alcock, 'Market abuse' (n 855)
[960] MAR 1.5.15, MAR 1.5.16 (Revoked 30 June 2005). However, this actuating purpose does not have to be the principle purpose.
[961] Alcock, 'Five years of market abuse' (n 826)
[962] See FSA fist enforcement action against Shell in a market abuse case that involved misleading statements, FSA Final Notice, *Shell Transport* (n 547)
[963] Alcock, 'Market abuse' (n 855)

care to ensure the authenticity of information is presumed.[964]

Note, in retrospect, that the aforementioned types of behaviour resemble the new statute market abuse behaviours added after MAD (manipulating transactions, manipulating devices and dissemination of information)[965] – to be discussed later. Therefore, it can be said that MAD did not substantively enhance the prohibition ambit of the original market abuse regime.

III. Distortion[966]

The FSA, in its *Consultation Paper No.59*[967], confessed that it was extremely difficult to distinguish distortion amounting to market abuse, from market volatility resulting from the interaction of major market participants. In the original Code, the FSA defined market abuse under this heading in respect of two specific circumstances: (1) Abusive squeezes[968]: where a person, with actuating purpose, has a significant influence over the supply, demand or delivery mechanisms of an investment or the underlying product, and directly or indirectly holds positions that he expects will affect delivery of them; (2) Price positioning:[969] where a person, with actuating purpose of distorting prices,[970] enters into a transaction or several transaction to move the price, without legitimate commercial reason.[971] This offence is also recognised under the SL of 2002 but under the criminal regime.

Hitherto, after implementing MAD, the two offences "false or misleading impression" and "distortion" had been lumped together in Section 118(8) the FSMA of 2000 and in MAR 1.9 of the Code.[972] The current provisions of the Code define both behaviours as[973]; (a) being likely to give a regular user of the market a false or misleading impression as to the supply of, demand for, or the price or value of a qualifying

[964] FSA Final Notice, *Indigo Capital LLC and Robert Johan Bonnier*, 21 Dec 2004. Bonnier was engaged in market abuse (false or misleading impression)
[965] FSM 2000 s.118(5)(6)(7)
[966] Originally FSMA 2000 s.118(2)(c) now in s.118(8)(b)
[967] FSA CP 59, 'Market abuse: A Draft of Code of Market Conduct', July 2000
[968] MAR 1.6.13-MAR 1.6.18 (Revoked)
[969] MAR 1.6.9-MAR 1.6.12 (Revoked)
[970] The "actuating purpose" requirement was cited in a recent FSA enforcement action, *Winterflood Securities Limited, Stephen Sotiriou, Jason Robins V FSA* (n 862). The offenders alleged that "actuating purpose" requires an intention to commit market abuse, yet the statute provision does not require this, and the role of the Code is only to clarify the definition in the statute. These allegations were turned down and the Code continued to use "actuating purpose" in its guidance (MAR 1.6).
[971] Alcock , 'Market abuse' (n 855); Alcock, 'Five years of market abuse' (n 826)
[972] The Code merely provided guidance on misleading impression. MAR 1.1.6G expressly states that the Code does not exhaustively describe all types of abusive behaviours.
[973] MAR 1.9.1E; MAR 1.9.2E

investment; (b) would be, or would be likely to be regarded by a regular user as, a behaviour that would, or would be likely to, distort the market[974].

In addition to these primary offences, Section 123(1) sets out the secondary offence of "requiring or encouraging" market abuse where a 'person A', by taking or refraining from taking any action, has required or encouraged another person or persons to engage in a behaviours which, if engaged in by 'person A', would amount to market abuse. This offence occurs even if the stimulating person was refraining from taking an action. Also, the focus in this offence is on the person encouraging, rather than the person being encouraged.[975] The FSMA of 2000 entitled the FSA to impose civil penalties on those circumventing the market abuse prohibition, by encouraging others to do so.[976]

An example of the FSA's enforcement actions against encouraging persons, is the *Jeremy and Jeffery Burley (son and father)* case.[977] *Jeremy* (the son) was the managing director of a company *(BMS)* which provided vehicles and equipment for oil and gas exploration companies in *Uganda*. One of those companies was *Tower Resources* whose shares were quoted on the *AIM London Stock Exchange*. *Jeffery* (the father) held shares in *Tower Resources* on behalf of his son *Jeremy*. Later, *Jeremy* acquired negative inside information regarding the exploration of *Tower Resources,* and, prior to announcing the information to the public, he passed the news to his father, *Jeffery*, and instructed him to sell all his shares in *Tower Resources*. The FSA held that *Jeremy* was engaged in two market abuse offences: "insider dealing" and the "encouraging" offence. As for the father, he was accused of insider dealing, even though he did not himself benefit from his behaviours.[978]

Before turning to the new market abuse offences, it is clear from the previous discussion, that the FSA's role in clarifying the breadth of statutory offences was vital. The guidance and examples provided in the FSA's Code show the importance of the regulator's role, not only in elaborating the statutory requirements for each offence, but also in helping market players to understand the offences. This regulatory role cannot be found in Jordan, as the current JSC instructions do not provide any explanation or

[974] One of the FSA's first enforcement actions against market abuse in the form of distortion is FSA Final Notice, *Evolution Beeson* (n 860)
[975] Examples of FSA enforcement action against the encouraging offence: FAS Final Notice, *William Coppin*, 7 Dec 2010 and FSA Final Notice, *Perry John Bliss*, 13 Dec 2010. MAR 1.2.23G provided examples of the encourage offence. (previously MAR 1.9 (Revoked 30 June 2005))
[976] FSMA 2000 s. 123 FSMA
[977] FSA Final Notice, *Jeremy Burley*, 3 July 2010
[978] Ibid benefiting was required under the FSA's original Code.

clarification on the broad prohibition of the SL 2002. Therefore it is to be expected that the level of understanding of offences, by market players in Jordan, would not be at the same level as in the UK. Also, the missing role of the JSC raises doubts of staff understanding of, and familiarity with, the prohibition regime. These issues of human capital inexperience are discussed further in Chapter 5.[979]

IV. Civil insider dealing offence

This is the first of the new categories of offence, resulting from implementation of MAD. This offence is distinct from the criminal offence in the CJA of 1993, but sits alongside it. The civil offence of insider dealing exists where an insider "deals, or attempts to deal, in a qualifying investment or related investment, on the basis of inside information relating to the investment in question."[980] This definition is based on key terms that need elaboration.

a. The insider

Akin to the CJA of 1993, insiders[981] are classified under the FSMA of 2000 into: (1) primary insiders (acquire inside information by virtue of their employment, professional relation or shareholding); and (2) secondary insiders or tippees (any person other than primary insiders).[982]

Although both regulations excluded any requirement of "information connection" with the source of information "issuer", the FSMA of 2000 went one stage further by also excluding any requirement of "knowledge" of the nature of information[983], unless tippee liability was triggered.[984] The FSMA of 2000 is therefore more capable of tackling insider dealing than the CJA of 1993[985], as far as primary insiders are concerned.

[979] Within JSC enforcement actions discussed in sec.2 of Chapter 5.
[980] FSMA 2000 s.118(2)
[981] FSMA 2000 s.118B
[982] Examples of FSA enforcement actions against insiders acquiring inside information through their professional or employment duties, or persons being tipped: FSA Final Notice, *Richard Ralph*, 12 Nov 2008; FSA Final Notice, *Filip Boyen*, 12 Nov 2008; FSA Final Notice, *Darren Morton* (n 938)
[983] Directive 1989 used to require full knowledge of facts and s.57 of CJA 1993 requires the knowledge of inside information. However MAD does not have such a requirement for primary insiders (Article 1(1)). Also MAR 1.2.9G provided that insiders in the categories (a) to (d) of s.118B FSMA (primary insiders) do not need to know the nature of information. See FSA Final Notice, *Mahmet Sepil*, 12 Feb 2010; FSA Final Notice, *Murat Ozgul*, 12 Feb 2010; FSA Final Notice, *Levent Acka*, 12 Feb 2010
[984] FSMA 2000 s.118B(e)
[985] Further details in section 1 (criminal insider dealing) of this chapter

Note that requiring tippee knowledge is due to MAD.[986] It would have been better if the FSMA had omitted the knowledge requirement, as tippees are in most cases not connected with the issuer in question, which makes it difficult to prove their knowledge. It seems that the Jordanian regulator was mindful of this hurdle because, as will be discussed later, the tippee knowledge of the information nature is not required.[987] However, the tippee might be liable under the original offence of misuse of information, as it only requires the behaviour to be based on '*relevant information not generally available*' (RINGA), which proves that this offence is more effective in tackling insider dealing cases.

b. The dealing requirement

Dealing is given a broad definition under the FSMA of 2000, that includes: (1) acquiring or disposing of investments, whether the insider was dealing as a principle or agent,[988] directly or indirectly; (2) agreeing to acquire or dispose of investment; and (3) entering into or and bringing to an end a contract creating such acquisition or disposal.[989] The dealing in this sense requires positive action, which is narrower than the wide definition of behaviour (action or inaction like negligence, reckless and refrain) [990] in the original offences. The SL of 2002 also used the "dealing" requirement, however not for the insider dealing offence, as the term *trading*, with its narrower ambit, was used instead.[991]

c. Inside information

The FSMA of 2002 provides two definitions of inside information.[992] The first is given in respect of qualifying investments that are *not* commodity derivatives, and the second is in respect of qualifying investments that *are* commodity derivatives. For the purposes of this comparative-analysis between the UK and Jordan, the focus will be only on the

[986] MAD art. 4 requires knowledge of inside information in cases involving tippees. The FSA in MAR 1.2.8E, listed factors to be used to indicate how a reasonable person in the position of tippee would know or should have known the nature of the information
[987] SL art.108(C), the improper disclosure offence is a civil offence where intention generally is not required. See s.2 in this chapter.
[988] MAR 1.3.6 till MAR 1.3.16 listed factors that amount to exemptions from liability for market makers and persons carrying out their clients' orders
[989] FSMA s.130A(3) FSMA. This section is similar to the meaning of dealing under s.55 CJA 1993
[990] Ibid. An example of negative action is: FSA Final Notice, *Peter Bracken*, 7 Jul 2004. Part of Mr Bracken's abusive behaviour was his failure to seek permission for trading, and failure in knowing the relevant rule concerning his trades.
[991] SL 2002 art.108(B) of the SL of 2002. See s.2 in this chapter
[992] FSMA 2000 s.118C FSMA

first definition, as Jordan does not have commodity derivatives, or markets for such investments.[993]

In respect of qualifying investments (that are not commodity derivatives), inside information can be defined as: *information of a precise nature which is not generally available, relating directly or indirectly to one or more of the qualifying investments, and which, if generally available, would be likely to have a significant effect on the price of qualifying investments*. Obviously, for information to be regarded as inside information, key characteristics should exist, as now described.

(i) Precise

Information is of a precise nature if it: (a) indicates circumstances that exist or may reasonably be expected to come into existence, or an event that has occurred or may reasonably be expected to occur; (b) is specific enough to enable conclusions to be drawn as to the possible effect of those circumstances on the price of qualifying (or related) investments in question.[994]

Again the requirement of "specific" and "precise", for inside information, is essential, but it is even stricter than under the CJA of 1993[995]. The CJA of 1993 requires the information to be either "specific", or "precise", but not both.[996] Similar debates to those raised during the passage of the CJA of 1993, in regard to specific and precise, were brought up in civil insider dealing cases. For example in the *Morton and Parry case*[997], *Mr. Parry* alleged that the information that he received from *Morton* was neither "clear", nor "precise", nor "sufficiently" reliable. These allegations had challenged the FSA to prove otherwise. In doing so, the FSA considered many factors, such as the effect of information on a reasonable investor's decision, its impact on the price, and the circumstances that the information was given under.[998] Accordingly, the FSA was satisfied that the information was of a precise nature, though the counterparties were not given the actual price, nor the definite time, relating to the inside information concerned.

[993] Only the ASE for securities and bonds; see s.2 in this chapter
[994] FSMA 2000 s.118C(5)(a)(b). This section fully implemented Article 1(1) MAD
[995] CJA 1993 s.56
[996] See previous discussions on the meaning of specific and precise, that was made previously in this chapter s.1 and in chapter 3, s.1 within the UK disclosure regime.
[997] FSA Final Notice, *Darren Morton* (n 938); FSA Final Notice, *Christopher Parry*, 6 Oct 2009. Both were engaged in market abuse (insider dealing) in relation to *Barclays Bank* new securities issuing.
[998] FSA Final Notice, *Christopher Parry* (n 997) p.7,9

It can be inferred, then, that whenever the challenge of information being "precise" and "specific" arises, the burden of proof is on the FSA, taking into consideration, of course, the circumstances of each case.[999] Note that the original offences are wider in their scope, because they used RINGA, without the need to be specific and precise – which makes proof much easier.[1000]

(ii) Information not generally available

When implementing MAD, the FSMA of 2000 did not adopt the same definition of inside information. MAD used "has not been made public"[1001], whereas the FSMA used "not generally available", which seems a better usage, considering market efficiency.[1002] As for the advantages of using RINGA, these were discussed earlier, under the misuse offence. The FSA Code lists several factors which are to be taken into account when determining whether or not information is generally available.[1003] If any of those factors apply, it means it is not inside information[1004]. The listed factors are similar to the information made public under the CJA of 1993[1005], but even wider. They include using new technological means (the internet) in generalizing information.[1006]

d. Dealing on the "basis of"

For behaviour to amount to insider dealing, a key factor is that of dealing "on the basis" of inside information.[1007] The FSA Code provided factors to be considered when determining whether dealing was based on inside information. The following factors are likely to indicate that the dealing was not on the basis of inside information:

1) the dealing decision was made before possessing inside information;

2) the dealing decision was commenced to satisfy a legal or regulatory obligation;

3) the dealing decision of a legal person did not involve, or was not influenced by, any person possessing inside information.

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[999] Example of FSA enforcement action in this regard: FSA Final Notice, *Steven Harrison*, 8 Sep 2008. Mr Harrison committed insider dealing by using inside information (was precise) in his trades.
[1000] Examples of FSA Final Notices under the old regime of market abuse, and using "RINGA" without encountering difficulties in proving the "precise" and "specific" nature of the information: FSA Final Notice, *Robert Middlemiss*, 10 Feb 2004; FSA Final Notice, *Michael Davies*, 28 July 2004; FSA Final Notice, *Robin Hutching*, 13 Dec 2004; FSA Final Notice, *David Isaacs*, 28 Feb 2005' FSA Final Notice, *Jonathan Malins*, 20 Dec 2005
[1001] MAD art 1
[1002] See the previous discussion on ECMH in this section
[1003] MAR 1.2.12E
[1004] FSA Final Notice, *Philippe Jabre* (n 898)
[1005] CJA 1993 s.58 CJA
[1006] MAR 1.2.13E
[1007] MAR 1.3.3E; MAR 1.3.5E

It should be noted that the "on the basis" requirement put the burden of proof on the FSA, in that the FSA had to prove that the perpetrator behaviour was based on inside information.[1008] However, in an interesting decision of the *European Court of Justice (ECJ)*, it stated that it was not necessary for the national authorities to demonstrate that the person accused of insider dealing had used the inside information with full knowledge. Instead, the "use" of inside information is a presumption already embedded in the definition of the insider dealing offence. Thus, it is open to the accused person to rebut this presumption.[1009]

e. Having significant effect on prices

The FSMA of 2000 states that inside information would be likely to have a significant effect on investments prices, if and only if, it is information of a kind which a reasonable investor would be likely to use as part of his investment decisions[1010]. The use of the "reasonable investor" test, in judging whether the information has "significant effect", was discussed earlier within the "based on" requirement of the misuse offence.

Based on the previous statutory requirements, it is clear that the scope of the new offence is narrower than the original offence: misuse of information. That offence, misuse of information, was wide enough to embrace not just the offence of inside information, but also that of improper disclosure[1011] – without any of the specifics in either offence which might be difficult for prosecutors to prove. For these reasons, it is clear that implementing the insider dealing offence did not add anything to the pre-existing regime.

V. Improper disclosure

This offence occurs when an insider discloses inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duties.[1012] This offence also requires an *insider* and *inside information*, under the

[1008] In all enforcement actions against insider dealing, the FSA was obliged to prove that the behaviour was on the basis of inside information. For example: FSA Final Notice, *Woolworths Group Plc*. (n 558); FSA Final Notice, *Stewart McKegg*, 16 Oct 2008

[1009] ECJ case *Spector Photo Group NV v Commissie voor het Bank, Financie-en Assurantiewezen*, C-45/08, [2010] All ER (D) 125 (Feb) The Court decision was based on the interpretation of MAD art 2(1)

[1010] FSMA 2000 2.118(c) which fully implements the wording of MAD art 1(1)

[1011] See FSA Final Notices under the old regime using the misuse of information offence to tackle insider dealing and improper disclosure. An example for the first is FSA Final Notice, *Michael Davies* (n 1000) and of the second: FSA Final Notice, *Indigo Capital* (n 964)

[1012] FSMA 2000 s.118(3)

previously mentioned conditions. It is also similar to the tipping offence of the CJA of 1993.[1013]

The FSA Code provided guidance and examples on the behaviour amounting to improper disclosure, such as that of a director who discloses inside information to another in a social context, or where the director (or any person discharging managerial responsibilities) gives selective briefings to analysts.[1014] Note that all of the examples provided involved "positive action" – deliberately disclosing inside information – which underlines the narrow ambit of this offence, in contrast to that of "misuse of information".[1015] This breadth is not provided in the *improper disclosure* offence under the SL 2002, which is akin to the civil *improper disclosure* of FSMA of 2000 in requiring positive action[1016].

VI. Manipulated transactions[1017]

The nub of this behaviour is using transactions to create a false or misleading impression, in order to manipulate market players. The FSA Code illustrates this behaviour and provides further guidance.[1018] The FSA Code also identifies factors to be taken into account in deciding whether behaviour amounts to manipulative transaction.[1019]

A practical example of one of those factors is the FSA Final Notice to *Winterflood.*[1020] In the case, FSA held that *Winterflood* executed trades without legitimate reasons (genuine market demand for supply) and thus amounted to market abuse. The *FSMT* and the *Court of Appeal*[1021] supported the FSA decision. However the challenge in this case was the "actuating purpose" behind the transaction, which MAR 1.6.5 required when determining whether there was legitimate reason. The appellants argued that the FSA Code relating to market abuse offences required *intention* or "actuating purpose", and that the case should be interpreted in this light. However, their allegations were

[1013] CJA 1993 s.57
[1014] MAR 1.4.2E; also MAR 1.4.3E provided descriptions of behaviours that do not amount to improper disclosure. Protected disclosure in compliance with s.130A FSMA will not amount to improper disclosure
[1015] FSMA 2000 s.130A(3)
[1016] See s.1 in this chapter
[1017] FSMA 2000 s.118(5)(a)(b); MAR 1.6.4(7)E
[1018] MAR 1.6
[1019] MAR 1.6.5E till MAR 1.6.8G; MAR 1.6.9E (behaviour giving false or misleading impression); MAR 1.6.10E (behaviour securing an abnormal or artificial price level) and MAR 1.6.11E (abusive squeezes).
[1020] *FSA v Winterflood Securities* (n 861) although the case was brought under the FSA original code and, the factors for legitimate reasons remained the same (MAR1.5); further see: Hayes (n 863)
[1021] *FSA v Winterflood Securities*, FSMT Case (n 861); *Winterflood Securities Limited, Stephen Sotirious and Jason Robins v FSA* (n 862)

turned down, as the FSMA of 2000 does not require an intention to commit market abuse.

Another example of manipulative transaction is the *Indigo and Bonnier*[1022]case, which was dealt with under the original offences "misleading behaviour" and "distortion". This proves again that the old regime was already capable of embracing all abusive behaviours, without implementing MAD.

VII. Manipulating devices

This abusive behaviour is an extension of manipulating transactions. The behaviour here consists of effecting transactions or orders to trade by employing fictitious devices or any form of deception or contrivance.[1023] The main difference between this behaviour and manipulative transactions is that it is not necessary that a false or misleading impression has occurred. It is sufficient to prove that the activity was itself deceptive or factious.[1024]

The Code contained guidance and examples on this behaviour which, in the FSA's opinion, fell within this kind of abuse.[1025] In addition, the FSA provided further examples in its newsletters, such as those where stake-building activities have been spread between different purchasers, to avoid disclosure obligations relating to a single stake[1026]. Note that under the SL of 2002, the manipulating transactions and devices are presented, but not with the same clarity, and as *criminal* offences, even though the underlying policy of the prohibition is akin to the FSMA of 2000.

VIII. Dissemination of information[1027]

The offence here merely requires a perpetrator, who disseminates information by any mean, to give false or misleading impression, regardless of any transactions or devices.[1028] Obviously, the scope of the offence is as broad as the original offences, and

[1022] FSA Final Notice, *Indigo Capital LLC* (n 964)
[1023] FSMA 2000 s.118(6)
[1024] Hayes (n 863)
[1025] These are under MAR 1.7, like "pump and dump" MAR 1.7.2(3)E, and "trash and cash" MAR 1.7.2(4)E
[1026] FSA, Market Watch, Issue 10, May 2007, para.2,3 <http://fsa.gov.uk/pubs/newsletters/mw_newsletter20.pdf> Accessed: 21/3/2011
[1027] FSMA 2000 s.118(7)
[1028] Alcock, 'Five years of market abuse' (n 826)

might encompass the previous offences of manipulative transactions and devices.[1029] An example of this abusive behaviour is posting information on an internet bulletin board or chat room that contains false or misleading statements about a company takeover.[1030] Also this behaviour might occur when a person recklessly discloses false or misleading information through RISs.[1031]

Guidance on abusive dissemination was provided by the FSA Code and FSA News Letters, where the FSA clarified that deliberately generating rumours about a company's future plans or developments is considered market abuse.[1032]

This sort of abusive behaviour is also recognised in the SL of 2002, as will be shown. It is worth repeating that the JSC has made no effort to provide guidance or examples, as the FSA did.

Before concluding this section, it should be mentioned that the three main *safe harbours* – share buy-back, price stabilization and conformity with market practices (presented in the FSA Code, and similar to those included in MAD[1033]) – are not discussed for two reasons. The first is that the aim of this section is to assess regulation clarity with regard to statutory offences amounting to market abuse. The second is that the SL of 2002 does not provide statutory defences to be compared with FSA safe harbours.

4.1.2.5 Concluding thoughts

The foregoing discussion showed how the flexibility of the civil regime enhanced the effectiveness of the FSA in combatting misconduct. However, the limited number of enforcement actions published by the FSA would suggest otherwise. The FSMA of 2000 was not enforced promptly after its enactment, and FSA enforcement actions were not introduced until 2004[1034]. At that time, only three cases were completed under the civil regime: two offences involved individuals who were engaged in market abuse in

[1029] MAR 1.8.3 asserts this opinion by describing behaviour amounting to dissemination as: knowingly or recklessly spreading false or misleading information through the media or RIS about a qualifying investment, or undertaking a course of conduct to give such misleading impression.
[1030] MAR 1.8.6(1)E
[1031] MAR 1.8.6(2)E
[1032] FSA Market Watch, Issue 10 (n 1026); MAR 1.8.4E and MAR 1.8.5E showing that the FSA used to consider whether the abuser knew or could reasonably be expected to have known that information was false.
[1033] CESR, Feedback Statements for Level 2 Implementing Measures, Dec 2002, CESR/02-2876 (Paris, CESR)
[1034] FSA, Market Watch, Issue no.10 (n 1026)

the form of misuse of information,[1035] while a third involved *Shell*, the giant petroleum company, which made misleading announcements.[1036]

Arguably, it was the conjunction of several factors which impacted the effectiveness of the regime. The FSA was dealing with a huge new regime that needed to be explained and illustrated with guidance – no small task for the FSA, especially during the early years of enforcing the FSMA of 2000.[1037] This challenge was in fact acknowledged in the aftermath of the banking crisis, and was considered one of the reasons for FSA regulatory failures.[1038]

Another factor could have been the consideration of the regime as criminal. The effectiveness of criminal insider dealing prohibition under the CJA of 1993 was challenged by the high standards of criminal proof, whereas civil market abuse was supposed to substitute *balance of probabilities.*[1039] However, in practice, market abuse cases brought before the *FSMT* showed that the regime was regarded as criminal, for the reasons discussed earlier. For this reason, the civil regime never overcame the obstacles to securing evidence, encountered under the CJA of 1993. Thus, arguably this controversial aspect of the market abuse regime impacted the effectiveness of FSA enforcement actions against insiders and abusers. That said, it was not the only factor - as discussed in the next chapter.

The clear drafting of the UK criminal and civil regimes provides evidence of the familiarity of drafters, decision makers and regulators with the regimes, and reflects the long experience in regulating and combatting market misconduct. Can the same be said of the SL of 2002? This is discussed in the next section.

[1035] FSA Final Notice, *Robert Middlemiss* (n 1000); FSA Final Notice, *Peter Bracken*, 7 July 2004, these were the two premier cases of market abuse; a third was FSA Final Notice, *Shell Transport* (n 547)
[1036] FSA Final Notice to "Shell" ibid, where FSA imposed a fine of 17 million Pounds on Shell
[1037] Adair Turner speech (n 124)
[1038] Ibid
[1039] Standing Committee A (n 827); Filby (n 405)

4.2 Section 2: The Jordanian Regime under the SL of 2002

Regulating insider dealing and market abuse offences under the SL of 2002 was encapsulated in three broad-based articles in Chapter Eleven (Violation and Penalties).[1040] Typically, the articles in SL of 2002 are general rules which suggest that it is, akin to the FSMA of 2000, a principle-based regulation.[1041] The JSC was required, through its instructions, to explain and detail those general rules for effective application of the SL of 2002.[1042] However, the JSC did not issue any instructions to detail and clarify the broad statutory prohibition, nor did it establish a code of market conduct, or provide any general guidance to explain what statutory requirements should be fulfilled for each offence.[1043] Thus, the analysis of statutory prohibition, covered in this section, is based mainly on articles of the SL of 2002. However, the first issues to be addressed concern the nature of the regime and its scope.

4.2.1 The nature of the regime (civil or criminal)

The SL of 2002 did not expressly state whether insider dealing and market abuse/ manipulation are civil or criminal offences. However their penal nature can be discerned from the relevant legislative sanctions, which include fines and imprisonment. In view of this, some of the prohibited behaviours are clearly criminal offences, while others are civil offences. In the absence of any government announcements or regulatory justifications, it is difficult to provide a precise answer as to why the nature of the prohibited acts differs, even though they were presented under the same Article (for example, insider dealing is criminal, while improper disclosure is civil). Such confusion indicates regulatory inexperience in regulating this area of market misconduct. This becomes clearer when considering the statutory drafting process, and substantively analysing the prohibition regime itself. Note that 'clarity of regime' is one of the key differences between the UK and Jordanian prohibition regimes.

4.2.2 Scope of the insider dealing and market abuse regime

To determine the scope of the regime, it is essential to consider what securities, markets and persons fall within the domain of prohibition.

[1040] SL 2002 arts.(107),(108),(109); Article 108 regulates insider dealing and improper disclosure offences, while Articles (107) and (109) regulate market abuse/manipulation offences.
[1041] Malkawi and Haloush (n 283) This will be considered more in Chapter 5, s.2
[1042] SL 2002 art.12(Q)
[1043] Kulczak (NASD Assessment of Jordan) (n 30)

4.2.2.1 What securities

Article (3) of the SL of 2002 states that securities: "mean any ownership, rights or any evidences local or foreign that are commonly recognised as securities and considered as such by the board [of JSC]". Specifically, securities include: transferable and tradable company shares; bonds issued by companies; securities issued by the government, official public institutions, public institutions, or municipalities; securities depositories; shares and investment units of mutual funds; spot contracts and forward contracts; put and call option contracts; and finally, any right to acquire any of the aforementioned securities.[1044]

Despite this range of financial instruments, in practice only two kinds of securities are traded on the Amman Stock Exchange (ASE); equities[1045] and bonds.[1046] Equities (transferable securities) are shares of public shareholding companies, whether owned by the private of public sector; while bonds are investment units issued by mutual funds and the government, or Treasury bonds or bills[1047]. Note that, even if all of the types of securities described in the SL of 2002 were listed on the ASE, they would still be very limited, in comparison to the variety of securities included under the definition of qualifying investments prescribed by *HM Treasury* in the UK.[1048] This may be due to the limited capitalization of the ASE,[1049] compared with UK financial markets. Also, the financial positions of each market, and differences in their financial experience, have influenced the provision and listing of types of securities, to meet the investment needs of the industry.[1050]

4.2.2.2 What exchanges

The securities market is defined in Article (2) of the SL of 2002 as: "the Amman Stock Exchange or any trading market in securities licensed by the Commission [JSC] in accordance with the provisions of this law". The ASE is an organised market, and so far

[1044] SL 2002 art.3
[1045] See listed equities on the ASM at: <http://www.ase.com.jo/en/equities> Accessed: 10/10/012
[1046] See listed bonds on the ASM at: <http://www.ase.com.jo/en/bonds_table/al>l Accessed: 10/10/2012
[1047] This is according to the ASE website: <http://www.ase.com.jo/en/types-securities> Accessed: 6/7/2011
[1048] See full details about the qualifying investments in Section 1 of this chapter.
[1049] "Market capitalization of subscribed shares is currently around JD19.1 billion, as compared to around JD286 million at the end of 1978; the number of listed companies also went up from 66 in 1978 to 243 by 2012". From the ASE website at: <http://www.ase.com.jo/en/capital-markets-profile> Accessed: 1/3/2013
[1050] These differences were highlighted in the discussion of the geneses of prohibiting insider dealing in the UK and Jordan in Chapter 2, s.2

the only platform for dealing in securities.[1051] It is clear then that the prohibition ambit with regard to the ASE market, will be narrower than that in the UK, with its diversity of prescribed markets described in the previous section – and because prohibition in the UK also covers misconduct outside the UK territorial scope, provided it has an influence on traded securities on a UK financial market.[1052]

4.2.2.3 What persons

The prohibition under the SL of 2002, to be discussed later, covers any perpetrator, regardless of his link or relation to the issuer in question. Also, natural and legal persons are fall within the prohibition,[1053] whether authorised/ licensed or not. This expansion in regard of persons is one of the positive characteristics of the SL of 2002. But has this advantage been of any benefit in practice? It is difficult to say, given the lack of enforcement actions.

The aforementioned remarks were necessary to highlight general differences between the emerging Jordanian regime, and that of the UK, with its developed financial markets and long experience in regulating insider dealing and market abuse, manifested in its civil and criminal prohibition regime. Such differences are illustrated more clearly in the analysis of the offences, below.

4.2.3 The insider dealing and improper disclosure offences

Unlike the FSMA of 2000, the SL of 2002 does not exhaustively define both offences. Rather Article (108) presents them broadly, in a way that does not clarify the specific requirements for each offence, as shown below. Article (108) of the SL of 2002 states:

> *"A person shall be in violation of the provision of this law, upon committing any of the following acts: A. Trading in securities or influencing others to trade in such securities on the basis of inside information. B. Using inside or confidential information to attain material or moral gains, whether for his own benefit or for the benefit of others, including members of the board of directors and employees of the market and the centre. D. Disclosing inside information to other than the competent authorities or courts."*

[1051] ASE official website http://www.ase.com.jo/en/capital-market-profile#2 Accessed: 6/7/2011
[1052] See previous section in this chapter.
[1053] SL 2002 art.2 (Definitions)

Although scholars have argued that this Article only regulates insider dealing[1054], its drafting, above, shows otherwise. Two separate offences can clearly be recognised: the *insider offence* and the *improper disclosure offence*. Scholars have seemingly confused the offences, since both are based on inside information. However, they differ not only in their statutory requirements, but also in their nature. Insider dealing is a criminal offence, while improper disclosure is civil, as will be shown.

Such scholarly arguments, arguably, are evidence of misunderstanding, and unfamiliarity with the offence of insider dealing. It suggests, as law and finance scholars have argued, that national legal reforms in one country, encouraged by legal assistance and reform programs, can be hindered by lack of proper understanding on the part of judges, lawyers, politicians, regulators, legal scholars and other legal intermediaries.[1055] This situation seemingly exists in Jordan to a significant extent, as evidenced in the previous scholarly misinterpretation of the Article, in the drafting of the SL of 2002 prohibition regime, and in the JSC's understanding of it, as highlighted in this section.

4.2.3.1 The insider dealing offence

According to Article (108) the insider dealing offence occurs when: (a) a person trades or influences another to trade, in securities on the basis of inside information or; (b) uses inside information or confidential information to attain material or moral gains for himself, or others.

I. The first requirement: who is involved?

Remarkably, the Jordanian legislator did not use the term "insider", or enumerate types of insiders, as for UK criminal insider dealing. Instead, the legislator used the term "person". This suggests that the prohibition net was stretched to catch any person (natural or legal) [1056] regardless of being an insider or not. This stance is akin to the situation under the FSMA of 2000, where the civil market abuse regime covers natural and legal persons.

But would this offence be carried out by more than one person jointly on in concert? The SL of 2002 definition of prohibited acts states that they include "any action,

[1054] An example of this argument in Malkawi and Haloush (n 283)
[1055] This argument was one the comparative studies of 24 transition economies including Jordan in: Berkowtiz *et al* (n 37)
[1056] SL 2002 art.2 (Definitions)

practice or scheme…"[1057] which makes it possible to state that the insider dealing offence can be committed in alliance or collusion with others.

Despite this breadth, the definition of an insider in the SL of 2002 had adverse effects in its interpretation of the term "person". Article (2) of the SL of 2002 states that an insider is: "a person (natural or legal) who possesses inside information by virtue of his position or job". Note here that the Jordanian legislator adopted the definition of 'classic' insiders, being those (directors, employees) who acquire inside information by virtue of, or in the course of their employment (direct nexus).[1058] Obviously the legislative definition overlooked other primary insiders having a professional relation with the company: secondary insiders or tippees, and shareholders. This, as noted earlier, was because the fiduciary theory was the basis of insider dealing prohibition in Jordan.[1059]

Note that shareholders, who are excluded from the definition of insider, are recognised, as mentioned earlier, by the JSC disclosure regime[1060] when their owned shares amount to five percent or more of the issuers' capital.[1061] Arguably this is because that percentage would qualify the shareholder to discharge managerial responsibilities, which means he could be a classic insider, under the previous definition.

The question here is to what extent the definition of an insider has impacted the interpretation and then the application of Article (108). A comprehensive review of JSC actions[1062] clearly showed that the targeted offenders were mainly classic insiders (directors, employees), regardless of the type of violation (mostly breach of disclosure obligation.[1063]) This highlights the point that JSC staff, discharging, monitoring or

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[1057] Ibid

[1058] It was stated in Chapter 3, sec.2 that this definition narrowed the JSC disclosure regime in regard of persons required to disclose. In this regard, JSC Disclosure Instructions 2004 art.23 states clearly that insiders are the chairman of the board, board members, general and financial managers, internal auditors and their relatives.

[1059] See Chapter 2, s.2

[1060] Ibid

[1061] JSC Disclosure Instructions 2004 art13 stating: "any person acquiring or having, for the first time, disposal of 5% or more of any securities of the same issuing company shall notify the commission of such in writing within one week of occurrence. The said person shall also notify the commission in writing of any 1% increase in acquisition within one week of such occurrence, and shall disclose motives for any purchase above 10%"

[1062] Types of violations and measures taken against violators are included in the Annexes of JSC Annual Reports. Published JSC Annual Reports are only available in English for the years 2004-2007 at: <http://www.jsc.gov.jo/Public/English.aspx?site_id=1&Lang=3&Page_Id=1575&Menu_ID=252&Menu_ID2=245> Accessed: 1/7/2011

[1063] See for example JSC Annual report for the year 2007, P.23.24 at <http://www.jsc.gov.jo/library/633686291339877706.pdf> Accessed 8/7/2011; JSC Annual report for the year 2008, P.27,28 at <http://www.jsc.gov.jo/library/633778835429106250.pdf> Accessed:7/17/2011

prosecuting, are insufficiently aware of the concept behind the insider dealing offence [1064] and the rationale for its prohibition. The same applies to ASE staff, specifically its executive manager.[1065] To avoid such misunderstanding, the Jordanian legislator should either expand its definition of insider, or eliminate it, to ensure proper application of Article (108). This critical issue is likely to be one of the key challenges to the enforcement process, as it limits the prohibition ambit and shifts the focus to corporate insiders only. Further discussion of this human capital inefficacy is provided in Chapter 5.[1066]

Before discussing behaviours amounting to insider dealing, the question of whether intention is a statutory requirement arises. In other words, does the SL of 2002 require the prosecution to prove that the offender knew or reasonably would have known that the information was insider information? Under the FSMA of 2000, the civil insider dealing offence excluded any requirement of "knowledge", as far as primary insiders were concerned, in contrast to the criminal insider dealing offence under the CJA of 1993. As for the SL of 2002, the wording of Article (108) [1067] does not refer to, or include, any stipulation of "*mens rea*". The explicit requirement is trading on the basis of inside information or using such information for moral or material gains.[1068]

However, the imposed sanctions of imprisonment for up to three years and a fine[1069] for committing insider dealing, suggests otherwise. The imprisonment sanction clearly points to the offence being of a criminal nature.[1070] Accordingly, *intention* is one of the essential requirements that the prosecutor has to prove[1071] in any insider dealing case. This is why the SL of 2002 took the same position as the CJA of 1993 in regards of requiring the existence of knowledge, which, as previously mentioned, was a hurdle for the prosecution, and one of the reasons for the failure to secure conviction in cases of criminal insider dealing in the UK.[1072]

[1064] Malkawi and Haloush (n 283) stating: "…. The staff of the JSC and prosecutors must be adequately trained to have the legal and financial background to handle insider trading offences, which are often very technical in nature."

[1065] See the later discussion of the improper disclosure offence and the ASE Executive Manager's understanding of an insider. This was also discussed in Chapter 3, sec.2, under the JSC disclosure regime

[1066] Chapter 5, s.2

[1067] SL 2002 art.108(A) and (B)

[1068] The same is applicable in the improper disclosure offence where no requirement of intention appears in the wording of Article (108) (D).

[1069] SL 2002 art.110 (A) and (B) (1)

[1070] The Jordanian Penal Code of 1960 art.15 states: "Misdemeanour penalties are: 1) imprisonment; 2) Fine". This is the researcher's translation. The full provisions of the code are available only in Arabic at: <http://www.lob.gov.jo/ui/laws/seareh_no.jsp?year=1960&no=16> Accessed:11/7/2011

[1071] Penal Code 1960 art.3 states: "The intention: is the will to commit the crime as defined by law."

[1072] See sec.1 of this chapter

Just as in the UK, it will come as no surprise to know that substantive prohibition against insider dealing has not been any more successful in Jordan.[1073] Proving criminal intention is yet one more hurdle for the JSC, in enforcing insider dealing.

II. The second requirement: inside information

Article (2) of the SL of 2002 defines inside information as:

> *"Information relating to one or several issuers or to one or several securities which has not been made public and which, if it were made public, would likely affect the price of any such security. This does not include inferences drawn on the basis of economic and financial studies, research and analysis".*

The elements that should be satisfied to consider information as inside information are:

a. Inside information is made public

The SL of 2002 did not clarify when information is made or considered to be made public, nor have the JSC Disclosure Instructions of 2004 provided any criterion or listed circumstances to determine when information will be considered public.

In the discussion over the JSC disclosure regime, the crucial problem of providing a timely disclosure mechanism was highlighted.[1074] The lack of *specific time*, to determine when the inside information was disseminated, is a loophole that an accused person can benefit from, build his defence upon, and thus render the enforcement process ineffective.

The nature of the required information arguably poses another challenge for the enforcement process. JSC Disclosure Instructions of 2004 base the disclosure obligation on disclosing "material fact", not *inside information*, which is the statutory requirement for the insider dealing offence. The "material fact" according to the SL of 2002 is any event or datum that, to a reasonable person, would have an effect in making a decision to buy, hold, sell or dispose of a security.[1075] Inside information, on the other hand, is defined as having an effect on the securities price in question when made public, regardless of its effect on the reasonable investor's investment decisions.[1076]

[1073] See Chapter 5, s. 2; Malkawi B and Haloush (n 283)
[1074] See Chapter 3, s.2. Also see: Kulczak NASD Assessment of Jordan (n 30)
[1075] SL 2002 art.2
[1076] Ibid

It is not stated or explained why the regulator chose to use two definitions. Although both seem to complement each other, and serve the underlying policy of prohibiting insider dealing and achieving *parity of information*, a vital difference exists. In inside information, the underlying test is price-sensitivity, where the non-public information must have an effect on the relevant securities price, otherwise it will not be considered inside information. This test is akin to the implemented test for inside information under the CJA of 1993.[1077] By contrast, *material information* is subject to the reasonable investor test, in which non-public information needs to be of a kind that a reasonable investor would be likely to consider in his investment decisions, regardless of its price effect. The test here is similar to the one used for the misuse of information civil offence, under the FSMA of 2000.[1078]

The nub of the problem, then, is that two different tests are to be applied, depending on the type of information: one for the disclosure obligation, and one for the insider dealing offence. If the regulator intended to provide two definitions, with two different tests, this means that the information that should be disclosed is material information, not inside information.

In practice, this would suggest that there is no regulatory mechanism to disseminate inside information – no duty to disclose it – thus, how would it be possible to enforce the insider dealing offence? On the other hand, if dealing was based on *material information*, would that mean that the accused person who traded on the basis of material information, would fall short of the prohibition ambit? For example, person 'A' knew that his company, 'X', was about to restructure its management, and tipped this information to a competitor company for which the information was vital. Let us assume that this information would not affect the securities price of company 'X', but that it would be vital for certain investors. Those who invested in company 'X' shares because of the reputation of it management, trusted their investment policy and decisions and would sell their shares if that management changed. Note that, whether 'A' gained financially from tipping the material information, or was, say, given a senior management position in the competitive company (moral gain), he would still not be subject to insider dealing prohibition. This is because his improper behaviour was based on *material information* not *inside information*. This is a crucial loophole in the prohibition ambit, and hinders the prohibition policy if the legislator really meant the

[1077] See s.1 of this chapter
[1078] Ibid

distinction between the two types of information. Indeed any lawyer of an accused person will challenge whether the dealing was based on material or inside information and will take advantage of the differences between the two. Thus it can be suggested that information subject to disclosure obligation should be of the same nature as information required for the insider dealing offence. This drafting problem, which cannot have been intended, highlights the unfamiliarity and inexperience of human capital in regulating insider dealing. Whether this problem was in the legislator (in the SL of 2002 drafting) or in the JSC, such problems do not end there: they also affect the enforcement of the regime, as law and finance scholars have emphasised.[1079]

In light of all this, it is still not clear how inside information might be disclosed, if it is not the type of information required for disclosure.

To return to inside information, the SL of 2002 did not require inside information to be specific or precise. Despite this, legal scholars argued that the main characteristic of inside information is its certainty, which cannot exist unless information is precise.[1080] Apparently, those scholars mistakenly regarded requiring some level of certainty in inside information, as akin to requiring it to be precise.[1081] To explain the difference, information about a company's intention to raise capital is *specific* inside information, but it is *precise* only if the possessor had full details (time, the amount raised, whether free shares would be distributed to shareholders……etc.). Therefore, it can be argued that, as long as the SL of 2002 does not expressly require information to be precise, it will be sufficient for the prosecutor to prove that the behaviour was based on specific inside information. Again, this scholarly point of view is evidence of unfamiliarity with the insider dealing offence.

b. Relates to one or more issuers or to one or several securities

This requirement mandates that inside information be related to a particular issuer, but not to issuers generally. For instance, information should relate to specific industrial company, not to the whole industrial sector. Also, information is regarded as inside information if it relates to one or several securities, where the information will have an influence on the price of such securities. Note that this requirement covers only licensed issuers that have listed securities on the ASE, and reflects the narrow ambit of what is

[1079] Berkowtiz *et al* (n 37); Siems, 'Legal origins: Reconciling law & finance and comparative law' (n 36)
[1080] Khashroum A and Zaid A, 'Civil liability for inside dealing, comparative analysis between UK and Jordan' (2007) 13 Al Manara Journal, Al Al-Bayt University 137
[1081] See the discussion of precise and what requirements are needed in s.1 of this chapter

covered by the FSMA of 2000 under "related investments.[1082]" This is due, as mentioned earlier, to the territorial scope of the insider dealing offence, to having only one exchange (the ASE) in Jordan, and to the limited range of instruments traded on it. This requirement is akin to the requirement under the CJA of 1993.

c. Information has an effect on securities price

It was mentioned earlier that the SL 2002 adopted, for the insider dealing offence, the "price-sensitivity" test, which relies on subsequent evidence of price movement of affected securities. A test which, it is argued, would be challenged for "being wise after event".[1083]

This requirement is similar to the criminal and civil insider dealing offence under the CJA of 1993 and the FSMA of 2000. However, the price-sensitivity test does not need to be of a significant effect; any slight effect on the relevant securities price, when the information is made public, will fulfil this requirement. This explains why the JSC focusses on monitoring market transactions and price movements, prior to and post disclosure, when tackling market misconduct.[1084]

Apparently the Jordanian legislator, by omitting the "significant" effect, intended to extend the prohibition net, to make it easier for the JSC to identify suspicious price movements and prove insider dealing offences.[1085] In fact, choosing the "price-sensitive test" seems appropriate for the Jordanian regime, since the ASE is the only securities platform, and market players are few[1086], compared to the UK[1087] of course.

III. The third requirement: the prohibited behaviours

Under the SL of 2002, behaviour amounting to insider dealing could take the form of: (1) trading in securities, or influencing others to trade, on the basis of inside

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[1082] See s.1.2 of this chapter

[1083] Alcock, Five years of market abuse' (n 826); manifest proof of this challenge can be found in the Irish case of *Fyffes Pic v DCC Pic* [2005] IESC 3 (Sup Ct (Irl))

[1084] See Chapter 5, s.2

[1085] Khashroum and Zaid (n 1080)

[1086] 243 companies were listed on the ASE at the end of 2012. From the ASE website at: <http://www.ase.com.jo/en/capital-markets-profile> Accessed: 1/9/2013

[1087] For example there are 2600 companies, from 60 different countries, listed on the main market of the London Stock Exchange. The information is from the LSE website at: <http://www.londonstockexchange.com/companies-and-advisors/main-market/main/market.htm> Accessed: 1/9/2013

information; or (2) using insider or confidential information to attain material or moral gains, whether for the offender himself or for others.[1088]

a. The trading or influencing offence

For this offence to be committed, two elements have to be shown: (1) a person (whether natural or legal) possessing inside information, regardless of whether an insider or not; and (2) trading, or influencing others to trade, in relevant securities on the basis of inside information. Although Article (108) did not expressly mention knowledge or intention as a requirement, classifying insider dealing as a criminal offence means that proving intention is vital.[1089] Note that proving perpetrator intention or knowledge is essential if the JSC opts to take enforcement action using the criminal regime, but if the JSC takes action using its disciplinary regime, intention is no longer required.

The scope of the trading offence is limited to the case of purchasing or selling affected securities. The limitation is due to the use of the term "trading", which is defined as being a contract of selling or purchasing securities.[1090] In this sense, the prohibited behaviour should be a positive action, similar to the insider dealing offence under the CJA of 1993 and the FSMA of 2000. However, it is in contrast to the original market abuse offences under the original offences of FSMA of 2002, where behaviour includes action and inaction.[1091]

In regard of the narrow ambit of trading (sell/buy), the noticeable thing is that the SL 2002 uses the wider term "dealing" but for this offence. The definition of dealing, under Article (2) of the SL of 2002, embraces many forms of transactions, such as public takeover bid, depositing, trading, purchasing from issuer, short sale….etc.[1092] It is therefore difficult to understand why the legislator, instead of using "dealing" (also positive action) in securities, used "trading". If the term dealing had been used, the prohibition ambit would have been expanded to cover various kinds of misconduct,

[1088] SL 2002 art.108 (A) and (B)

[1089] SL 2002 art.110 (B) (1) states: "B. …., any person violating the provisions of the articles mentioned hereunder shall be subject to the following penalties. 1. Imprisonment of up to three years for violations of the provisions of paragraph …, (A) and (B) of Article (108), and Article (109) of this law." As previously described, "intention" is also a critical requirement in criminal offences under the Penal Code of 1966

[1090] SL 2002 art.2 defines "Trading contract" as: "A contract on the basis of which securities are purchased and sold".

[1091] This is also clear from the definition of the "prohibited act" in SL 2002 art.2

[1092] Dealing is defined in SL 2002 art.2 as: "The registration, issuance, subscription, promotion, marketing, custody, listing, depositing, trading, settlement, purchase from issuer, public offer or public takeover bid of securities or the financing of dealing therein, or the lending, borrowing, short sale or hypothecation thereof or any other activity approved by the Board".

including "trading". However, as long as the term used is "trading", the prosecution will be compelled to adopt the narrow statutory meaning.

Trading on the basis of inside information is prohibited, whether the person gained from it or not as the legislator did not stipulate profiting or avoiding loss from the trading. Therefore, in proving the trading offence, the prosecutor should provide evidence that selling or purchasing securities was on the basis of inside information, which, when made public, affected the relevant securities price.

Also, the trading offence includes the case where a person influences or procures others to trade in such securities, whether directly or indirectly. This case might provoke discussion in practice, since the SL of 2002 did not provide any circumstances under which a person would be regarded as influencing others to commit the offence (in contrast to the CJA of 1993).[1093] An illustration of this would be the sole shareholder of a shareholding company[1094] who might use his influence over the company to get it to deal in securities on the basis of inside information.[1095] Although any profit made, or loss avoided, would be attributed to the company, being the sole shareholder means that any benefit will end up in his account.[1096] Probably, this is not the only example of influence over a company. Since the majority of shareholding companies in Jordan are family owned businesses,[1097] major shareholder influence on companies is to be expected.[1098] In fact those family members discharging managerial positions often seem to consider the company's capital to be their own, with little regard for other shareholders.[1099]

Family-based ownership is one of the JSC's major enforcement challenges, not only because of their possible influence, aforementioned, but because they are the dominant

[1093] In the UK, this case was brought up by the Economic Secretary during the passage of the CJA of 1993. See sec.1 in this chapter.
[1094] CL 1997 art.90(B) permits the establishment of a shareholding company with one funder, or to be owned by a single shareholder.
[1095] This example was given during the parliamentary debate on the Criminal Justice Bill in sec.1 of this chapter
[1096] Harabi N, "State of corporate governance in Arabic countries: An overview' (Feb 2007) University of Applied Sciences, Northwestern Switzerland 31 at: <http://mpra.ub.uni-muenchen.ed/45661/1/MPRA_paper_4566.pdf> Accessed: 4/9/2011. Harabi, in a quotation from a MENA Roundtable discussion under the heading "Owner's wealth and company's financial position", said that: "the region needs to address the issue of separating the owner's wealth from the company's financial position and extracting private benefits from the company such as extending credit to major shareholders."
[1097] Ibid; Harabi states: "…..governance systems in the MENA region are insider systems…….In those systems, there is no separation of ownership and control…"
[1098] Ghassan Nuqul of the Nuqul Group stated that: "Often a person in a family company can withdraw money from the company at any time he wishes…" Quoted from MENA focus group discussion (n 697)
[1099] This was expressly emphasised in: WB Report of Jordan (n 692)

economic forces in the market. Whether alone, or by lobbying elite politicians, they have significant influence on the JSC.[1100]

The "influencing prohibition" should not therefore be limited to "trading in securities"; rather it should be expanded to cover any improper behaviour that undermines market integrity. Replacing the *trading* requirement with *dealing*, would help serving this purpose. Again in this regard, issues of regulation clarity arise here. Using several terms, like trading and dealing, material and inside information, has reduced the clarity of the SL of 2002. Also, it significantly affects the enforcement process, especially when the regulator itself has problems of inexperience.[1101]

b. Using inside or confidential information

This offence is based on using inside or confidential information to attain material or moral gains, whether they were for the perpetrator himself or for others. Like the trading offence, the nub of this offence is taking advantage of "inside information". However, the "use" this time should result in attaining gains, which was irrelevant in the trading offence. The novelty of this offence is that secured gains could be moral, something that was not covered by the UK prohibition ambit.

Before proceeding, the use of "confidential information" should be noted. It is the third type of information under the SL of 2002, in addition to inside and material information. Under the using offence, the SL of 2002 introduced the term "confidential information", apparently as an alternative to inside information. The SL of 2002 did not provide a definition of confidential information, so it cannot be known what is meant, or why the legislator used it.

It is possible that the legislator regarded *inside information* and *confidential information* as two sides of the same coin. If so, this understanding is incorrect, because they do not have the same meaning. For example, some changes to a company's management might be regarded as confidential but not inside information, especially if such changes, when made public, did not affect relevant securities prices or investor decisions. Similarly, information in a company's annual report, prior to publishing, might include *confidential information* but not *inside information,* because it would be old

[1100] This situation was discussed under the FSA's disclosure regime, specifically the case of delaying disclosure. See Chapter 3. s.1. Also the influence of elite market players is discussed under JSC enforcement actions, s.2 of Chapter 5

[1101] See Chapter 5, s.2

information. Thus, confidential information would not amount to inside information unless it satisfied the price-sensitivity test. For this reason, it is suggested that the legislator mistakenly used *confidential information* as an alternative for inside information. The drafting problem, that the SL of 2002 suffered, manifests itself again in that it impedes proper enforcement of this offence. Any suspected person can challenge the issue of dissimilarity between confidential and inside information.

On the same question of drafting, it would have been optimal if the legislator had used "misuse of inside information" instead of the term "use", which gives the impression of a legitimate act. By providing the "use offence", the legislator has extended the narrow prohibition ambit of the "trading" offence, as regards the types of prohibited behaviours covered. However, this potential extension is curtailed by the need to prove that using inside information resulted in benefit, or attempting to benefit,[1102] whether materially or morally. Moral gains, as mentioned earlier, are something particular to the Jordanian prohibition regime. As with other provisions of the SL of 2002, the reason for implementing moral gains is not stated or even explained by the JSC, and requires clarification.

To explain its meaning, a good starting point would be a legal dictionary definition, along with examples from other Jordanian laws that use the world "moral". At first sight, one might think of moral as being "a set of personal standards relating to right and wrong conduct",[1103] or a "person's ethics and values".[1104] This is the meaning of moral in English language dictionaries, but is it the meaning that the Jordanian legislator intended? Most likely it is not. The use of "moral gains" was included in the official translation of the original Arabic drafting of the SL of 2002, however the translator did not choose an English word that was exactly equivalent to the meaning of the Arabic word. The original Arabic word would be better translated by using the more precise: "incorporeal" or "intangible" gains.[1105]

[1102] SL 2002 art.108(B) wording used "to attain", which means that it is sufficient to prove that the perpetrator was aiming to attain gains whether this happened or not.
[1103] Oxford English Dictionary: definition of the English word 'moral' as a noun, p.3/7 at: <http:www.oed.com/Entry/122085?skey=qceOPX&result=1&isAdvanced=> Accessed: 1/3/2011
[1104] Ibid, the definition of 'moral' as an adjective, p.1/19 at: <http:www.oed.com/Entry/122086?skey=qceOPX&result=2&isAdvanced=> Accessed: 1/3/2011
[1105] This meaning can be found in: Faruqi H, Faruqi's Law Dictionary: English to Arabic, 3rd edn. (Beirut: Librairie Du Liban, 1991); Faruqi H, Faruqi's Law Dictionary: Arabic to English, 2nd edn. (Beirut: Librairie Du Liban, 1995)

It should be noted that this is not the first time that the Jordanian legislator has used moral/ intangible gains – it was also used in the Income Tax Law (ITL) of 2009.[1106] In listing the income sources subject to tax, the ITL of 2009 included the "income from selling or leasing intangible assets in the Kingdom, including goodwill."[1107] Although the Jordanian legislator did not provide a definition for goodwill, or an explanation of its exact meaning, it is something intangible/ moral.[1108] Goodwill was defined as being an intangible thing/asset that has a market value and may consist of the company/ business reputation, brand names, consumers, location, value of provided goods, etc.[1109] Indeed those all constitute the '*incorporeal elements of a merchant's store*', under the Jordanian Commercial Law of 1966.[1110] Therefore, it could be argued that the meaning of moral, whenever used by the Jordanian legislator, means intangible things. Therefore, for the "use" offence under the SL of 2002, it would be sufficient if the person using inside information secured moral gains. Clarifying this would be easier if examples were also provided.

In the previous example of person 'A' tipping the managerial change in his company 'X' to a competitor company, it was said that 'A' did not deal in securities, nor secure financial profit in exchange for the information he passed. However, he got a senior managerial position at the competitor company. Even if the new position offered did not include a better salary, the behaviour of 'A' would fall under the "use", because he secured moral gain (a better job title and position). Indeed, if 'A' had not considered the job to be a reward for tipping, he would not have accepted it.

Note that the moral gain can be attained for others. For instance, an auditor of a shareholding company passed to his fiancé – who worked for a competitor company – inside information about his company's expected losses which would have severely affected its securities price when made public. His fiancé, in turn, passed the inside information to her company, which managed to avoid losses by selling their securities in that company. For doing this she was promoted. Thus, though moral gains were not attained for the auditor himself, he would still be accused of using inside information.

[1106] ITL 2009 art.3(A)7. Available in English at: <http://www.lexadin.nl/wlg/legis/nofr/lxwejor.htm> Accessed: 25/2/2013

[1107] Ibid

[1108] This was the core of the discussion in most of the papers presented at the Goodwill Symposium, held at the Sheraton Hotel, Amman, Jordan, 26 Feb 2012. In particular see the paper: Al-Qudah F, 'Could goodwill be subject to corruption?' (2012). The Symposium papers are at: <http://www.clejordan.com/Goodwill/> Accessed: 20/2/2013

[1109] For further explanation see: Goodwill law and legal definition at: <http://definitions.uslegal.com/g/goodwill> Accessed: 26/2/2013

[1110] Commercial Law 1966 art.38

From the aforementioned examples and discussion, it can be seen that moral gains extend the prohibition ambit beyond material benefits. Although this regulatory stance is not officially justified, it could be argued that including moral gains is highly pertinent to a person's investment *rationale/decision* – which, in Jordan, is not always based on financial assessment[1111] – as well as being very relevant to the personalized nature of Jordanian market relations.[1112] In discussing the Jordanian disclosure regime, for example, it was noted that investment decisions may be based as much on kin relationships, as on financial assessment or analysis.

This investment trend, along with the dominance of family-based, listed companies, explains why moral gains were included. In personalized markets, where influences and personal relations are vital tools, it is to be expected that 'gains' from an exchange of tipping/ using inside information, can take the form of a better job, or expanded and strengthened relations with the powerful in the market. All are arguably moral gains, and, although not tangible, they definitely represent benefits, since relations or new positions can open doors for new investment opportunities. For these reasons it can be said that including moral gains was optimal and in line with the local nature of both the securities market and the investment mechanism. Note here that the personal character of the Jordanian market is quite different from international markets, such as the UK market, where mainly the capital and financial position of issuers is taken into consideration.

The previous analysis of the insider dealing offence revealed problems of clarity in the SL of 2002. It was shown that the term trading was used instead of the wider term dealing, without any coherent justification for why the two terms were included, or why the term trading was chosen over dealing. Also, the SL of 2002 uses three different types of information – inside, material and confidential information – which means that different information, is required depending on the case. Additionally, the study highlighted how the statutory definition of an insider led to misinterpretation of the term "person", and thus narrowed the prohibition ambit. Thus, the statutory definition, instead of clarifying the statutory requirements of the offence, created more uncertainty. To overcome this problem, the SL of 2002 should be redrafted by skilled persons who have sufficient experience and familiarity with this offence. A suggested drafting of Article (108) of the SL of 2002 could be:

[1111] See Chapter 3, s.2
[1112] This was recognized in the WB Report of Jordan (n 692) and in MENA focus group discussions (n 697)

"A person shall be in violation of the provisions of this law upon committing any of the following acts: A: Misuse of information: where the behaviour is based on relevant information that is not generally available to market investors and which if available to market investors would be considered in their investment decisions, or would have an impact on the relevant securities price, whether material or moral gain was secured or not".

The proposed drafting combines two tests: the reasonable investor and the price-sensitivity test, which overcomes the problem of which is better to use – inside or material information. Also, using RINGA – which is optimally used for the civil market abuse offence, "misuse of information", under the FSMA of 2000 – would allow time for markets to fully absorb and adjust to new information. Finally, although the proposed definition still refers to moral and material gains, securing them is not a vital requirement in proving the offence.

4.2.3.2 The improper disclosure offence

Under Article 108 (C), disclosing inside information to other than the competent authorities or courts constitutes the offence of improper disclosure. This offence exists upon proving the existence of inside information, with all of the aforementioned statutory requirements, whether the person committing the offence knew, ought to have known, or did not know, that he was possessing inside information. In other words, intention or knowledge is not a statutory requirement – as it appears to be from the wording of Article (108) – and because it is classified as a civil offence.

Note that the insider dealing offence, and the improper disclosure offences, are regulated under the same Article (Article (108)), but they are not of the same nature. This is because the improper disclosure offence was excluded from criminal penalties (fine and imprisonment) in Article (110) of SL of 2002.[1113] This bizarre situation, which is not regulatory, raises once again the problem of clarity in the SL of 2002. Whereas the nature of the UK prohibition regime was made clear – as a result of government statements when proposing the regime, and in its presentation in relevant statute – in Jordan the nature of the regime was only discernible from the sanctions for the offences. Why these sanctions where presented in this way, and why sanctions were not provided

[1113] SL 2002 art.110 expressly stated that criminal sanctions were available for the offences under subsections (A) and (B) of Article 108, on insider dealing and misuse of inside information.

for all offences under Article (108), is unclear. However, if criminalizing insider dealing was intended to emphasise the necessity of establishing a rigorous prohibition regime against misconduct, why was improper disclosure excluded? Improper disclosure is no less harmful, and can equally undermine confidence – especially in a market the size of the ASE, with its personalized character,[1114] where it is quite possible to disclose inside information inadvertently.

The improper disclosure offence can be committed simply by disclosing inside information, in contrast to the permitted situations under the SL of 2002, and the JSC Disclosure Instructions of 2004. It can be committed by any person, whether an insider or not. For example, if a major shareholder 'A', recommended to a friend 'B', to buy shares in company 'X', and this friend in his turn passed this recommendation to person 'C', all of them could be accused of improper disclosure, whether the tipped persons knew it was inside information or not. This raises the question of why improper disclosure was not included under the "use" offence, since it is widely construed to cover any improper behaviour that is based on inside information. If this had been considered by legislators, improper disclosure would have been a criminal offence. Arguably this would still be possible, if the JSC were to use its statutory autonomy to extend the "use" offence to include improper discloser, without the need to amend the SL of 2002.

Most probably the JSC did not think of this because the improper disclosure offence is only considered to be a violation of disclosure obligations. [1115] In that, the focus is only on corporate insiders, which narrows the ambit of prohibition. Evidence of this misunderstanding of the improper disclosure offence can be found in the statement by *Jalil Tarif*, Executive Manager of the ASE:

> *"Insiders, including members of the board of directors, as well as executive managers and employees, shall not use any inside or confidential information to attain material or moral gains … and may*

[1114] "The dominant feature of the ownership structure of listed companies is family companies…", quoted from: Middle East and North Africa Corporate Governance Workshop, "Corporate governance in Morocco, Egypt, Lebanon, and Jordan (countries of the MENA region)", October 2003, p.20 (hereafter MENA Corporate Governance Workshop) at <http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/MENA_Sep_03_CG_in_in_MENA_countries/FILE/MENA_Sep_03_MENA_CG_report.pdf> Accessed:20/7/2011

[1115] A comprehensive review of JSC disciplinary actions against violators showed that, in terms of disclosure issues, the only recognized offence which insiders can commit is failure to comply with disclosure obligations. Indeed, no improper disclosure cases were cited. JSC Annual Reports (n 1062)

not divulge any such information to any person other than their respective authority or the courts.''[1116]

Note *Tarif's* rationale for the improper disclosure offence, and what persons are targeted.[1117] His statement shows how the definition of an insider in the SL of 2002 was used to constrain the meaning of "person", whereas it could have extended to include any person committing misconduct. Interestingly, although primary insiders are targeted, as *Halaseh* stated, the JSC has "no functioning mechanisms to stop board members from benefiting from trading based on inside information."[1118]

The pervious discussion is further evidence of the insufficient skill levels of JSC and ASE staff, for dealing with this complicated area of market misconduct (insider dealing and improper disclosure). The professionalism problem among JSC staff is further discussed in Chapter 5, under JSC enforcement actions.

Improper disclosure cannot be committed recklessly or negligently because the "prohibited act" is defined positively as "any action, scheme,….conduct or device forbidden…"[1119] For example, if the CEO of a company left his office, forgetting that he had left important papers on his desk about an intended bid, and his secretary used the papers to deduce inside information about the bid, could the CEO be accused under the improper disclosure offence? If he can prove that his behaviour was reckless (negative action), then he cannot be accused of insider dealing or improper disclosure.

In sum and from all these offences, it appears that the legislator, in providing the glossary for the SL of 2002, did not think of its possible effect on the ambit of substantive articles, such as the definition of prohibited acts that led to excluding any passive act from prohibition, even though the statutory drafting of the offences was broad enough to include action and inaction. Also, those statutory definitions were relied on in interpreting the offences – as with the definition of insider, which was used to construe the term person in a way that affected the ambit of prohibition. The SL of 2002 should therefore be redrafted as a whole, with particular attention to the effect of glossary definition on the statutory ambit of substantive articles.

[1116] Quoted from MENA focus group discussion (n 697)
[1117] His rationale stemmed from Article (23) of the JSC Disclosure Instructions 2004 art.23 (n 1058) that provides non-exhaustive enumeration of insiders.
[1118] Ra'afat Halaseh of the ABC Bank of Jordan, quoted from MENA focus group discussion (n 697)
[1119] SL 2002 art.2

4.2.4 Market manipulation[1120]

The offence of market manipulation is set out in Article (109). Akin to the insider dealing offence, it is considered a criminal offence due to the criminal sanctions provided for the offence in Article (110). Therefore, the prosecutor has to prove knowledge or intention of the accused person. According to Article (109), behaviour amounts to market manipulation when persons (natural or legal):

> *"A- disseminate and promote rumours to provide false or misleading information, data or statements which may affect the price of any security or the reputation of any issuer; B- Solely or in collusion with others, affect any transaction in securities with the intention of creating a false impression of price or volume of trades of a security or any related security."*

Though it is argued[1121] that market manipulation is only regulated under this Article, a review of Article (107) indicates otherwise. This Article provides further prohibition:

> *"A- The following shall be regarded as a violation of the provisions of this law: … C- Offering or selling securities on the basis of false or misleading data regarding: 1. The rights and privileges conferred by the security being offered or sold;*
> *2. The nature of the issuer's business, the success thereof, the issuer's financial conditions or future prospects.*
> *… E- Any deception or misrepresentation relating to securities…"*

Note that Article (107) merely provides further elaboration of what has been prohibited under Article (109). However, it is noteworthy that offences under Article 107 are not criminal offences, because they are not covered by the criminal sanctions in Article (110). Thus, civil market abuse is also recognised under Article (107) of the SL of 2002.

Generally, the ambit of prohibition covers any person (legal or natural, licensed or not) where his conduct affects securities transactions, or trades, otherwise than for legitimate reasons. The market manipulating offence can be subdivided into two distinct

[1120] Note that SL 2002 did not use the terminology "market abuse" or "market manipulation" in regulating this misconduct. However, ASE refers to such misbehaviours as "market abuse". See ASE frequently asked questions at <Http://www.ase.jo.en/faqs> Accessed: 1/9/2011. Despite this, the researcher chose to use "market manipulation", to reflect the criminal nature of the offences and to distinguish it from the civil market abuse regime in the UK.
[1121] Khashroum and Zaid (n 1080)

"behaviours": dissemination and manipulating transactions, which are discussed hereunder.

4.2.4.1 The dissemination offence[1122]

The nub of this offence is to affect the price of securities (move the price materially higher or lower) traded on the ASE by disseminating, promoting rumours, or providing misleading information (False information). The dissemination might be committed by any means other than transactions (which are covered under manipulating transactions).

Note that the prohibition here resembles that provided under the UK market abuse offences "false or misleading impression" and "dissemination" offences. However, under the SL of 2002 they are criminal offences. Criminalizing the dissemination offence requires the prosecutor to prove that the violator knew, or could have reasonably expected, that the disseminated information was false or misleading. Proving such intention, or extracting it, might be challenging, unless Article (107) was applied instead (that is when the false information affects the issuer's business, financial conditions or future prospects).[1123]

The offence is committed when a person, for example, disseminates information about an issuer's financial reputation, while knowing it to be false or misleading; or generates rumours intended to create a false or misleading impression – and the consequence in either case might be that the securities price of the issuer was affected.

One might question whether disseminating false or misleading information through an accepted channel (under the disclosure obligation to the JSC) is covered under the dissemination offence? The prohibition scope in Article (108)(A) suggests that it is, as long as dissemination affects the securities price in question. Nevertheless, this case was separately regulated under Article (107) (B), by stating that "submitting false or misleading data in any document filed with the Commission [JSC]…" is regarded as a violation of the SL of 2002. Accordingly, this type of dissemination is not covered by the criminal prohibition in Article (109). Arguably it should be, since disseminating false or misleading information through JSC disclosure channels might be more

[1122] SL 2002 art.109(A)
[1123] SL 2002 art.107(C) and (E)

harmful, since issuers rely on these channels to assess their financial positions and risks.[1124] Therefore, any false information could pose a direct threat to market integrity.

Article (107) provides another type of dissemination, considered to be a civil offence, where a person promulgates or generates false information when offering or selling securities.[1125] This offence is identical to the criminal dissemination offence under Article 109, although it is unclear why it was presented as a civil offence.

Regulating the same improper behaviour under both criminal and civil regimes, could arguably be confusing for JSC enforcement staff – especially with their problems of inexperience – so uncertainty in the enforcement process is to be expected. The JSC only is pursuing disseminating offences, using its disciplinary/ administrative powers, when they represent a failure of disclosure obligation.[1126]

4.2.4.2 Manipulating transactions

Prohibition under manipulating transactions covers situations where a person, solely or in collusion, targets the transactions in securities with an intention of creating a false impression of the price or volume of trades of the securities in question, or any related security. This prohibition, though it is concerned with transactions only, also overlaps with the dissemination offence. It could be considered an extension to the dissemination offence, as both create a false or misleading impression. As is the case for the disseminating offence, no guidance or examples are provided to market players to help them understand what practices amount to market manipulation.

As with the situation under the UK market abuse regime, the prohibition of manipulating transactions is broad enough to capture artificial transactions, since they create a false or misleading impression. However, the offence in the form of artificial transactions might be also considered civil if Article (107)(E) was to be applied. This Article considers any deception relating to securities to be a violation of the SL of 2002, if it is likely to have the effect of misleading others.[1127] Also, it should be mentioned that using manipulative devices is prohibited through Article (107)(E), where any

[1124] See Chapter 5, sec.2 where it was argued that the JSC adopted a risk-based approach to regulation and enforcement. This means that the JSC relies heavily on issuers' senior management to assess their business risks, which first requires genuine information.
[1125] SL 2002 art.107(C)
[1126] At the date of this study, the published offences in JSA Annual Reports showed that the JSC opts to use its administrative powers in dealing with market manipulation offences, rather than taking cases to court. For further details see JSA Annual reports (n 1062)
[1127] SL 2002 art.2 defines deception as being "an act, scheme, device, practice or course of conduct likely to have the effect of misleading others or intended to mislead them."

deception or misrepresentation[1128] relating to securities is regarded as a violation of the SL of 2002.

As mentioned for the disseminating offence, the legislator's attempts to regulate similar offences under different regimes (civil and criminal), as a result of weak drafting, has been one of the most obvious flaws in the prohibition regime, and explains the lack of prosecuted cases.

4.2.5 Concluding thoughts

Although the Jordanian insider dealing and market manipulation regime is encapsulated in only three articles, it has achieved some remarkable achievements. The breadth of the regime ambit is noticeable in some areas, such as in its use of the term "person", instead of "insider", which gives powers to law enforcers to prosecute perpetrators, regardless of their relationship with issuers. Also, adding "moral gains" to classic material profits can be viewed as a novel regulatory stance, as it goes beyond the need to secure financial material gains.

However, critical deficiencies in the regime were identified. The vagueness of the regime, by which the criminal or civil nature of offences was only discernible from the sanctions provided for each offence, led to similar behaviours having different natures. This is of great importance, given the differences in statutory requirements that should be fulfilled – specifically the intention in criminal offences. Also, such imprecision has adverse effects on the effectiveness of the enforcement process. The lack of clarity and cohesiveness in the drafting of the SL of 2002 has arguably led to poor enforcement actions, as will be discussed in the next chapter. In light of this, it can only be expected that the general articles regulating insider dealing and market manipulation would be subject to variable interpretation, particularly as the JSC cadre lacks the skills and experience necessary to deal with such complicated offences.[1129]

The lack of adequate financial experience, of both the legislator and the JSC, was noticeable, and clearly influenced both the drafting of articles (regulation clarity), and the way the JSC and ASE interpreted their provision. This could be because the prohibition regime under the SL 2002 resulted from financial reform in Jordan,

[1128] Misrepresentation is defined in SL 2002 art.2 as: "any untrue statement of material fact, or any omission or concealment of a material fact or any other datum required to ensure that a statement made is true".
[1129] See Chapter 5, s.2

encouraged and advanced by the WB and IMF.[1130] The prohibition regime did not go through the process of trial and error, nor was it a consequence of financial scandals, globalization requirements and the financial position of the country, as it was in the UK[1131]. Rather the regime presented in the SL of 2002 had transplanted minimum international standards for financial markets, as a result of financial reform programs. This form of transplantation – as recognised in comparative studies by law and finance scholars – is evidence for the description of Jordan as an unreceptive (unfamiliar), directly transplanted, transition country.[1132] To those scholars, unreceptive means that, at a domestic level, the regulators, decision makers, lawyers, judges and any other legal persons or institutions – who are supposed to develop and modify the borrowed legal rules to fulfil the local needs of the targeted industry and affected parties – had not done so. As *Berkowtiz* and *Pistor el al* stated of Jordan and countries in a similar position, they merely implement legal rules without being aware of the need to adapt them to the local and legal environment.[1133] The human capital problem, that manifested itself in the lack of regulation clarity shown earlier, is evidence of this, and was viewed as coherent justification for the regulation clarity problem. This problem extends also to enforcement, as the next chapter shows.

Another explanation for the clarity problem could be the way that the JSC, ASE and their staff were appointed. Were they nominated because of their qualifications and personal skills in the financial markets? The clarity problems suggest that they may have been nominated for other reasons, otherwise how can the drafting problem in the SL 2002 be explained, bearing in mind that, as *Berkowtiz* and *Pistor el al* found, some transition economies had transplanted their legal rules, without suffering familiarity and adaptation problems.[1134] This leads us to question whether the political will to reform really existed, or whether it was only on paper, in response to the imposed reform programs. The discussion over JSC enforcement actions, in the next chapter, clarifies these issues.[1135]

As for the substantive deficiencies identified in the SL 2002, the glossary did not encourage real understanding of the offences and their requirements. The offences themselves need to be redrafted to clarify their ambit, the behaviours included and the

[1130] See s.1 of Chapter 2 under the development of Jordan's financial regulator.
[1131] Ibid under the development of the UK financial regulator
[1132] Berkowtiz *et al* (n 37)
[1133] Ibid
[1134] Ibid; this issue is further dicussed in the next chapter, s.2
[1135] Chapter 5, s.2

nature of each – particularly the market abuse/manipulation offences, based on similar abusive behaviours – but with different interpretation. This will not only help clarify the requirements for the offences, but will also support enforcement. The aforementioned discussion answered Research Question 2) – Is the recently introduced Jordanian law effective?

4.3 Summary

This chapter presented a critical analysis of the insider dealing and market abuse regimes of the UK and Jordan. In the UK sections, the analysis started with the criminal insider dealing regime under the CJA of 1993. The criminal insider dealing offence was explained in terms of requirements, ambit and the resultant enforcement challenges. The civil market abuse regime was then analysed, including all abusive behaviours (the original and new offences after implementing MAD) and their statutory requirements. The challenges of enforcing this regime were discussed – particularly in light of the *FSMT* view of its criminal nature. This controversial aspect of the regime is its main deficiency, in terms of regulation clarity criterion.

The analysis of the civil regime identified the FSA's vital role in providing guidance and examples of its Code, to explain and detail the scope of the FSMA of 2000. As for the employed criterion – regulation clarity – the critical analysis demonstrated the clarity of the UK prohibition regime, as a result of its clear drafting, and FSA efforts. This reflects the experience and familiarity with the prohibition regime, and suggests that any enforcement problems the regime may have will not be the result of either regulation clarity or human capital deficiencies.

The analysis then turned to the Jordanian criminal regime, which was examined with regard to the prohibition ambit, and the clarity of regulation in presenting offences. The criminal nature of the regime was not stated clearly, and could only be discerned from the sanctions provided. This was particularly noticeable in the market manipulation offences, where similar abuses might be criminal or civil, without any regulatory justification for either. In general, the offences are presented and encapsulated in three broad articles, without any further explanation or elaboration of statutory requirements. This makes it difficult to identify the ambit of prohibition, particularly where the glossary definitions seem to limit this ambit, if used for interpretation. This suggests problems of human capital, not just in drafting the SL of 2002, but also in JSC and ASE understanding of the regime.

In sum, the critical problem with the Jordanian prohibition regime is its clarity. This is a serious deficiency and undermines its enforcement. The drafting problem seems the more serious, since the JSC itself lacks the skilled staff necessary to apply the regime. An unclear regime, coupled with inexperienced staff, is a recipe for regulatory failure. For comparison purposes, and aside from what has been mentioned, the UK regime is

wider in terms of markets, securities and in its ambit, particularly in regulating insider dealing and market abuse under two regimes, which gives the regulator flexibility and diversity in choosing how to tackle improper behaviour. Also, the statutory requirements for each offence are well presented, which minimizes incidents of misinterpretation. The FSA experience in elaborating and explaining the regulatory regime is a model for the JSC to learn from, in order to enhance its own mechanisms in this area.

Chapter 5 The Enforcement of Regulatory Prohibition on Insider Dealing and Market Abuse

The regulatory enforcement process is one of the essential elements for the success of any prohibition regime. It is "an ex post tool used to punish breaches of laws and regulations as well as deter further wrongdoings."[1136] A robust regulatory enforcement process will ensure compliance with and adherence to regulation by taking action against perpetrators. It fosters investors' confidence in the financial markets and at the same time is a tool to secure achievement of regulatory objectives.[1137] For these reasons enforcement is important, and any study of the prohibition regime cannot but examine regulatory enforcement.

The area of insider dealing and market abuse poses challenges to regulatory enforcement greater than any other market misconduct. In the previous chapter it was shown that proving the criminal insider dealing offence was challenging because of the high standards of proof required under the criminal regime. Although the civil regime was proposed to overcome these obstacles, enforcement remained challenging, not least because of the *FSMT* decision on the criminal nature of market abuse. The nature of these highly technical offences is challenging in itself. However, this is not the only challenge. Issues like regulatory structure, regulatory independence (financial and political), the regulatory approach to enforcement and regulation, human capital professionalism, the clarity of regulation itself, the regulatory armoury of powers and sanctions, are all critical for any successful enforcement process. In this chapter, the effectiveness of the enforcement actions of the UK and Jordanian financial regulators will be explored and critically examined in light of the comparison criteria aforementioned.

Section 1 will look at the UK and the reasons for the FSA's shift from the light-touch approach to the enforcement-led approach, why each was adopted, and how, and to what extent, these approaches affected its combatting of insider dealing and market abuse. The section will examine how the FSA's enforcement of the prohibition regime countered incidents of market abuse and insider dealing. Section 1 aims to answer the third Research Question: *After decades of prohibiting insider dealing, has the UK legal framework succeeded in tackling insider dealing and market abuse effectively? If so,*

[1136] Carvajal and Elliott, 'The challenges of enforcement in securities markets: Mission impossible' (n 31)
[1137] Ibid

has this been achieve through the criminal or civil regime? In other words, which regime provided better level of credible deterrence?

Section 2 will seek to discover the underlying reasons for the lack of enforcement actions against insider dealing and market manipulation in Jordan. The aim is to provide coherent answers to the second Research Question: *Is there any enforcement of the law? If so, why are no cases brought to court (even though the Jordanian prohibition regime was inaugurated in 1997)? Do judges settle these cases using alternative dispute resolution? If there is no enforcement, what are the underlying factors that are hindering enforcement?*

The chapter concludes with Section 3 and an assessment of the effectiveness of enforcement actions under civil and criminal regimes in both the UK and Jordan: whether they provide the same level of credible deterrence for insiders and abusers or not. This assessment will be based on published information about enforcement actions, the arguments among legal scholars, the weaknesses found in both regimes, and a consideration of the lack of empirical research and enforcement statistics in this area.

5.1 Section 1: The FSA Enforcement Approach to Market Abuse and Insider Dealing Cases

The FSMA's market abuse regime was introduced in 2001 to "fill the gap" in the protection of financial markets and to provide sound deterrence against market misconduct.[1138] Since then, the FSA supervisory and enforcement actions in the area of market abuse and insider dealing have been under scrutiny from the financial sector, the media and the *FSMT*.[1139] Although the FSMA of 2000 empowered the FSA with extensive and wide-ranging powers to investigate and discipline regulated persons and to take actions against perpetrators, criticisms of the FSA "light-touch" approach to regulation aggregated, especially during the heady times of the global credit crisis.[1140] According to critiques, the FSA's enforcement actions, particularly against insiders and abusers, fell short to the extent that it was felt that insiders were not "frightened".[1141] In corroboration of this, the FSA market cleanliness assessment revealed that insider dealing was rife.[1142]

The purpose of this section is not to review in a detailed manner the FSA enforcement procedures and how they were developed historically. The section aims to assess the FSA enforcement regime to answer the research question about the effectiveness of the civil market abuse regime in promoting market confidence and reducing financial crime. In other words, *did the civil regime provide more credible deterrence than the criminal regime under the CJA of 1993?* Of course the new financial regulator's (the FCA's) enforcement approach to regulation will be referred to, but the focus will be on the FSA's enforcement action, considering that the FCA has only recently started its mission.

[1138] Alcock, 'Five years of market abuse' (n 826)
[1139] Bazely S, 'Market cleanliness, systems and controls and future regulatory enforcement' (2007) 28 Company Lawyer 341
[1140] This description "light-touch" was highlighted and discussed in the Turner Review (n 220) p.86; Bazely S, 'FSA enforcement activity, reflections on 2010 and the challenges of regulatory change' (2011) 32 Company Lawyer 1
[1141] This was the expression used by Hector Sants, then Chief Executive of the FSA. See Sants H, 'Delivering intensive supervision and credible deterrence' 12 Mar 2009
[1142] Monterio el al, 'Updated Measurement of Market Cleanliness', FSA Occasional Paper No.25, Mar 2007, p.64

5.1.1 The FSA enforcement policy – from a "risk-based" to an "enforcement-led" regulator

The FSA in describing its general functions (operations, rule-making and policy making) used to assure stakeholders that it would work in a way that ensured achieving its four statutory objectives.[1143] Specifically, maintaining market confidence and reducing financial crime were two objectives that had influenced FSA enforcement actions[1144] against market abuse offences. As mentioned earlier, the FSA was criticised because of its adoption of a light-touch approach to regulation prior to the banking crisis. In the aftermath of the crisis the FSA started using all the weapons in its armoury to combat insiders and abusers (an enforcement-led approach). *John Coffee* commented on the FSA as follows:

> *"They have just discovered that they can enforce insider trading laws if they want to. It suggests that their prior lack of success had more to do with passivity and indifference than problems gathering evidence."*[1145]

Thus, tracing the transition of the FSA's enforcement policy and actions will be divided into two stages, prior to and post the banking crisis in 2008.

5.1.1.1 The FSA approach to regulation and enforcement prior to the Banking Crisis

The FSA light-touch approach to regulation manifested itself following 1997 in *Gordon Brown's* speeches. He was then Chancellor of the Exchequer and reflected the Labour Government's policy on the financial markets.[1146] *Brown* reiterated the Labour Government's commitment not merely to "*laissez-faire*" but even to deregulation.[1147]

[1143] FSMA 2000 s.2. These objectives are: market confidence, public awareness, protection of consumers and reduction of financial crime. Note that an additional objective -- financial stability -- was added by the FSA of 2010, amending FSMA 2000.

[1144] Speech by Gordon Brown, the then Chancellor of the Exchequer, 28 Oct 1997. The Chancellor said: "The objectives we set will give the new regulator [FSA] a clear sense of its priorities, and will provide a benchmark against which the performance of the regulator can be measured." For further see: Bazely, 'The Financial Services Authority, risk-based regulation, principles based rules and accountability' (n 232)

[1145] John Coffee, cited in the Financial Times, 'Insider dealing: A bigger bite' 12 May 2010 at: <http://www.ft.com/cms/s/0/bbc0ee56-5dfa-11df-8153-00144feab49a.html#axzz2Rqfy7ghu> Accessed: 25/12/2011

[1146] See for example: Gordon Brown MP, Chancellor of the Exchequer's speech at the Enterprise Conference, London 2 Dec 2005; Gordon Brown Speech to the CBI (n 210) ; Gordon Brown's Mansion House Speech (n 210) Speeches available: <http://webarchive.nationalarchives.gov.uk> and <http://www.archive.treasury.gov.uk/speech> Accessed: 1/3/2013

[1147] Dorn N, 'The metamorphosis of insider trading in the face of regulatory enforcement' (2011) 19 Journal of Financial Crime 75

This confirms the influence of political policy on restructuring UK financial regulation (as discussed[1148]) and on implemented approaches to regulation.

Interestingly the Labour Government's light-touch policy was echoing the dominant legacy of deregulating the financial markets since the 1970s.[1149] Deregulation meant that the role of the state should be to put an institutional framework in place for financial practice, but with minimum regulatory intervention[1150]. This accounts for the dominance of SROs and their vital role in the UK financial markets[1151] until the creation of the FSA. Also, it explains why the SROs, for example the *Panel on Takeover and Mergers*, were against the creation of a unified financial regulator entitled to enforce state regulation.[1152]

Deregulation and its influence on the state's role originated from neo-liberal state theory, one of the neo-liberal ideologies and theories.[1153] For capitalist countries, neo-liberalism was perceived as the route to prosperity. A person's well-being could be optimally achieved by advancing entrepreneurial freedom, free markets and free trade.[1154] Neo-liberalism, salient in the 1970s, was an advanced phase of capitalism.[1155] It emerged in the mid-1970s in the US and the UK, then spread to the rest of the world[1156] in the aftermath of the wave of inflation that hit major capitalist countries.[1157] The inflation crisis was considered to be a severe political defeat for the advocates of state economic controls[1158] which, in turn, paved the way for the capitalists to restore

[1148] Chapter 2, s.1 under the development of the UK financial regulator model
[1149] Silver D and Salvkin H, 'The legacy of deregulation and the financial crisis: linkages between deregulation in labor markets, housing finance markets, and the broader financial markets' (2009) 34 Journal of Business and Technology Law 301
[1150] Harvey D, *A brief history neoliberalism* (Oxford University Press 2006) .64-86
[1151] In Chapter 2, s.1
[1152] Ibid
[1153] Bavoso V, 'Financial innovation and structured finance: the case of securitization' (2013) 43 Company Lawyer 3
[1154] Harvey (n 1150) 74-86; Lee S and McBride, 'Neoliberalism, state power and global governance in the twenty-first century' in Lee S and McBride S (eds.), *Neo-liberalism, state power and global governance* (Springer 2007) 1-24
[1155] Dumenil G and Levy D, *The crisis of neoliberalism* (Harvard University Press 2011) 1
[1156] Montgomerie J, 'The logic of neo-liberalism and the political economy of consumer debt-led growth' in Lee S and McBride S (eds.), *Neo-liberalism, state power and global governance* (Springer 2007) 157-172
[1157] Ibid
[1158] The description of this period and its political, economic and social policies, can be found in the Keynesian social democratic state. John Maynard Keynes, the prominent British economist, advocated government control of the economy to keep production and investment running normally. In his view, this would boost the economy in times of recession, which the private sector could not do because they would not be able to invest at such times. Generally see: Keynes M, *Essays on John Maynard Keynes* (Cambridge University Press 1975); Hazlitt H, *The critics of the Keynesian economics* (2nd edn, Mises Institute 2009)

their earlier hegemony, as exemplified prior to the *Great Depression* in the 1930s.[1159] For this to happen, the role of the social democratic state (the *Keynesian State*) had to be rolled back in favour of a more "*laissez-faire"* state that promoted investments through deregulation and minimum interference.[1160] In this context, the law merely functioned as a guiding principle.[1161] As a consequence, FSMA 2000 was principle-based regulation[1162] as further discussed later in this section.

The doctrines of neo-liberalism tended towards an ascendancy of the financial markets over the state, which in economic terms meant efficient allocation of resources and a politically improved basis for human organisations.[1163] The upper capitalists' class power was embodied and expressed through the financial institutions in the industry[1164] (banks, pension funds, firms).[1165]

This situation expanded beyond domestic levels to become the ideology for global competitiveness.[1166] The reduction of capital constraints, which advanced enterprises' geographical mobility, and deregulation were the contributing factors for the emergence of international cross-border companies that were capable of negotiating with states over their optimal investment terms.[1167] This was accompanied by the rapid evolution of the capital market globally in the 1980s.[1168] Thus, under global neo-liberalism, financial innovation was a vital means to achieve global competiveness.[1169]

[1159] Dumenil G and Levy D, 'The crisis of Neoliberalism as a stepwise process' 2012 at: <http://www.jourdan.ens/levy/dle20121.pdf> Accessed: 25/4/2013

[1160] Harvey (n 1150); Lee and McBride, 'Neoliberalism, state power and global governance in the twenty-first century' (n 1154) p.6; Generally see: Hayek F, *The constitution of liberty*, (Rutledge & Kegan Paul 1960); The World Bank, The state in a changing world, WB Development Report 1997, Washington DC.

[1161] Thomson G, 'Responsibilities and neo-liberalism' Jul 2007, Open Democracy at: <http://www.opendemocracy.net/article/responsibility_and_neo_liberalism> Accessed: 24/4/2013

[1162] The breadth of statutory provision in civil market abuse offences was discussed in Chapter 4, s.1

[1163] King D, *The New Right: Politics, markets and citizenship* (Macmillan Education 1987) 9; Lee and McBride, 'Neoliberalism, state power and global governance in the twenty-first century' (n 1154) p.6

[1164] Those formed the nucleus of the SROs that regulated themselves and their financial activities. See Chapter 2, s.1

[1165] Dumenil and Levy, 'The crisis of Neoliberalism as a stepwise process' (n 1159)

[1166] Neoliberalism underpinned everything to do with the control of financial markets, not just control by states, but also control by international organizations such as the WB and IMF, and their reform programs. See: Lee and McBride, 'Neoliberalism, state power and global governance in the twenty-first century' (n 1154) pp.1-24

[1167] Hermann C, 'Neoliberalism in the European Union' (2007) 79 Studies in Political Economy 1

[1168] Note that these factors, and the move to integrated financial services, influenced the financial reform of the regulator model, as discussed in Chapter 2, s.1

[1169] Morris C, *The two trillion dollar meltdown: Easy money, high rollers and the great credit crash* (2nd edn, (Public Affairs 2008) xiv

Maintaining competitiveness globally meant more deregulation, more self-regulation in certain financial sectors[1170] and minimum regulatory intervention.[1171] It was a situation that could be described as a global competitiveness race or as, *Lutz* stated, a "race to bottom". [1172] It was driven by international financial integration, particularly in the securities markets. In the face of global neo-liberalism and global competitiveness, states internally were "hollowed out" by mobile international capital.[1173] What should be highlighted here that the myth of a sound economy through increasing liberalism was also adopted by international organisations such as the *WB* and the *IMF* in their reform programs.[1174] This suggests a consensus of justification for financial reforms in Jordan's emerging markets and the UK's developed markets.

In the case of UK deregulation, the roots of the light-touch approach can be detected in 1979 with the erosion of the bank capital controls that were previously holding capital within boundaries.[1175] This was followed by the integration of the financial services (banking, securities and insurance)[1176] and the globalization of financial markets (the UK 1986 Big Bang).[1177] On a political level, neo-liberalism was endorsed by the *Thatcher* government and illustrated in privatisation, market liberalisation and deregulation. These were employed to create opportunities for entrepreneurship, global competition and to maximise profits.[1178]

Thatcherism was a significant turning point for the UK, both at a political and a global economic level.[1179] With the Labour Government led by *Tony Blair* in 1997, neo-liberalism/ *Thatcherism* was not only embraced but more deeply rooted and expanded

[1170] Ibid; Morris stated that US presidential elections in the 1980s brought the Chicago School free market ideology to Washington, and with it came financial deregulation.
[1171] Hermann (n 1167)
[1172] Lutz S, 'The revival of the nation-state? Stock exchange regulation in an era of globalized financial markets' (1998) 5 Journal of European Public Policy 153
[1173] Ibid; Jessop B, 'Changing forms and functions of the state in an era of globalization and regionalisation' in Delmore R and Dopfer K, *The political economy of diversity: Evolutionary perspectives on economic order and disorder* (Edward Elgar Publishing 1994) 102-124
[1174] Dumenil and Levy, The crisis of Neoliberalism as a stepwise process' (n 1159)
[1175] Black J, 'Decentring regulation: Understanding the role of regulation and self-regulation in a post regulatory world' (2001) 54 Current Legal Problems 103; Havranek M, 'The Bank of England and the bank failures' (2000) 2 Insolvency Lawyers 73
[1176] Discussed in Chapter 2, s.1, on how the integration of financial services was one of the reasons for creating a unified regulator -- the FSA
[1177] Discussed in Chapter2, s.1 as one of the factors that influenced the partial dismantling of traditional SROs into a two-tier regulator under the SIB.
[1178] Lee and McBride, 'Neoliberalism, state power and global governance in the twenty-first century' (n 1154); Hayek F, *Law, legislation and liberty: A new statement of the liberal principles of justice and political economy* (Rutledge & Kegan Paul 1982) 77
[1179] Lee and McBride, 'Neoliberalism, state power and global governance in the twenty-first century' (n 1154) p.3. For further details of Thatcher's ideology see also: Joseph K, *Stranded in the middle ground* (Centre for Policy Studies 1976) 19. Sir Keith Joseph was Thatcher's ideological ally.

through the adoption of the light-touch approach to regulation.[1180] In addition to neo-liberalist influence, the "blind faith in the power of the 'invisible hands' to ensure that markets are self-correcting"[1181] had influenced the adoption of such an approach. In other words, the notion was that there was no need for any intervention from government in the markets as they were already efficient.[1182]

It can therefore be argued that political policy based on neo-liberalism was the leading influence in setting the scene and creating the scenarios for the financial industry from the 1970s till the banking crisis in 2008. The strong alliance between economic forces (elite capitalists controlling the financial institutions) and the political will of the state,[1183] mirroring neo-liberalism, not merely shaped the financial regulator in the UK but persuaded it into adopting the light-touch approach. This was an approach that fostered a relaxed grip by the state on the financial markets, mainly the securities markets, to attract foreign capital.[1184]

Note here that the UK regulatory transparency in regard to explaining and justifying what the government and the regulators are doing and why, does not exist in Jordan. Thus, while the FSA's approaches to regulation and enforcement were easy to identify and to explain, the details of the JSC's implemented approaches needed to be extracted, as will be shown in the next section.

The light-touch approach to regulation had to be underpinned by two further approaches: a risk-based approach and a principle-based approach. Adopting both approaches as *Gordon Brown* contended would not only result in light-touch regulation but also limited-touch regulation.[1185] The perception was that a risk-based approach would mitigate or minimize the regulatory burdens which were frontline challenges for enterprises.[1186] This approach was based on trust in the firms' (more precisely, their senior management's) ability to assess their own risks.[1187] To have a broader

[1180] Lee and McBride, 'Neoliberalism, state power and global governance in the twenty-first century' (n 1154) p.7
[1181] Tomasic R (n 168)
[1182] Ibid; Turner Review (n 220) See also the discussion of the ECMH in Chapter 2, s.3
[1183] An example of this can be found in the SRO's influence on government amendments to Gower's proposed reform of the regulator, that led to the creation of the SIB, instead of the US-style model that Gower had proposed. See Chapter 2, s.1
[1184] Lutz S (n 1172)
[1185] Gordon Brown Speech CBI (n 210)
[1186] Ibid; Black J, 'The development of risk-based regulation in the financial services: Canada, the UK and Australia' Sep 2004, A research report to the ESRC Centre for Analysis of Risk and Regulation, London School of Economics and Political Science at: <http://www.lse.ac.uk/collections/law/staff%20publi...> Accessed: 11/12/2011
[1187] Gordon Brown Speech to CBI (n 210)

understanding of the light-touch approach and its influence on FSA enforcement actions, it is necessary to briefly present the risk-based approach and the principle-based approach.

I. The risk-based approach

To achieve its statutory objectives optimally, the FSA declared from the outset its commitment to a risk-based[1188] approach to regulation and supervision, and devoted the next few years to refining it.[1189] Interestingly, the risk-based approach was transferred to the FSA from the BoE,[1190] which the latter had developed in the aftermath of the crisis over mismanagement of *Barings Bank.*[1191]

The FSA favoured the risk-based approach for several reasons.

1) It would allow the FSA to justify what it did or did not do – a defensive shield in times of financial failures[1192].

2) It would enable the FSA to allocate its resources coherently to the areas of most need, and justify this allocation internally to staff and externally to the finance industry, to politicians and to the public[1193].

3) Broad and vague statutory provision would not be drawn into operation unless the risk-based approach first triggered the process.[1194] In that, the approach would be employed to identify what in particular gave rise to risks that threatened the achievement of the FSA's statutory objectives.[1195]

Identifying those risks was primarily by reliance on the firms' senior management reports, reviews of their systems and controls, and risk assessments.[1196] This accounts for the relaxed supervisory approach of the FSA which, arguably, could be described as

[1188] FSA, 'A new regulator for the new millennium' Jan 2000
[1189] Black J, 'The development of risk based regulation in financial services: Canada, the UK and Australia' (n 1186)
[1190] Ibid; Black stated that the FSA approach evolved from RATE (Risk Assessment Tools and Education), the BoE risk-based approach. She described it as "a systematic method for determining the allocation of resources and for structuring supervisory processes."
[1191] The BoE Report on the collapse of Barings Bank, 18 Jul 1995 at: <http://www.numa.com/ref/barings/bar00.htm> Accessed: 12/12/2012; Gray J and Hamilton J, *Implementing financial regulation: Theory and practice* (John Wiley & Sons 2006) 5
[1192] Black, 'The development of risk-based regulation in financial services: Canada, the UK and Australia' (n 1186)
[1193]Ibid; Fisher E, 'The rise of the risk commonwealth and the challenge for administrative law' (2003) Public Law 455
[1194] Ibid Black
[1195] Ibid Black; FSA, 'A new regulator for the new millennium' (n 1188);
[1196] Ibid Black; Bazely, 'The Financial Services Authority, risk-based regulation, principles based rules and accountability' (n 232)

mere box-ticking, without real investigations or any challenge to received risk assessments.[1197] To be fair, it was also an implementation of *Gordon Brown's* vision of the risk-based approach: "*No inspection… no form filling… no information required without justification, not just a light-touch but a limited-touch…*"[1198]

In other words, the FSA was not in favour of early intervention for two reasons: markets are self-correcting,[1199] and the primary responsibility to manage and assess firms' risks lies with the firms' own senior managements who are better placed to choose risk models.[1200] However, this reliance was considered, after the banking crisis, to be one of the contributing factors that led to the crisis.[1201]

Another consideration was the FSA's own limited financial resources. Implementing the risk-based approach was necessary to prioritise the allocation of those limited resources to hazard areas that most threatened its statutory objectives.[1202] This meant that not every potential case of market abuse or insider dealing would trigger an FSA investigation or enforcement.[1203] In the light of previous arguments it could be suggested that regulatory independence was at risk. The FSA was exposed to two influential factors negatively impacting its approach to regulation and enforcement: political influence and its own limited financial resources.

For the industry the risk-based approach, as *Brown* stated, would reduce the regulatory burdens.[1204] Nevertheless, the financial industry from the beginning had raised concerns about the FSA's risk-based approach.[1205] For example, the industry complained that the FSA on some occasions had a heavy-handed approach that inhibited innovation.[1206] Instead of refuting these concerns, *Tony Blair* in 2005 affirmed them by stating:

[1197] Bagge J, 'Senior management responsibilities under the new regulatory regime' (2000) 8 Journal of Financial Regulation and Compliance 201; Black J, 'The emergence of risk-based regulation and new public risk management in the UK' (2005) Public Law 512; see also: FCA, Journey to the FCA, 31 Oct 2012; The FCA approach to regulation, Jun 2011, p.7 in which the FCA acknowledged the failure of the compliance-based approach.
[1198] Gordon Brown Speech to CBI (n 210)
[1199] This shows the strong belief in the validity of the ECMH. The ECMH was discussed in Chapter 2, sec.3
[1200] Tuner Review (n 220) p.87
[1201] Ibid
[1202] FSA, A new regulator for the new millennium' (n 1188); Rider *et al, Market abuse and insider dealing* (n 384) p.186
[1203] Rider *et al* ibid; also in this regard see: Kari Hale speech, then FSA former Director of Finance, Strategy and Risk, 'Risk-based compliance for financial services' 25 Nov 2004
[1204] Gordon Brown Speech to CBI (n 210)
[1205] See for example the report by the Centre for Policy Studies review team: 'The leviathan is still at large - an open letter to Mr John Tiner, Chief Executive of the FSA', Mar 2005
[1206] Bazely, 'The Financial Services Authority, risk-based regulation, principles based rules and accountability' (n 232)

> *"The Financial Services Authority… is seen as hugely inhibiting of efficient business by perfectly respectable companies that never defrauded anyone"*[1207]

Although the FSA considered these remarks undermining of its duties, it responded by moving to more principle-based rules.[1208] These allowed regulated firms to set up their own systems and controls to meet the risks of their business. Consequently, the FSA shifted to a yet more light-touch approach, with more focus on the firms' senior management in identifying risks.[1209]

Based on this argument, it might be reasonably concluded that the FSA was exposed to another influence, the force exerted by elite market players (the upper class of capitalists). The discussion in Chapter 2 highlighted their influence in reforming the regulatory structure, and now this same influence shaped the adopted policy when dealing with the industry and enforcing regulation. As was said earlier, those forces were at the heart of neo-liberalism. In pinpointing this influence, it was clearly stated that:

> *"The FSA is captured by the financial industry and allows it far too much power over the regulatory design… [FSA] which was created to act in the public interest instead advances the commercial interests of the industry it is meant to regulate…..[FSA staff were swapping positions] from the industry to regulator and back again……"*[1210]

In 2005 the *Hampton Review* reiterated a recommendation that the risk-based approach be applied also to enforcement. The approach was based on evaluating the effect of risks resulting from non-compliance with the FSA's statutory objectives.[1211] Based on the results, inspections and enforcement action would be conducted in such a way that limited financial resources were best used.[1212] A year later, the FSA risk-based approach was refined and developed through the "Advanced, Risk-Responsive Operating

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[1207] Quoted from then Prime Minister, Tony Blair's speech: 'Common sense culture, not compensation culture', The Institute of Public Policy Research, 26 May 2005

[1208] See Callum McCarthy, then FSA Chairman, speech, 'Principles-based regulation - what does it mean for the industry' at the Financial Council's Annual Conference (2nd) 31 Oct 2006

[1209] Ibid; Turner Review (n 220) p.87

[1210] The World Development Movement, 'The Financial Services Authority: Watchdog or lapdog' (n 262)

[1211] Sir Philip Hampton Review, 'Reducing administrative burdens: Effective inspection and enforcement' Mar 2005, Final Report at : <http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/prebud_pbr04_hampton.htm> Accessed: 1/4/2013

[1212] Baldwin R and Black J, 'Really responsive regulation' (2007) WP/15/2007, London School of Economics and Political Science, Law Department at: <http://ssrn.com/abstract=103322> Accessed: 5/4/2013

Framework" (ARROW),[1213] but remained based on prioritising market risks.[1214] Consequently, the FSA was to take enforcement actions in "priority" areas where it believed that market misconduct was exposing its statutory objectives to the greatest risk,[1215] among which areas market abuse was top of the list.[1216]

II. Principle-based regulation

Principle-based regulation[1217] means setting the broad principles or standards that a regulated firm's business should be in conformity with[1218]. The FSMA of 2000 and the FSA Handbook are examples of principle-based regulation which at the time were widely praised.[1219] Principle-based regulation illustrates the role of a neo-liberalist state in setting standards for the financial markets and in promulgating regulations providing principles for business conduct.

In Chapter 2 it was highlighted that the FSA had inherited the old regulatory structure of SIB and SROs,[1220] but apparently not just that, it also inherited their framework. The principle-based approach can be traced back to the self-regulatory regime under the FSA of 1986.[1221] At that time, the SROs adopted high-level principles to govern the conduct of business by their members. The nub of those principles was to set general values rather than detailed rules.[1222] When the FSA was created in the face of the SROs' failures, the industry raised concerns about business innovation being hindered by a powerful regulator armed with various sanctions.[1223] To mitigate those worries and to create a friendlier image, the FSA had to adopt the same principle-based approach as the

[1213] FSA, 'The FSA risk-assessment framework', Aug 2006 Note that ARROW, emanating from the FSA's substantial enforcement review, was a result, *inter alia*, of Tribunal criticism in: *Legal and General Assurance Society Ltd v FSA*, FSMAT case no: 015, 2005
[1214] The FSA used certain factors when identifying the priority of sectors (high, medium high, medium low and low). These were: (a) the importance of sending a message to a certain market sector, or to the financial industry as a whole; and (b) the concentration of resources in large financial groups. For further details see: FSA, 'The FSA risk-assessment framework' (n 1213); Swan and Virgo (n 838) 127
[1215] FSA, 'Enforcement process review: Report and recommendations' July 2005 (hereafter Enforcement Review 2005); Swan and Virgo (n 838) 127
[1216] Sally Dewar, then FSA Director of Markets, FSA PR (FSA/PN/080/2007), 'FSA publishing conclusions on M&A inside information review' 2 July 2007
[1217] See Chapter 4, s.1.2 for a discussion of the advantages of this approach and why it was chosen for the FSMA of 2000
[1218] Black J, Hopper M and Band C, 'Making a success of principle-based regulation' May 2007, Law and Financial Markets Review 191
[1219] Alexander K, 'Principles v. rules in financial regulation: re-assessing the balance in the credit crisis' (2009) 10 European Business Organization Law Review 169
[1220] See Chapter 2, s.1
[1221] Alexander, 'Principles v. rules in financial regulation' (n 1219); Black J: *Rules and regulators* (Oxford University Press 1997) 41-108
[1222] Ibid
[1223] Ibid

BoE and the SROs.[1224] As *Alexander* explained, this approach was vitally important for London to maintain its financial position as an international trading centre.[1225] Note here, therefore, that the global competitive race created by neo-liberalism and endorsed by senior politicians[1226] and elite capital markets left no choice for the FSA but to implement the principle-based approach.

In the area of insider dealing and market abuse, as with the rest of market misconduct, principle-based regulation embraced further approaches. For example, with regard to systems and controls for inside information which firms should have and maintain,[1227] the FSA did not consider the process or systems themselves, but rather their outcomes (i.e. success or failure in preventing the leakage of inside information). The outcomes approach involved the assumption that firms' senior managements were best placed to decide what systems and controls[1228] should be implemented to optimally achieve the regulatory objectives and to minimize risks threatening those objectives.[1229] In other words, the FSA would not step in unless those systems and controls failed to do their job. A review of FSA's published enforcement actions revealed that the overriding factor in many cases was "a failure in a firm's systems and controls… whether the topic of the enforcement case is fraud, money laundering or other financial crime".[1230] Enforcers and supervisors would approach the industry in flexible manner where both the spirit and the wording of a legal rule would be considered.[1231]

Since the early years of enforcement, the FSA had been criticised for adopting the risk-based approach. For instance, *Anthony Hilton* commented:

> "*risk-based regulation inevitably means that someday the risk will be misjudged and an accident will happen. Will the MPs at Westminster remember their calls for a lighter touch then or will the relevant Select*

[1224] Ibid
[1225] Ibid
[1226] Mainly, Gordon Brown Speech to CBI (n 210) and generally Gordon Brown speeches (n 1146)
[1227] This was discussed in Chapter 3, s.1 (FSA disclosure regime)
[1228] Bazely, 'FSA enforcement activity: reflections on 2010 and the challenges of regulatory change' (n 1140)
[1229] Waters D, then FSA Retail Director, speech, 'Implementing principles-based regulation', Dec 2006; Black *et al*, 'Making a success of principle-based regulation' (n 1218)
[1230] Travers Smith Regulatory Investigation Group, 'FSA enforcement action: Themes and trends' (2010) 76 Compliance Officer Bulletin 1
[1231] FSA, 'Treating customers fairly - Towards fair outcomes for consumers' Jul 2006 at: <http://www.fca.org.uk/static/fca/documents/fsa-tcf-towards.pdf> Accessed: 3/4/2013; Black *et al*, 'Making a success of principle-based regulation' (n 1218)

Committee of the future once again unjustly berate the helpless regulator for being 'asleep at the wheel'?[1232]

Hilton's comment was the nub of commentators' criticisms[1233] of the FSA's leniency and unveiled concerns about the effectiveness of a "risk-based" approach, especially in tackling market abuse and insider dealing.

This was manifested, as mentioned in the previous chapter, in the fact that the FSA's first enforcement actions against civil market abuse incidents were not until 2004.[1234] Against market manipulation (under Section 397 of FSMA of 2000) the FSA's first criminal case was in 2005.[1235] Note that at that time the largest imposed fine on an individual for committing a market abuse civil offence was fifteen thousand pounds,[1236] something indeed of a "light-touch" compared to the currently imposed fines of millions of pounds, as will be discussed later.

By 2007, the FSA's published enforcement actions amounted to eight final notices against firms and fifteen against individuals, which is arguably a relatively small number considering the size and the global prominence of UK financial markets. As for the FSA's enforcement actions using criminal law, the FSA did not bring any criminal prosecutions at all against insider dealing during 2001-2007,[1237] preferring to rely on civil prosecutions under the market abuse regime.[1238] More evidence of the consistency of the FSA's "risk-based" approach can be found in the FSA's measurement of market cleanliness.[1239] This measurement, through focussing on market movements around the times of significant trading announcements made by listed companies ahead of

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[1232] Anthony Hilton, financial columnist, 'Lighter touch on regulation needs all-round support' 2 Dec 2005, London Evening Standard; an archive of Hilton's comments is available at: <http://www.thisislondon.co.uk/standard-home/columnistarchive/Anthony%20Hilton-columnist-182-archive.do?offset=44> Accessed: 11/112011

[1233] Bazely, 'FSA enforcement activity, reflections on 2010 and the challenges of regulatory change' (n 1140) supra at (3); Edmond T, 'Financial markets, supervisory and structural reform', 2011 (SN/BT/5934) HC Library; this criticism was also discussed by the Turner Review, supra at (3)

[1234] FSA Market Watch, Issue 10 (n 1026) Examples of such enforcement actions are provided in Chapter 2, Section 2, of this study.

[1235] *R. v Rigby, Baily and Rowley* [2005] EWCA Crim 3478

[1236] For example: FSA Final Notice, *Robert Middlemiss*, 10 Feb 2004 (was fined 15,000 Pounds for committing the misuse offence); FSA Final Notice, *Jason Smith*, 13 Dec 2004 (was fined 15,000 Pounds for improper disclosure).

[1237] In this regard see Margaret Cole (Director of Enforcement, FSA) speeches on 17 March 2007, 29 June 2007 and 4 October 2007. Cole has stated that the FSA had not used its powers against insider dealing as a criminal offence under CJA 1993.

[1238] Willmott N and James R, 'The FSA's changing approach to investigating and punishing regulatory misconduct: Practical implications for firms and individuals' (2009) 65 Compliance Officer Bulletin 1

[1239] FSA Occasional Paper, 'Measuring market cleanliness', 23 Mar 2006. The study was conducted by Ben Dubow and Nuno Monterio, 'Study finds evidence of widespread insider dealing', (2006) 27 Company Lawyer 179. This measurement continued thereafter.

takeovers, showed an increase of insider dealing ahead of takeovers. The study was based on the proportion of informed price movements (IPM) preceding the significant announcements. These were 28.9 per cent in 2006, compared to 21 per cent before the enactment of the FSMA of 2000.[1240] These numbers suggest that there were deficiencies in the FSA enforcement approach and raise questions on the effectiveness of civil sanctions in punishing and deterring offenders.

It can be concluded that until the banking crisis of 2008, the FSA was not an enforcement-led regulator for several reasons. These include the political and economic influences on FSA structuring and its approaches to regulation and enforcement. The FSA had limited resources but broad objectives[1241] that left it no choice but to adopt the risk-based approach to regulation and enforcement. The FSA believed that by using its objectives as basic good conduct principles this would encourage good market practices. There was also a perception that senior managements were better placed than the FSA to achieve the outcomes (regulatory objectives) and minimize risks as far as possible.[1242] The FSA was also required to regulate the whole financial industry with its wide variety of risks depending on the types of financial service. This regulatory responsibility was acknowledged later as a heavy burden.[1243] In addition, characterising market abuse as criminal[1244] would result in fresh expenditure and legal challenges comparable to handling criminal insider dealing cases.

5.1.1.2 The FSA approach to regulation and enforcement since the Banking Crisis

Considering the aforementioned criticisms, the FSA's enforcement actions have undergone thorough and substantial revisions.[1245] Nonetheless, and even in the immediate aftermath of the banking crisis, the FSA continued announcing its

[1240] FSA OP, 'Measuring market cleanliness' ibid
[1241] Tomasic (n 168)
[1242] Joseph S, 'Efficiency and Effectiveness in Securities Regulation: Comparative Analysis of the United States Competitive Regulatory Structure and the United Kingdom's Single Regulator Model' (2008) 6 DePaul Business & Commercial Law Journal 247
[1243] Tomasic (n 168)
[1244] See Chapter 4, s.1.2
[1245] In 2005: FSA Enforcement Review 2005 (n 1215); FSA, 'Enforcement process review: Handbook changes", July 2005. In 2007: new Enforcement Guide (EG) and new Decision Procedures and Penalties Manual (DEPP) were introduced in the FSA Handbook - further information in: Swan and Virgo (n 838) 127. In 2008: following criticism of FSA supervision mechanism weaknesses, evidenced by the collapse of Northern Rock Bank - further information in: Bazely S, "The financial Services Authority, risk-based regulation, principles based rules and accountability' (n 232). In 2009: in the aftermath of the global banking crisis - see: Turner Review (n 220)

commitment to risk-based and principle-based approaches to regulation.[1246] In other words, the focus remained on the outcomes and consequent reliance on senior management risk assessments as if the FSA had not learned their lesson.[1247] Thus, it could be argued that seeds of neo-liberalism still persisted.[1248]

What has radically changed though was the FSA approach to enforcement. In 2008 the FSA launched its new "enforcement-led" policy.[1249] In acknowledging that effective regulation requires effective enforcement, the FSA had abandoned the risk-based approach to enforcement and the mantra of not being an "enforcement-led" regulator[1250]. The FSA's new aggressive policy to provide credible deterrence appeared in *Hector Sants'* (then FSA CEO's) statement:

> "*There is a view that people are not frightened of the FSA. I can assure you that this is a view I am determined to correct. People should be very frightened of the FSA.*[1251]"

The FSA in the aftermath of the banking crisis, and till it was replaced by the FCA, had "come down hard"[1252] on market misconduct. Although the FSA had acknowledged that market abuse was always difficult to detect, investigate and prosecute,[1253] its enforcement actions whether under the disciplinary, civil or criminal regimes noticeably increased.[1254] This was true especially of its enforcement action under the CJA of 1993, as if the FSA recognised that its criminal prosecutions were essential and effective tools in its armoury for combatting insider dealing and market abuse.[1255] In this regard, *Jamie Symington*, then the FSA Head of Wholesale Department, emphasised that:

[1246] See FSA Business Plan for 2008/2009 reaffirming the FSA's adoption of principle-based regulation; Alexander K, 'Principles v. rules in financial regulation' (n 1219); Turner Review (n 220)
[1247] Alexander K, 'Principles v. rules in financial regulation' (n 1219)
[1248] Dumenil and Levy, 'The crisis of Neoliberalism as a stepwise process' (n 1159) p.1
[1249] Margaret Cole speech, then FSA Director of Enforcement, 'How enforcement makes difference', at FSA Enforcement Law Conference, 18 June 2008 Cole said: "…we intend to be bolder and more resolute……with market abuse and insider dealing cases so that we can actually bring about a change in the culture in the city. We've got to get all the market players to take this subject seriously…."
[1250] FSA Discussion Paper (DP) 09/2, 'A regulatory response to the global banking crisis', 18 Mar 2009. This DP was published alongside the Turner Review (n 220); Willmott and James (n 1238)
[1251] Hector Sants, 'Delivering intensive supervision and credible deterrence' (n 1141)
[1252] The expression was used by Alistair Darling, the then Chancellor of the Exchequer, in an interview given to the Guardian newspaper, 28 Mar 2008 at: <http://www.guardian.co.uk/business/audio/2008/mar/28/marketturmoil.alistairdarling> Accessed: 12/11/2011
[1253] Willmott and James (n 1238)
[1254] Wilson G and Wilson S, Market misconduct, the Financial Services Authority and creating a system of "city grasses": blowing the whistle on whistle-blowing' (2010) 31 Company Lawyer 67
[1255] As stated previously, FSA used no criminal action in regard of insider dealing under CJA 1993 until 2007. Margaret Cole speeches (n 1237)

> "*the objective is to up the stakes for people who might risk committing market abuse, so that they are deterred by the fact that they face a real prospect of a spell in prison, and the publicity and stigma of a criminal convection*[1256]"

As a result, the year 2008 witnessed the FSA first insider dealing criminal prosecution against *Christopher McQuoid* and his father-in-law[1257] and this resulted in a sentence for *McQuoid* of eight months.[1258] During the following years the FSA continued its criminal prosecutions against insiders[1259] as these prosecutions were regarded as the most significant feature of the FSA "enforcement-led" policy.[1260] In regard to civil market abuse, the FSA also pursued its enforcement actions[1261] with a noticeable increase in the level of the imposed financial penalties.[1262] Indeed the largest imposed fine against an individual to date is £3.638 million, consisted of disgorgement financial benefit from market abuse of £638,000 and an additional penalty of £3 million.[1263] The FSA's largest fine till now against a firm for breaching the principals of business was £33.3 million.[1264] In relation to market abuse offences, the imposed fine on *Shell* (£17 million) remains the highest.[1265]

[1256] From a speech by Jamie Symington (Head of Wholesale Department, FSA) entitled, 'The FSA and enforcing the market abuse regime', at the City and Financial Market Abuse Conference, 6 Nov 2008
[1257] Willmott and James (n 1238)
[1258] *R. v McQuoid* [2009] EWCA Crim 1310, 10 Jun 2009
[1259] For example: Malcolm Calvert, former market-maker at the stock broker Cazenove, who was found guilty on five counts of insider dealing and was sentenced to 21 months in jail. In May 2010 a confiscation order of approximately 475,000 Pounds was also made against him. This was cited in FSA Annual Report 2009/2010, p.38. Also see The Daily Telegraph article: "Ex-Cazenove partner Malcolm Calvert gets 21 months in jail for insider dealing", 11 May 2010, available at: <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7422473/Ex-Cazenove-partner-Malcolm-Calvert-gets-21-months-in-jail-for-insider-trading.html> Accessed: 10/11/2011. *R. v Rollin; R. v McInerney* [2009] EWCA Crim 1941; *R.v Rollins* [2011] EWCA Crim 1825, 29 June 2011; [2010] UKSC 39, the defendant was sentenced to 27 months imprisonment. See this case also in The Criminal Law and Justice Weekly, 4 Sep 2010, available at: <http://www.criminallawandjustice.co.uk/index.php?/CLJ-Reporter/r-v-rollins-2010-uksc-39.html> Accessed: 9/11/2011
[1260] Hayes (n 863)
[1261] FSA issued seven final notices (Oct 2011), six in 2010, seven in 2009 and four in 2008. Note the increase in FSA enforcement actions after announcing the "enforcement-led" approach. A list of FSA Final Notices in market abuse cases available at: <http://www.fsa.gov.uk/pages/About/What/financial_crime/market_abuse/library/notices/index.shtml> Accessed: 12/3/2013 and at: <http://www.fsa.gov.uk/library/communication/notices/final> Accessed: 1/5/2013
[1262] Under the FSA of 2010, a new penalty regime was introduced and enforced on 6 March 2010, see FSA Annual Report 2009/2010; FSA Consultation Paper (CP/0919), "Enforcement Financial Penalties", Jul 2009. Note the minimum starting point for fines imposed on individuals is 100,000 Pounds.
[1263] FSA Final Notice, *David Einhorn*, 12 Feb 2012
[1264] FSA Final Notice, J.*P. Morgan Securities*, 25 May 2010. FSA using its disciplinary powers imposed a fine in respect of breaching its Principles for Businesses, based on part of the FSA Handbook and applicable to regulated persons.
[1265] FSA Final Notice, *Shell and Royal Dutch* (n 547)

What can be inferred from the aforementioned is that, regardless of all the challenges, the FSA was capable of taking deterrent action. As *Coffee* said[1266], it appears that the FSA discovered its powers and its ability to take effective enforcement actions against insiders and abusers. However, the blame should not be put on the FSA itself but on the political policy that advanced using the light-touch approach to enforcement, then influenced the change to enforcement-led after the banking crisis. Again, problems around the regulator's independence are manifest.

After endorsing the enforcement-led approach, the FSA adopted a more interventionist approach in its supervision, and used more aggressive investigatory techniques and strategies. [1267] One of those techniques was to conduct unannounced telephone interviews with potential offenders in insider dealing and market manipulation.[1268] Also, the FSA had started applying to courts for search warrants for entering premises and collecting evidence.[1269] Noticeably, the FSA had this power since 2001[1270] but did not use it until recently.

Following this theme, the UK's new financial regulator, the FCA, announced its intention to build on the FSA's recent supervision approach in intervening early to protect consumers and investors and to ensure market integrity and investors' confidence. Such an approach will aim at tackling potential risks before any catastrophic failures materialize.[1271] Akin to the FSA's more intrusive approach[1272] in recent years, the FCA will not use the old compliance-based approach to supervision. Rather it will keep checking the systems and controls of regulated firms and challenging those systems. In the same way, the FCA will apply a pro-active "judgement-led" approach[1273] that goes beyond compliance and targets the root of the problem.[1274]

[1266] John Coffee statement cited in the Financial Times (n 1145)
[1267] Willmott and James (n 1238)
[1268] Ibid
[1269] See FSA Press Release: 'Arrests made in major FSA insider dealing investigation', FSA/PN/082/2008, 29 Jul 2008; FSA Press Release, "Two arrested in FSA insider dealing investigations', FSA/PN/045/2009, 31 Mar 2009.
[1270] FSMA 2000 s.176 confers this right to FSA under certain conditions.
[1271] Journey to the FCA; FCA Approach to Regulation, pp.17, 23 (n 1197)
[1272] Examples of this: FSA Final Notice, *HSBC Bank*, 14 Dec 2005; FSA Final Notice, *Royal Bank of Scotland*, 11 Jan 2011. FSA imposed a fine of 2.8 million Pounds for breaches of Principle 3 (Management and Control); FSA Final Notice, *Goldman Sachs International*, 9 Sep 2010. FSA imposed a financial penalty of 17.5 million Pounds for failure to ensure that it had put in place adequate systems and controls to comply with its regulatory reporting obligations.
[1273] Journey to the FCA (n 1197); Allen & Overy, 'The Financial Conduct Authority - An overview, 1 Apr 2013, p.14 at: <http://www.allenovery.com/SiteCollectionDocuments/The%20Financial%20Conduct%20Authority%20April%202013.pdf> Accessed: 11/3/2013
[1274] FCA Approach to Regulation (n 1197) 24

As for enforcement, the FCA will follow the FSA's credible deterrence strategy and will strengthen its penalty regime by considering the proportionality between the benefit received from the misconduct and the size of the fine.[1275] Also, it will use all the enforcement powers in its armoury to combat market misconduct in a way that sends deterrent signals to the industry.[1276] Even before launching the FCA, it was stated that it will adopt the same latest enforcement approaches of the FSA, if not tougher, in its actions against perpetrators whose conduct falls short of market standards or amounts to breach of regulation.[1277]

All of this sounds promising and indicates that the FCA should ensure market integrity and investors' confidence. However, the FCA's approach will be closely related to the risk-based approach (although using a differentiated approach, abandoning one-size-fits-all).[1278] The risk-based approach will remain, stemming from the same rationale of focussing on the most serious and severe risks to the FCA's strategic objectives[1279], and prioritising the FCA resources to ensure best allocation.[1280] In line with its objectives, the FCA could be exposed, like the FSA, to political and economic influences considering its new competition objective.[1281] An indicator of all this could be found in a recent announcement by *Martin Wheatley*, the FCA Chief:

> *"You [the industry] won't hear from us the 'be afraid' tone; that is not how we want to act.[1282]" This statement the press described as, "FCA promises lighter regulatory touch.[1283]"*

Senior management will continue to be identified who, as *Baldwin* and *Black* argue, are not the best to assess their firms' risks.[1284] Managers are exposed to "political and practical consequences of establishing particular levels of risk tolerance.[1285]" The FCA seems to be mindful of this as it stated that it will adopt a firm systemic framework

[1275] Ibid p.25
[1276] Ibid p.26
[1277] See Tracey McDermott speech, then FSA Director of Enforcement and Financial Crime Division, at APCIMS Conference, 'Combating financial crime: Key themes and priorities for 2013', 15 Nov 2012 at: <http://www.fsa.gov.uk/library/communication/speeches/2012/1115-tm.shtml> Accessed; 1/5/2013
[1278] FCA Approach to Regulation, p. 30; Journey to the FCA (n 1197)
[1279] FSA of 2012 s.1B(2)
[1280] FCA Approach to Regulation, p. 30 (n 1197)
[1281] FSA of 2012 s.1B(3)(C)
[1282] *Wheatley* at press conference held on 21 Mar 2013, and cited by many newspapers including: Financial Times, 'FCA promises a lighter regulatory touch', 21 Mar 2013; The Guardian, 'Financial Conduct Authority Chief says increasing fines will not change culture", 21 Mar 2013; The Independent, 'Friendlier, but watchdog will still have teeth', 21 Mar 2013
[1283] Financial Times ibid
[1284] Baldwin and Black, Really responsive regulation' (n 1212)
[1285] Ibid

(FSF), among other things, to assess the effectiveness of the firms' systems and controls.[1286]

Nonetheless, the foregoing suggests that the same persisting deficiencies in the FSA risk-based approach are still in place.

5.1.2 FSA/FCA civil and criminal enforcement powers in tackling market abuse and criminal insider dealing

5.1.2.1 FSA powers under the civil market abuse regime

The FSA was entitled to impose penalties in market abuse cases under Section 123 of the FSMA of 2000, whether the person who committed market abuse was an authorised or unauthorised person. Where authorised persons were involved the FSA could additionally impose disciplinary sanctions.

The FSA was required under Section 124 of the FSMA of 2000 to publish a statement of its policy in respect of the imposition of penalties, under Section 66 in regard to regulatory penalties against approved persons, and under Section 210 in relation to authorised persons. This statement was provided under Chapter 6 of Decision Procedure and Penalties Manual (DEPP).[1287] According to the DEPP, the purpose of imposing a financial penalty or issuing a public censure was to promote high standards of market conduct by deterring perpetrators from committing further breaches, and helping to deter others from committing similar regulatory breaches.[1288] Further, the FSA policy in imposing penalties aimed at eliminating any financial gain or profit acquired from non-compliance and at remedying the harm caused by non-compliance where appropriate.[1289]

Thus, the FSA used its market abuse enforcement powers in furtherance of meeting its statutory objectives, namely maintaining market confidence and reducing financial crime.[1290] *Margaret Cole*, then the FSA Director of Enforcement, emphasised this by stating:

[1286] Allen & Overy (n 1273)
[1287] Part of the FSA Handbook
[1288] DEPP 6.1.2
[1289] EG 2.1(4)
[1290] FSMA 2000 ss.3-6; EG 2.1

"Enforcement outcomes contribute towards the prevention and cure of elements of market abuse strategy.[1291] *"*

The previous discussion suggests that the sanctions had a dual purpose, punitive and deterrent. Note that the *FSMT* shared this perspective on the necessarily punitive nature of the FSA's financial penalties, leading it to confirm that market abuse was of a criminal nature.[1292]

As mentioned before, the FSA had indirectly stated that it would not take action in every incident of market abuse[1293], prioritising its actions towards the most threatening incidents to its statutory objectives. This used to apply also where FSA believed on reasonable grounds[1294] that the person concerned took all precautions and exercised all due diligence to avoid engaging in market abuse, or if it appeared that the person's behaviour did not amount to market abuse.[1295]

In deciding whether to impose a financial penalty or to issue public censure, the FSA applied a number of non-exhaustive factors[1296] with a thorough analysis of each case circumstance.[1297] Some of these factors were: whether the breach is deliberate or reckless; the frequency of breach; the impact of the breach on the orderliness of markets; the possibility of re-committing the breach;[1298] the person concerned's compliance with any regulatory requirements; and the degree of the person's cooperation with the FSA during the investigations.[1299]

I. Imposing financial penalties

The FSA policy on enforcing penalties has changed in the past few years.[1300] The FSA's rationale was that achieving optimal credible deterrence would be by increasing the level of the imposed fines.[1301] Accordingly, it could be said that the FSA's

[1291] From Margaret Cole speech, then FSA Director of Enforcement, 'The FSA's market abuse strategy: prevention and cure', to the Securities Houses Compliance Officers Group, 29 Jun 2007
[1292] See Chapter 4, s.1.2 under the debate on the nature of the market abuse regime.
[1293] DEPP 6.3.1
[1294] Under DEPP 6.3.2 FSA listed non-exhaustive factors to be considered when deciding whether to take action. Also it considered certain principles set out in EG 2.1
[1295] DEPP 6.3.1(1)(2)
[1296] DEPP 6.2.1
[1297] DEPP 6.2.1; also see: Rider *et al*, *Market abuse and insider dealing*, p.213 (n 384)
[1298] See for example FSA Final Notices to *Toronto Dominion Bank* (London Branch), on 17 Nov 2007 and 15 Dec 2009 where FSA increased the imposed penalty for committing the same breach.
[1299] DEPP 6.2.1(1)(2)
[1300] The proposed changes were included in FSA Consultation Paper 09/19 (CP 09/19), 'Enforcement financial penalties', Jul 2010
[1301] Ibid p.8 at (2.8-2.9)

"enforcement-led" approach was characterised by the increasingly severe financial penalties on abusers, mainly during the past three years[1302]. For instance, a review of FSA published final notices since 2004 shows a significant increase in the level of imposed penalties from £15,000 [1303] to reach its highest level in 2012 at £3,638 million.[1304]

Under the new penalties regime for market abuse which the FCA will adopt,[1305] the amount of fine will be linked to income and based on: (a) up to 20 per cent of a firm's revenue from the product or business area linked to the violation in the relevant period; and (b) a minimum starting point of £100,000 for individuals in serious market abuse cases.[1306]

The penalty regime was based on three principles: disgorgement (a firm or a person should not benefit from any breach); discipline (the wrongdoer should be penalized); and deterrence (in regard to the person committing the breach and others who may commit it in the future).[1307] Indeed, the FSA final notices showed that the total amount of the imposed fines included the disgorgement of profit and a financial penalty reflecting the seriousness of the breach.[1308]

The FSA was keen to use its new penalty regime to strengthen its credible deterrence shield, to ensure that the abusive behaviour would not recur again, and to convey a message to the market that wrongdoers would not be allowed to benefit from market misconduct. The FSA's financial penalties also targeted firms' senior management[1309] by imposing fines.[1310] This was an illustration of the FSA's intrusive approach, and an acknowledgement that directly targeting senior management would be more effective in

[1302] For example: FSA Final Notice, *David Messy*, 21 Feb 2011. FSA imposed a financial penalty of 150,000 Pounds for engaging in market abuse; FSA Final Notice, *Jeremy Burley* (n 977). FSA imposed a financial penalty of 144,000 Pounds for engaging in market abuse and encouraging others.
[1303] FSA first case in market abuse; FSA Final Notice, *Robert Middlemiss* (1236)
[1304] FAS Final Notice, *David Einhorn* (1263); the second largest was FSA Final Notice, *Simon Eagle*, 18 May 2010 (2.8 million Pounds); the third was FSA Final Notice, *Samuel Khan*, May 2011 (1 million Pounds)
[1305] Journey to the FCA (n 1197)
[1306] FSA PR, 'FSA finalizes framework for financial penalty-setting', FSA/PN/036/2010, 10 Mar 2010
[1307] DEPP 6.5.2 introduced on 6 Mar 2010
[1308] DEPP 6.5.3; see for example FSA Final Notice, *Samuel Nathan Kahn* (n 1304) where the imposed fine (1,094,900 million) consisted of: (a) disgorgement of financial benefit arising from committing market abuse of 210,563.52 Pounds and (b) additional penalty of 884,365 Pounds
[1309] FSMA 2000 s.63A was introduced by FSA 2010 s.11
[1310] See FSA Final Notice, *David Baker*, 13 April 2010. The FSA fined Mr Baker, former Chief Executive of Northern Rock Bank, 504,000 Pounds and imposed a full prohibition on him for misreporting mortgage figures.

reducing market misconduct than targeting firms, which indeed is the FCA's opinion.[1311]

But it could still be queried whether the increased level of penalties would provide better deterrent levels. This will be answered within Section 3 in this chapter.

II. Issuing public censure

In deciding whether to issue a financial penalty or a public censure, the FSA applied criteria which included factors such as[1312]: (a) whether or not deterrence may be effectively achieved by issuing public censure; (b) whether the breach is serious;[1313] (c) whether the concerned person brought the breach to the attention of the FSA (a factor that would incline the FSA towards public censure rather than penalty); (d) whether the person showed cooperation with the FSA; and (e) the person's previous disciplinary record (poor or showing compliance). Therefore, it could be inferred that the FSA preferred issuing public censure where the person's breach was not too serious, and the person had a disciplinary record that reflected his cooperation with the FSA and compliance with regulation.[1314]

In addition to the previous penalties (fine and public censure) under the market abuse regime, the FSA used its disciplinary regime to impose disciplinary sanctions where the person concerned was an authorised or an approved person.

III. FSA disciplinary sanctions

The FSA was entitled to take disciplinary actions against regulated persons under Sections 206A and 66 of the FSMA of 2000. The FSA used to take one or more of the following actions against regulated persons: impose a financial penalty; suspend any authorisation for a period the FSA considered appropriate; impose restrictions or limitations on performance of any approved function for a period of time; or publish a statement of misconduct.[1315]

[1311] From Wheatley press conference cited in the Guardian (n 1282)
[1312] DEPP 6.4.2
[1313] DEPP 6.5.c2 and DEPP 6.5A.2 provided the FSA mechanism in determining the level of seriousness in market abuse cases.
[1314] See for example; FSA Final Notice, *Darren Morton* (n 938). FSA publicly censured Mr Morton for engaging in market abuse; FSA Final Notice, *Christopher Parry* (n 997)
[1315] FSMA 2000 ss.66(3), 206A as amended by FSA of 2010. FSA's power to take action against approved persons for misconduct was extended from two to three years. Section 66(4) of FSMA 2000 s.66(4)

It should be mentioned that the evidential setbacks arising from legal cases of market abuse of a criminal nature,[1316] specifically in *Davidson and Tatham Tribunal* case[1317] as was discussed in Chapter 4,[1318] led the FSA to prefer bringing actions for market abuse against authorised and approved persons on the basis of breaching its High Level Principles for Businesses (PRIN).[1319]

Some of the FSA enforcement actions against market abuse demonstrated this trend.[1320] For example, the FSA found that *Mr. Gower*,[1321] an approved person, made disclosure of inside information which was misleading, inaccurate, and had a negative impact on a certain share's price which constituted a breach of Principle 3 of the FSA's Statement of Principles for Approved Persons.[1322] In fact, the FSA used the overlap between the market abuse offences and the violations of its principles in its fight against abusers.[1323] For instance, Principle 5 stated that the regulated person's behaviour should be in conformity with proper market standards. Thus, any behaviour amounting to market abuse also constituted a breach of Principle 5.

Suspension and restriction were new disciplinary sanctions provided under the FSA of 2010[1324] to allow the FSA to target directly the relevant part of business where the misconduct occurred.[1325] Additionally, the FSA had the power of imposing penalties on authorised persons in conjunction with withdrawing the relevant firm's authorisation.[1326] This combination prior to the FSA of 2010 was not allowed. The FSA

[1316] This suggestion was presented during the passage of the FSMA, see for example: The Joint Committee on the Financial Services and Markets Bill, 'Draft Financial Services and Markets Bill; Part V, VI, XII in relation to the European Convention on Human Rights", 27 May 1999, HC 415, p.82. Also see: Haynes A, 'Market abuse, fraud and misleading communications', (2012) 19 Journal of Financial Crime 234; Dorn (n 1147)

[1317] *FSA v Paul Davidson and Ashley Tatham*, FSMT (n 929); Alcock, 'Five years of market abuse' (n 826)

[1318] Chapter 4, Sec.1.2

[1319] FSA Handbook, under the heading "High Level Standards"

[1320] For example FSA PR, 'Tribunal upholds FSA decision to ban and fine hedge fund CEO and CFO 2.1 m for deceiving investors and market abuse', FSA/PN/071/2011, 15 Aug 2011. The Tribunal had directed the FSA to fine *Michiel Weiger Visser* 2 million Pounds and *Oulwole Modupe Fabbulu* 100,000 Pounds, and ban both from performing any regulated financial services, for breaching Principle 1 and for engaging in market abuse.

[1321] FSA Final Notice, *Christopher Gower*, 12 Jan 2011.

[1322] Principle 3 states: "An approved person must observe proper standards of market conduct in carrying out his controlled function"

[1323] Swan and Virgo (n 838) p.150

[1324] For further see: FSA CP 10/11, 'Implementing aspects of the Financial Services Act 2010', Apr 2010.

[1325] Willmott N, McGowen P, Ghusn M, Brocklehurst V, Aikens R, Baily S, Scodie M, Palmer J, Whorthon R and Gold A, 'Equipping the modern regulator: assessing the new regulatory powers under the Financial Services Act 2010' (2010) 78 Compliance Officer Bulletin 1

[1326] FSMA 200 s.206(2) as amended by FSA of 2010.

was also capable of using its disciplinary sanctions in addition to, or instead of, imposing a financial penalty or issuing a public censure.[1327]

The foregoing discussion has shown that the FSA was empowered with various tools and sanctions to counter market abuse and civil insider dealing. The same level of empowerment is not available for the JSC, though it has the power to take actions through its disciplinary regime. The FSA penalty regime and its underlying policy entitled it to impose penalties proportionate to the seriousness of the abuse with a starting point of £100,000 for individuals, which is the maximum amount that the JSC can impose. Another difference, as will be shown, is that the JSC does not have any manual or guidance for its enforcement actions. Thus, unlike the FSA's clear enforcement procedures, the JSC's procedures are to some extent vague and the principles for its enforcement actions are undocumented[1328]. These points are brought up now to explain why the discussion on the JSC enforcement process and actions will not be as detailed as for the FSA.

5.1.2.2 FSA enforcement actions in criminal insider dealing cases

Despite the FSA's perception of the difficulties involved in securing evidence in criminal insider dealing cases,[1329] post the banking crisis it started using the criminal route more regularly. The shift could be because civil market abuse cases proved in practice that they were not any less challenging.[1330] Additionally, it was because of the FSA rationale that credible deterrence would be best achieved through the criminal route[1331]. The FSA in 2012 had won eight insider dealing cases out of a total of twenty since 2009[1332].

[1327] DEPP 6A.1.3. See for example: FSA Final Notice, *Bamett Alexander*, 14 June 2011. The FSA issued a prohibition order on Mr Alexander, banning him from performing any regulated activities; FSA Final Notice, *Perry John Bliss*, 13 Dec 2010. FSA issued a prohibition order, and imposed a financial penalty of 30,000 Pounds, for engaging in market abuse.

[1328] See Margaret Cole speech in the Introduction to FSA Enforcement Conference (n 1249)

[1329] Ibid

[1330] Was discussed in chapter 3, s.1.2

[1331] This rationale is in the speech by Margaret Cole, FSA Director of Enforcement, 'Setting out FSA's strategy and approach to fighting fraud', 10 Sep 2009.

[1332] Morrison and Foerster, 'Insider trading annual report' (2012) p.16 at: <http://www.mofo.com/files/Uploads/Images/130116-Insider-Trading-Annual-Review.pdf> Accessed: 1/5/2013 See also for example: FSA PR, 'Insider dealers ordered to pay 1.5 million in confiscation', 20 Aug 2012 at: <http://www.fsa.gov.uk/library/communication/pr/2012/082.shtml>; FSA PR, 'Six sentenced for insider dealing", 27 Jul 2012 at: http://www.fsa.gov.uk/library/communication/pr/2012/080.shtml ; FSA PR, 'David Einhorn and Greenlight Capital Inc, fined 7.2m for trading on inside information in Punch Taverns Plc.' 25 Jan 2012 at: http://www.fsa.gov.uk/library/communication/pr/2012/005.shtml Accessed: 1/5/2013

Note that securing evidence was not the FSA's only hurdle in criminal cases: its role as a criminal prosecutor was also challenged. This role was challenged more than once.[1333] For instance in *R. v Westminster Magistrate Court,*[1334] the claimant (U) appealed for a judicial review of the *Magistrate Court's* decision that the FSA did not have to obtain the consent of the relevant Secretary of State or the Public Prosecutions in order to institute proceedings for the offence of insider dealing under the CJA of 1993. The *Court*[1335] dismissed the application, affirming that the FSA was not required to obtain such consent as the "FSA may institute proceedings under Section 402(1)… without the antecedent need to obtain the consent of the Secretary of State[1336]"

The FSA was eventually added[1337] to the list of specified prosecutors in the Serious Organised Crime and Police Act (SOCPA) 2005. In fact, the FSA had lobbied[1338] for the granting of these powers which were necessary tools in its battle against insider dealing.[1339] In consequence, as a criminal prosecutor, the FSA was entitled to grant immunity to witnesses[1340] in insider dealing cases who contributed towards establishing evidence. The FSA used this power in its third insider dealing case against *Malcolm Calvert*, a former market-maker at *Cazenove*, who was found guilty of five counts of insider dealing.[1341] The prosecution involved a key witness, *Bertie Hatcher*, a friend of *Calvert*, who agreed to provide evidence in the trial in return for the granting of immunity. *Mr Hatcher* was tipped inside information and profited from it, but because of his cooperation with the FSA, he was sanctioned under FSA regulatory powers rather than the criminal prosecution.[1342]

In addition, the FSA under the SOCPA of 2005 was granted plea-bargaining powers.[1343] The FSA used this power in the case against *Anjam Ahmad*[1344], a former hedge fund

[1333] See the Court of Appeal decision in *R v. Rollins; R. v McInerney* [2009] EWCA Crim 1941
[1334] *R. (on the application of Uberoi) v Westminster Magistrates Court* [2008] EWHC 3191 (Admin); 2 Dec 2008
[1335] High Court of Justice Queen's Branch Division Administrative Court
[1336] Lord Justice May in: *R. (on the application of Uberoi) v Westminster Magistrates Court* (n 1334) paras. 25, 29. This decision was upheld by the Supreme Court in *R. v Rollins and R. v McInerney* [2010] UKSC 39. For further information see: Stott C, 'case comment, case analysis: *R. v Rollins; R. v McInerney*' (2010) 25 Journal of International Banking Law and Regulation 460
[1337] In Nov 2009 by the Coroners and Justice Act 2009 s.113
[1338] See Margaret Cole speech at FSA Enforcement Conference (n 1249)
[1339] Peat R, Mason I and Bazel S, 'The FSA as a criminal prosecutor' (2010) 31 Company Lawyer 119
[1340] Under SOCPA 2005
[1341] FSA PR, 'Former Cazenove partner found guilty of insider dealing', FSA/PN/041/2010, 10 March 2010
[1342] FSA Final Notice, *Bertie Hatcher*, 13 May 2008. FSA imposed a financial penalty of 56,098 Pounds for engaging in market abuse (insider dealing as a civil offence)
[1343] FSA granted this power on 6 April 2010
[1344] FSA PR, 'Ex-hedge fund trader sentenced for insider dealing', FSA/PN/104/2010, 22 June 2010

trader and manager at *AKO Capital* who was convicted of insider dealing. *Mr Ahmad* agreed to plead guilty after reaching an agreement with the FSA to cooperate with its investigations into his co-conspirator. This was the first case in which the FSA used its plea-bargaining powers, which resulted in a reduction of *Mr Ahmad's* sentence.[1345] In addition, *Mr Ahmad* agreed to a final notice.[1346]

Note that the JSC has not yet played a comparable role as it has not yet made any criminal prosecutions for insider dealing. Thus it has not encountered any of the FSA's difficulties arising from the criminal route, and it has not considered enhancing its statutory powers in this area.

It is clear that the FSA was making full use of its tools to achieve credible deterrence, with the recognition that criminal prosecutions are the most effective way.[1347] Therefore, it can be argued that increasing the level of imposed financial penalties in market abuse cases would not provide as effective deterrence as the criminal sanctions. This will be discussed further within the assessment in Section 3.

[1345] Ibid
[1346] FSA Final Notice, *Anjam Ahmad*, 22 June 2010, he was fined 131,000 Pounds.
[1347] -"….insiders should recognize the real risk of being pursued through the criminal courts and stripped of the benefits of their crime…" Quoted from Margaret Cole speech in FSA press release: 'Ex-hedge fund trader sentenced for insider dealing' (n 1344)

5.2 Section 2: The JSC Enforcement Approach in Insider Dealing and Market Manipulation Cases

To ensure and promote investors' confidence and market integrity,[1348] the JSC is authorised[1349] to regulate and develop the securities market in a manner that ensures high standards of fairness, transparency and efficiency.[1350] The JSC can underpin that by carrying out investigations[1351] and taking enforcement actions against improper behaviour, either by using its disciplinary regime or the criminal insider dealing and market abuse/manipulation regimes.[1352] Nevertheless, the fact that the JSC since its creation in 1997 has taken enforcement actions against insiders and manipulators only once raises many questions. It cannot be simply that all market players' transactions are in conformity with the law and they are showing a great deal of compliance. If developed countries like the UK struggle to ensure market integrity by devoting a great deal of effort and reform to the task of tackling insider dealing and market abuse, such efforts logically should be all the more necessary in Jordan's emerging market.

This section will try to discover why there are not enforcement actions taken against insiders and manipulators. Criteria such as regulatory transparency, human capital, regulatory independence, and regulation clarity will be applied in considering the JSC's rare enforcement actions. Discussion will start with the JSC's approach to regulation and enforcement, if any, and its investigatory and enforcement powers.

However, the lack of regulatory transparency,[1353] either in regard to the SL of 2002[1354] or the JSC's policies and adopted approaches, poses challenges[1355] to identifying what

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[1348] National Association of Securities Dealers (NASD), 'NASD market surveillance assessment and recommendations - Final report', 22 Oct 2004 (hereafter NASD market surveillance assessment) at: <http://pdf.usaid.gov/pdf_docs/PNADB391.pdf> Accessed: 1/8/2011. This Assessment was made for JSC in cooperation with USAID Jordan.

[1349] SL 2002 art.7(A) of SA 2002

[1350] SL 2002 art.8(A)(1)&(2)

[1351] SL 2002 art.21(A)

[1352] SL 2002 art.8(A) states: "The Commission in particular aim to achieve the following: 1-Protecting investors in securities; 2-Regulating and developing the capital market to ensure fairness, efficiency and transparency; 3-Protecting the capital market from the risks it might face." These objectives are an implementation of International Organization of Securities Commissions (IOSCO) objectives for securities at : <http://www.finrep.kiev.ua/download/ioscopd154_en.pdf> Accessed: 1/12/2011

[1353] This was highlighted in 2003, a year after enforcing SL 2002, but no efforts were made to enhance regulatory transparency. See for example: MENA Corporate Governance Workshop (n 1114); Saidi N, 'Corporate governance in MENA countries: improving transparency and disclosure' (2004) at <http://www.ifc.org/wps/wcm/connect/b508b10048a7e753ab1fef6060ad5911/Transparency_and_Disclosure.pdf?MOD=AJPERES> Accessed: 1/3/2010; WB Report on Jordan (n 692); MENA-OECD investment programme, 'National Investment Reform Agenda' (n 264); Billmeier A and Massa I, 'What drives stock market development in the Middle East and Central Asia - Institutions, remittances, or

indeed is the JSC approach to regulation and enforcement. Thus, any analysis provided will, as was the case in the previous analysis, rely mainly on the SL of 2002 articles and the JSC by-laws to find logical legal justifications. In addition, reference will be made to information found in the *IMF* and *WB* and other international reports, and articles addressing Jordanian political and economic reforms.

The broad and ill-defined articles of the SL 2002[1356] and the JSC by-laws that were supposed to clarify the situation, arguably, had their negative effect on the enforcement process. For proper enforcement, it is vital for both the regulator and the financial industry to have clear rules and principles to comply with, and for the rules to be enforced,[1357] which is not the case here, as was shown in the previous chapter. Otherwise, the enforcement process will be hazy and patchy, if there is any at all.[1358]

5.2.1 The JSC approach to enforcement and regulation

In Chapter 2, it was made clear that the financial reforms in Jordan were part of overlapping political and economic reforms stipulated by the *WB* and the *IMF* financial reform programs in exchange for the granting of loans.[1359] This international political and economic influence, allied with the internal political will of the executive authority, resulted in promulgating the provisional SL of 1997, in turn repealed by the provisional SL of 2002, and within which the financial institutions were created. Also, the influence of the internal political will can be found in the JSC, whose Board members and Chairman are appointed by the Council of Ministers.[1360] Therefore, political will (national and international) and economic reform jointly influenced the creation of the JSC. Do these political and economic influences affect its approach to regulation and enforcement? This will be explored in the coming discussion.

The intention of Jordan's financial reforms was to encourage market liberalisation through, *inter alia*, privatisation and bringing the investment environment up to global

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national resources?', IMF WP 07/157, Jul 2007 at: <http://www.imf.org/external/pubs/ft/wp/2007/wp07157.pdf> Accessed: 1/2/2013

[1354] The parliamentary debates are not available, in contrast to the UK, particularly those describing the SL of 2002, which is a provisional law, as described in Chapter 2, s.1. Also, official documents are not available.

[1355] See Chapter 2, s.1. This was discussed with regard to the regulatory reforms in Jordan and the factors which influenced the creation of the insider dealing offence.

[1356] This was stated in: MENA Corporate Governance Workshop (n 1114)

[1357] Billmeier and Massa (n 1353)

[1358] MENA Corporate Governance Workshop (n 1114)

[1359] Chapter 2, s.1

[1360] SL 2002 art.10(B)&(C)

standards to attract foreign and domestic investment.[1361] Indeed, Jordan was considered one of the good examples in the region in fostering liberalising reforms.[1362] As was discussed in the previous section, liberalisation meant, in regard to financial markets, light-touch regulation accompanied with flexible regulatory approach. Thus, considering that the JSC resulted from prescribed reforms to a governmental body, it would not be surprising if the JSC policy in attracting foreign investments was based on relaxed regulation providing a competitive environment and fostering competitive investment requirements.[1363]

In the absence of any published policy by the JSC declaring its approach to regulation and enforcement, it could be argued that in fulfilling globalization and liberalisation requirements the principle-based approach and risk-based approach would be adopted. [1364] As for the risk-based approach, implementing and developing risk competitiveness thereafter was recommended in *Middle East and North Africa (MENA)* workshops[1365] and by the *IOSCO*[1366] to emerging market regulator members, of which the JSC is one.[1367]

Apparently, the JSC's risk-based approach will not differ from the FSA's in regard to the main underpinning bases.

1) If the UK financial regulator has limited financial resources, the JSC, considering the country's economic constraints,[1368] arguably has the same, if not a worse problem. Thus, it is expected that the JSC will target risks which most threaten its regulatory objectives (mainly investors' confidence in market integrity).

2) The JSC will also rely on firms' senior managements to assess their risks and to adopt systems and controls accordingly.

[1361] MENA Corporate Governance Workshop (n 1114)
[1362] Ibid
[1363] Ibid
[1364] This was discussed in the previous section
[1365] MENA Corporate Governance Workshop (n 1114)
[1366] IOSCO, 'Guidelines to emerging market regulators regarding requirements for minimum entry and continues risk based supervision of market intermediaries', Sep 2009 at: <http://www.secp.gov.pk/Reports/IOSCO%20Risk%20Based%20Supervision.pdf> Accessed: 3/5/2013
[1367] JSC became a signatory to the IOSCO Multilateral Memorandum of Understanding (MMOU) in Feb 2008. JSC considered this an indicator of its compliance with international standards in adopting legislation and regulatory frameworks in the capital market. At: <http://www.jsc.gov.jo/public/english.aspx?site_id=1&Lang=3&site_id=1&page_id=2183&menu_id2=299> Accessed: 5/5/2013
[1368] This was discussed in Chapter 2, s.1

Although the JSC has financial autonomy,[1369] a considerable part of its financial resources comes from the General Budget[1370] which could expose it to the country's economic setbacks.[1371] In fact, it would be surprising if the JSC was financially independent while the country as a whole depends on international and domestic aid and loans.[1372] The financial dependency problem was acknowledged by *Mohammad Tash*, the JSC Chairman, soon after he was appointed in 2012. In an interview with the media, he stressed that his top priority is to regain independence for the securities market institutions.[1373] Thus the JSC's financial constraints would be one factor behind enforcement reluctance, particularly since the enforcement process is costly, either under the civil or criminal regime.[1374]

Apart from this, the critical problem in the risk-based approach adopted by the JSC is the reliance on companies' senior management in assessing their risks and in implementing effective systems and controls. If this approach has contributed to the FSA's regulatory failures, even though UK market players were familiar with regulation of financial services and thus capable of assessing their business risks, what would be the case with the market players in Jordan?

In fact, the lack of professionalism among Jordanian companies' board members has been acknowledged, and there are always calls for experienced board members to carry out managerial responsibilities,[1375] or at least to train others on risk-assessment methods

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[1369] SL 2002 art.7(A)

[1370] SL 2002 art.28(E) of SA provides that JSC resources consist of fees, fines, charges for the use of JSC facilities, donations and "the amounts allocated to the Commission in the General Budget."; Malkawi and Haloush (n 283)

[1371] A detailed argument in this regard can be found in: Carvajal A and Elliot J, 'Strengths and weaknesses in securities markets regulation: A global analysis' (n 127). Further, it was argued that the lack of regulator resource, or insufficient resource, is a key challenge in promoting market integrity, see: Friedman F and Grose C, 'Promoting access to primary equity markets: A legal and regulatory approach, May 2006, WB WPS 3892 at: <http://elibrary.worldbank.org/docserver/download/3892.pdf?expires=1329075935&id=id&accname=guest&checksum=F561B44550050FA0698E8F4E3A8E4B4C> Accessed: 12/12/2011

[1372] Piro T, *The political economy of market reform in Jordan* (Rawman & Littlefield Pub. 1998) 2. Piro stated: "Jordan of today owes a good deal of its longevity to Britain, the United States and the oil-rich Arab states…."

[1373] *Mohammad Tash* interview with Jordan News Agency, Petra, cited in: The Jordan Times, 'Capital market institutions lack professionals', 6 Feb 2012 at: <http://jordantimes.com/capital-market-institutions-lack-professionals> Accessed: 2/1/2013

[1374] This will be discussed in the next section on the economic benefits of fines compared to imprisonment.

[1375] A statement that was made by *Khaled Al Wazani*, then Head of the Economic Department of the Hashemite Royal Court, cited in: MENA Corporate Governance Workshop (n 1114). The call for training was reiterated in 2008, see: Steffens K, 'Recommendations for improving the compliance of Jordanian financial firms', 17 Jun 2008, USAID Jordan Economic Development Program (SABEQ) at: <http://pdf.usaid.gov/pdf_docs/PNADBM843.pdf> Accessed: 1/9/2011

and strategies.[1376] Although this might not be the situation in the banking sector, which has been well established since the 1930s and is under scrutiny and surveillance from the *Central Bank*,[1377] the problem arguably manifests itself in regard to other securities market players. It can be said, therefore, that the JSC is placing its trust in firms which lack sufficient experience to identify market risks.

As for the principle-based approach, the adoption of this approach could be easily inferred from the broad structuring of the SL 2002 as mentioned earlier. No doubt, the advantage of adopting this approach is to provide flexibility to the regulator in keeping abreast of innovation and development in the financial markets. However, the regulator should further explain, and provide detailed by-laws to add flesh to the SL of 2002 skeleton, which unfortunately has not been the case.[1378] Like the risk-based approach, the principle-based approach relies on the firms' senior management, which takes us back to square one, the human capital problem. If corporate senior managements were inexperienced in assessing their business risk in the normal course of events, how would they be able to deploy efficient systems and controls for inside information? How would they assess whether their information amounts to inside information or not? Further discussion on senior managers' inexperience and their economic influence will be provided later in this section.

The inexperience problem is not confined to senior managers;[1379] the JSC staff themselves need training to carry out their supervision and enforcement responsibilities.[1380] *Mohammad Tash*, the JSC Chairman, admitted that the decline in the JSC's qualified and professional cadre is one of the JSC's most critical challenges.[1381] This fact was highlighted within the disclosure obligation[1382] and substantive analysis of the prohibition regime that described the JSC's and the ASE's inexperience in understanding the regime and in issuing suitable by-laws.[1383]

[1376] MENA Corporate Governance Workshop (n 1114)
[1377] The role of the Central Bank in providing sound regulatory systems was acknowledged and highly applauded. See for example: MENA-OECD investment programme, 'National Investment Reform Agenda' (n 264)
[1378] A clear illustration was the JSC Disclosure Instruction 2004. See Chapter 3, s.2
[1379] MENA Corporate Governance Workshop (n 1114)
[1380] This was raised by JSC staff, see: MENA-OECD investment programme, 'National Investment Reform Agenda' (n 264); Steffens (n 1375)
[1381] From his interview cited in the Jordan Times (n 1373)
[1382] See Chapter 3, s.2. The deficiencies of the JSC disclosure regime were highlighted, as well as the lack of timely disclosure.
[1383] Chapter 4, s.2 showed that the JSC did not issue instructions to clarify statutory offences, and that its disclosure regime requires the disclosure of different type of information than inside information. ASE misunderstanding of its prohibition ambit was also discussed.

Thus the lack of experienced persons, highly skilled or professional, from two sides, the JSC and the industry, poses a severe problem in the SL of 2002 application and enforcement. This is particularly the case in sophisticated insider dealing cases where expertise and professionalism are greatly needed. The lack of familiarity with the regime, as legal and financial academics have said, is one of the reasons for weak enforcement.[1384]

In light of this discussion, it appears from the outset that the enforcement process would be a challenge for the JSC. It suffers from deficiencies in its independence (financially and politically[1385]), inadequate skilled staff, and weaknesses in the SL of 2002 prohibition regime.[1386]

5.2.2 The JSC investigation and enforcement regime

The SL of 2002 grants the JSC powers to conduct investigations[1387] and take actions[1388] against perpetrators either by using its administrative powers (disciplinary regime) or by referring the matter to the competent court.[1389]

5.2.2.1 The JSC investigations

The JSC investigations are closely linked to its market surveillance. It relies on monitoring market operations to identify suspicious transactions and then to conduct an investigation.[1390] However, tackling insider dealing and market manipulation should not be restricted to these methods. There should on-site visits from the JSC to assess the efficacy of firms' controlling measures, systems of inside information, and the integrity of persons having access to inside information.[1391] Conducting such inspections would help solve the problem by identify it at source, instead of waiting till the problem materializes. Thus, ensuring that firms have suitable controls for inside information to minimize or stop any possible leakage would be better than identifying and combatting offences already committed.

[1384] Berkowtiz *et al* (n 37)
[1385] A detailed argument in this regard can be found in: Carvajal A and Elliot J, 'Strengths and weaknesses in securities markets regulation: A global analysis' (n 127); Friedman and Grose (n 1371)
[1386] This was discussed in Chapter 4, s.2
[1387] SL arts.17 & 21
[1388] SL arts.19 & 22
[1389] SL art.22(D) of
[1390] Kulczak NASD Assessment of Jordan (n 30)
[1391] Carvajal A and Elliot J, 'Strengths and weaknesses in securities markets regulation: A global analysis' (n 127). In their assessment of countries, including Jordan, they stated: "…..on-site inspections are not a regular part of the supervisory program of the regulator, and the problem is acute concerning exchanges……"

In addition, the JSC should consider employing and enforcing effective disclosure mechanisms that ensure timely dissemination of inside information to the market. The JSC disclosure regime does not currently provide this, which undermines the objective of prompt and timely disclosure of inside information. While this situation persists, how can the JSC decide whether a suspect transaction was made prior to or post the regulatory disclosure? This critical problem of regulatory transparency can be added to the list of factors behind the JSC's hesitant enforcement process.

The Capital Market Institutions Monitoring Department (CMIMD) and the Surveillance Department, one of the JSC departments,[1392] monitor trading sessions on the ASE to identify any suspicious transactions, especially during the time prior to and post the announcement of information that affects securities' prices or the trading volume.[1393] Note that this focus merely on trading sessions could be because the SL of 2002 considers any slightly abnormal move of securities' prices an indicator of an insider dealing offence.[1394] Upon identifying a suspicious deal, the CMIMD will report this to the investigation authority.

According to the SL of 2002 the competent authority could be one of the JSC's own departments[1395] under its administrative hierarchy[1396], or the JSC might "enlist the service of experts and specialists in conducting investigations[1397]".

The latitude given to the JSC[1398] in entitling any of its departments to conduct investigations raises concerns about providing a consistent level of transparency, adequacy and rigour in the investigation's procedures and outcomes. And above all, there arises the problem of consistent interpretation of the broad basic articles of the SL of 2002, especially since the JSC has not provided any instructions, explanatory notes or

[1392] No detailed information is available for either of the departments about procedures and staffing, as SL 2002 does not specify JSC departments, nor does JSC provide a procedures manual. However, the mission statement for each department is typically published on the JSC website, at: <http://www.jsc.gov.jo/Public/english.aspx?site_id=1&Lang=3&Page_Id=2059&Menu_ID=165&Menu_ID2=160> Accessed: 1/2/2012

[1393] This was stated clearly under the Surveillance Department role at: <http://www.jsc.gov.jo/Public/english.aspx?site_id=1&Lang=3&Page_Id=2059&Menu_ID=165&Menu_ID2=160> (Accessed: 1/2/2012)

[1394] Chapter 4, s.2 discussed how one of the statutory requirements of the insider dealing offence is the effect the inside information has on the relevant securities price, regardless of its significance.

[1395] SL 2002 art.17(A)

[1396] Instructions of Investigating Violations of Securities Law, 2008 (hereafter: Investigating Instructions 2008) art.2 (Glossary)

[1397] SL 2002 art.17(D)

[1398] By virtue of Investigating Instructions 2008

guidance [1399] to help in setting forth the statutory requirements for each type of misconduct.

This lack of clarification is a critical problem, especially when JSC staff is inexperienced as already mentioned. It would therefore be a great help to issue a guidance or enforcement manual[1400] akin to the FSA's manual[1401] that provides detail and definition of minimum standards, includes each type of misconduct, the required elements, the procedures that should be followed during the investigation, [1402] the investigated person's right of defence, etc. By having such a manual, even if the department entrusted with the investigation were changed, or new staff members were recruited, this would not affect the consistency of the process or the outcomes.[1403]

In fact, the JSC Investigating Instructions of 2008 did not even provide any elaboration of or addition to the general investigation rules under the SL of 2002. Those instructions are merely repetition of the SL of 2002 provisions on giving the JSC latitude in appointing a "competent department" to carry out the investigation of detected violations or complaints to the JSC.[1404]

With regard to the investigation procedures, the investigation usually starts by serving a notice to the suspected insider/ abuser that includes a description of the potential violation, an invitation to a hearing of statements and for submission of any evidence.[1405] However the Investigating Instructions 2008 did not mention whether the concerned person's lawyer would be allowed to attend the investigation or not. Arguably this could be an issue of great importance, considering the lack of proper understanding, even among industry players, of what behaviours amount to insider dealing or market manipulation.[1406]

[1399] This was recognized by Kulczak NASD Assessment of Jordan (n 30)
[1400] Ibid, though this was recommended, JSC investigating instructions overlooked such recommendation.
[1401] See s.1 of this chapter
[1402] JSC was advised in 2004, see: Kulczak NASD Assessment of Jordan (n 30). However, to date, JSC has not issued any instructions, nor guidance categorizing specific types of market manipulation, nor provided examples of such abusive behaviours.
[1403] Carvajal A and Elliot J, 'The challenge of enforcement in securities markets: Mission impossible' (n 31)
[1404] JSC Investigating Instructions 2008 art.3(C)
[1405] SL 2002 art.21(A) of SA 2002 and JSC Investigating Instructions 2008 art.4(E)
[1406] This issue was brought up by JSC staff, who suggested the need for training workshops, not only for themselves, but also for professionals, judges and lawyer. See: Kulczak NASD Assessment of Jordan (n 30)

For investigation purposes, the competent authority would request any documents or papers relevant to the matter under investigation,[1407] which could be bank statements, correspondence, memoranda, computer files, or any other means of storing data whether written or electronic.[1408] For this, the JSC was granted powers to request documents from issuers, licensed and regulated persons,[1409] where the failure to comply with such a request is regarded as a violation of the SL of 2002.[1410]

After hearing the concerned person's statements and defences, hearing from witnesses and examining evidence, the investigating "competent department" will submit a report to the JSC Chairman on the investigation's outcomes. The report will include: "A description of the subject violation, the person or persons to whom the violation is ascribed, a summary of the procedures carried out, and the investigation's findings and recommendations[1411]". Note that "recommendations" (i.e. the sanctions) suggest that the investigator's role would to a certain extent overlap with the role of a decision maker or enforcer who would be entitled to choose the relevant sanctions. Such a situation conflicts with the principles of fairness and fair trial that require total separation between the investigation process and the enforcement.[1412] Further support for this concern can be found in the Investigating Instructions of 2008 stating that the JSC Board, upon concluding the investigation, might "approve the report[1413]" that includes the recommended sanction, or might reject it. This means that if the investigation report is approved by the JSC, the recommended sanction by the investigator will be enforced.

Drawing on this discussion, it is worth suggesting that the JSC needs to redraft the Investigating Instructions of 2008 to ensure a total separation between the investigation process and the decision making. The JSC also needs to ensure consistency in the investigation process a) by providing detailed procedures, and b) by nominating a specific entity to conduct investigations, so that its staff can enhance and develop their experience in dealing with market misconduct. In line with this, the JSC should consider issuing guidance[1414] for investigators to provide explanation and examples of prohibited behaviours, mainly insider dealing and market manipulation, and the types of evidence

[1407] SL 2002 arts.17(C), 18(B); JSC Investigating Instructions 2008 art.4(C)
[1408] SL 2002 art.15 (B)(C)
[1409] Ibid art.15(A)
[1410] Ibid art.18(A)
[1411] JSC Investigating Instructions 2008 art.5
[1412] This was required under the Law of Criminal Procedures of 1961
[1413] JSC Investigating Instructions 2008 art.7
[1414] This was recommended by Kulczak NASD Assessment of Jordan (n 30) but, to date, JSC has not issued such guidance.

that should be considered for each violation. Through this, the JSC would develop and enhance the experience of its staff.

Finally, and of great importance, is the recommendation to publish details of these investigations after being concluded. First of all, such publication would educate and enlighten both the industry and public awareness about what conduct was considered to be a violation, and how the JSC dealt and would deal with it. Also, by publishing their investigations, the JSC's own consistency and conformity with the law would be better ensured because the JSC's actions would be under closer scrutiny from the industry and legal advisors. Therefore, the public accountability of the JSC would be greater, and this would enhance confidence in the market. Having those investigations published would demonstrate the level of JSC transparency in dealing with market misconduct, and confirm that it applies the same measures and standards regardless of the identity of the people involved.

Whether there is currently an issue of inappropriate influence from market players on the JSC's enforcement actions will be discussed later in this section. Unfortunately, however, the JSC's investigations are "wrapped up with secrecy[1415]", raising concerns about transparency issues. The need to provide more transparency has been brought to the attention of the JSC since 2003, but it seems that market forces have not allowed implementing it.[1416]

5.2.2.2 The JSC enforcement actions

The JSC can take enforcement actions under its disciplinary regime and under the criminal regime of insider dealing and market manipulation[1417] by bringing an action to the competent court, "the Amman Court of First Instance.[1418]" However, the JSC has not yet made use of this option, up to the time of this research (December 2013).

The JSC under its disciplinary regime can apply one or more of the following sanctions for improper behaviour, including market misconduct: suspend or cease the activities of a licensed or registered person; suspend the public offering; suspend or cease activities related to securities or a specific security;[1419] issue a ceasing or desisting order for the

[1415] MENA Corporate Governance Workshop (n 1114)
[1416] This was raised in 2003 in MENA Corporate Governance Workshop (n 1114) and reiterated in 2004 in the NASD Market Surveillance Assessment (n 1348)
[1417] SL 2002 art.110
[1418] The court was specified in SL 2002 art.2
[1419] SL 2002 art.19(A)

perpetrator to forbid him from committing or attempting to commit a violation; issue an order requiring elimination of the violation;[1420] or impose a financial penalty.[1421]

The sanctions of the JSC administrative/disciplinary regime above would seem to be more appropriate, relevant and effective where licensed and regulated persons are involved (brokers, dealers or listed issuers). The effectiveness of the sanctions in deterring other insiders and manipulators (financial professionals, lawyers, any tipped person) would be less. Even the maximum fine of JD 50,000 (around £49,500) might easily fail to be proportionate to the seriousness of the breach or the illicit gains. Interestingly, despite all this, the maximum amount was imposed only once: in 2008, on an individual for violating Article 108 of the SL of 2002 (the Article prohibits insider dealing and improper disclosure).[1422] This sole enforced case was probably against an insider for committing insider dealing. It is difficult to confirm this because the JSC's publications of enforcement actions are very brief. For example, in the previous case, only what being mentioned was the name of the individual, the article he had violated and the imposed sanction. The difficulty in determining what type of offence he had committed is because more than one offence is regulated in the Article (insider dealing and improper disclosure).

Again therefore, issues of an absence of transparency manifest themselves in connection with JSC enforcement, as with JSC investigations. It is something, as was argued earlier, that hinders the main purpose of enforcement, namely deterrence. [1423] Enforcement actions are published within the JSC Annual Report in a manner that is "likely to focus more on trends rather than specific instances."[1424] Thus, for the reasons already mentioned in connection with JSC investigations, the publication of enforcement outcomes is vital. Publishing brief and low-detail accounts of enforcement actions once a year is insufficient and counter-productive.

This is not the only difference between JSC and FSA/FCA enforcement process. The FSA's final notices are provided throughout the year giving details of the misbehaviour, the legal rule that was violated, and the enforcement action. Two birds are thereby hit

[1420] SL 2002 art.21(A)(2)
[1421] SL 2002 art.21(A)(3). The level of fine was provided in art.22(A)
[1422] JSC Annual Report 2008, Appendix 2, table 35, p.81 (JSC Annual Reports (n 1062)). It was only mentioned that the person violated Article 108, without specifying what exactly his breach was (insider dealing or tipping?)
[1423] This was brought to the attention of the JSC in 2004 but has not yet been addressed. See NASD Market Surveillance Assessment (n 1348)
[1424] Ibid

by one stone: publication ensures regulatory transparency and accountability in dealing with the industry, and publication also enhances the industry's awareness of abusive behaviours and deters future offenders. To achieve these vital benefits, the JSC should publish its actions against offenders and insiders.

Another difference can be found in the variety of sanctions and the amount of the fines levied. The FSA, under its penalty regime, is able to escalate the amount of the fine depending on the seriousness of the behaviour, with a starting point of £100,000 in the case of individuals. On the other hand, the maximum fine that the JSC can impose under its disciplinary regime is half of the FSA's minimum amount. In the light of this, one might wonder to what extent the JSC's enforced sanctions are deterring effectively, if at all.

In connection with this, a general review of the JSC published enforcement actions under its disciplinary regime (against any regulatory violation) revealed that the same offenders had committed the same violation more than once, and that instances of the same sanctioned breach were increasing among industry players.[1425] It can be suggested that JSC sanctions are therefore failing as dissuasive/deterring sanctions.[1426]

In addition to tackling insider dealing and market manipulation using the disciplinary regime, the JSC can bring enforcement actions to the competent court[1427] under the criminal regime which was precisely created for both offences.[1428] Referring cases of alleged insider dealing and market manipulation to courts using the criminal regime arguably provides better levels of deterrence. The imposed fines would be up to JD 100,000 in addition to "a fine of not less than twice the amount, and not more than five times the amount, of profit made or loss avoided by the person committing the violation[1429]" and imprisonment for up to three years.[1430] The argument over the optimal deterrence by using the criminal regime will be discussed in the next section.

[1425] JSC Annual reports (n 1062)
[1426] In support of this rationale see: Carvajal A and Elliot J, 'The challenges of enforcement in securities markets: Mission impossible' (n 31)
[1427] Amman Court of First Instance (SL 2002 art.2) has criminal and civil jurisdiction, depending on the nature of the case, see The Formation of Ordinary Courts Law of 1952
[1428] SL 2002 art.110
[1429] Ibid
[1430] Ibid

However, the JSC since its creation in 1997[1431] has never used the criminal regime[1432] and there is no indication that it will refer cases to courts in the near future, probably for reasons that will be discussed hereafter.

In addition to all the aforementioned challenges facing the enforcement process, the criminal route in itself poses additional challenges, even for experienced regulators like the FSA. Proving the existence of criminal intention was always difficult and has hindered many prosecutions made under the CJA of 1993. If this was the case in the UK, how would it be for the JSC? Most probably, any attempt to enforce the criminal insider dealing and market manipulation process would fail. The JSC, due to its human capital problem, faces challenges not just in understanding the prohibition ambit, mainly in regard to the person committing the offence, but it also faces challenges in the enforcement procedures and the skills of the staff carrying out the process itself.[1433]. If the JSC has enforced only one action against an insider since 1997 through its disciplinary regime, which is less challenging than the criminal route, then it is no wonder that it chooses not to use the criminal process.

5.2.3 What went wrong? - Concluding thoughts

The discussion has shown that over the past 16 years, the JSC has taken only one action against an insider through its disciplinary regime, and until now has avoided the criminal route for any case.

It is a situation that raises many questions on the proper application and enforcement of the SL of 2002 prohibition regime. A situation of regulation that bans insider dealing and market manipulation without knowing how to be applied, or without the will to apply it, is arguably a situation tantamount to deregulation.[1434]

In regard to know-how, the earlier discussion showed that the JSC has serious problems in its staff[1435]. The human capital problem manifested itself as well in corporates' senior management who seemed to be incapable and unqualified, not just to assess their companies' risks, but also to fulfil compliance requirements.[1436] As *Khaled Al Wazani*,

[1431] Under the previous repealed SL of 1997
[1432] Malkawi B and Haloush (n 283)
[1433] This was highlighted in Chapter 3, s.2 (JSC disclosure regime) and in Chapter 4, s.2 (Jordanian statutory prohibition)
[1434] Support for this argument can be found in: Carvajal A and Elliot J, 'Strengths and weaknesses in securities markets regulation: A global analysis' (n 127)
[1435] In his interview cited in the Jordan Times (n 1373)
[1436] Kulczak NASD Assessment of Jordan (n 30)

then the *Head of the Economic Department of the Hashemite Royal Court* said, the problem gets worse if these senior managers were appointed by the government. This is because they are not just lacking in professionalism but also because "*it is difficult if not impossible to prosecute a government-appointed board member for corporate misdeeds.*[1437]" The statement could be applied to members of the JSC's own Board, who are appointed by the government with minimum experience of and skills in the financial markets.

During 2011 the JSC human capital problem was in the media: headlines criticised JSC's superficial market surveillance.[1438] Criticism went on into January 2012 when investors raised concerns again about the JSC's relaxed approach generally in market surveillance and its failure to identify and punish offenders.[1439] Thus, it is hard to anticipate having a sound enforcement mechanism in the near future.

As for the JSC being unwilling to enforce the law, in other words to take enforcement actions against perpetrators, this could have many reasons. One of them, arguably, is political influence and pressure. Political influence spreads through most aspects of Jordanian public life, whether in the form of elite politicians, senior public servants, or their families and friends. Individuals may be entitled through public positions to influence the general economic policy; they may be nominated by government to be board members; they may be managing their investments in the financial markets, either directly or indirectly. These elites, apart from being ignorant about financial regulation, exploit their positions in the companies to run them according to their own personal interests.[1440] They enjoy, as *Khaled Al Wazani* said, *"immunity from being caught by*

[1437] His statement was cited in: MENA Corporate Governance Workshop (n 1114)
[1438] For further details see published article of 19 Feb 2011 at: <http://www.ammonnews.net/articles.aspx?articleno=80700> Accessed: 1/3/2011
[1439] Investor and professional criticism of the JSC's role in controlling market transactions, which were, according to them, mostly manipulative transactions, resulted in the JSC Chairman stepping down on 10 Jan 2012. This was one headline in Media, for example: <http://khaberni.com/more-67710-1-%D8%A8%D8%B3%D8%A7%D9%85%20%D8%A7%D9%84%D8%B3%D8%A7%D9%83%D8%AA%20%D9%8A%D8%AA%D8%B1%D9%83%20%D9%87%D9%8A%D8%A6%D8%A9%20%D8%A7%D9%84%D8%A7%D9%88%D8%B1%D8%A7%D9%82%20%D8%A7%D9%84%D9%85%D8%A7%D9%84%D9%8A%D8%A9%20%20%D9%86%D8%B5%20%D8%A7%D9%84%D8%A7%D8%B3%D8%AA%D9%82%D8%A7%D9%84%D8%A9.> Accessed: 10/2/12. Interestingly, it was reported that the volume of trading rose 10% after his resignation. For details see: <http://www.amman-stock.com/threads/72971-أحجام-التداول-في-بورصة-عمان-ترتفع-بنسبة-10-7-بعد-استقالة-بسام-الساكت?p=187805#post187805> Accessed:15/2/2012. Investors blamed the JSC Chairman for leniency in punishing manipulators, which undermined their confidence in the securities market; see article published in Ammon News on 11/2/2012 at: <http://www.ammonnews.net/article.aspx?articleno=111021> Accessed: 7/2/2012
[1440] Muasher (n 265)

the law.[1441]" They may also take advantage of their political and economic power to manipulate public policy for their own benefit. *Muasher*, former Foreign Minister, pointed this out when he said:

> "*Political elites have become entrenched, powerful…, recalcitrant, self-appointed guardians of the state, who believe they alone should decide how the country ought to evolve.*[1442]"

This statement is very important not just for evidencing the "ugly truth" of politicians' influence, but also because it came from a politician who was involved as an architect of reform.[1443] *Muasher*, who was the *Head of the National Reform Agenda*[1444] in 2005, emphasised that politicians' influence was the main reason behind the failure of any reform, and since then all economic and political reforms have been merely vain attempts.[1445] Indeed, the massive influence of elite politicians reached a point where they considered King Abdulla II's directives as if they were open to their personal interpretations. This often resulted in either a watered-down version of reform or no reform at all.[1446] The King himself, in an interview published in the *Atlantic*, admitted struggling with those politicians resisting and hindering many reforms.[1447] This circumstance could explain why the prohibition regime under SL of 2002 was not developed and enforced, even though its promulgation was directed by the King.[1448]

If this is saying anything, it is saying that the problem goes far beyond the deficiencies in the JSC's enforcement process. It is most likely that the problem is one of endemic corruption, and at a level rooted deep in the system of the State itself.[1449] Also, it seems that the influence of corrupt elite is more powerful than any program of reform. They go with the flow, enact regulations that implement the international reform agendas of the *IMF* and *WB*, for example, but make sure that such reforms remain on paper, without any effective application and enforcement, as is the case with the JSC enforcement process.

[1441] As described in Chapter 2, sec.1, Jordan, being a rentier country, not only had to bow to international conditions, but, as Muasher said, it also had to provide privileges to elite politicians in exchange for their loyalty. See: Muasher (n 265)
[1442] Ibid
[1443] Marwan Al Muasher was Jordan's Foreign Minister and Ambassador to Israel.
[1444] Muasher (n 265); Jaradat (n 270)
[1445] Alissa (n 269)
[1446] Muasher (n 265)
[1447] Goldberg J, 'Monarch in the Middle', Apr 2013, The Atlantic at: <http://www.theatlantic.com/magazine/archive/2013/04/monarch-in-the-middle/309270/> Accessed: 15/4/2013
[1448] This was described in Chapter 2, s.1
[1449] This was clearly stated in the International Business Publication (USA) (n 208) 153

However, these forces are not the only obstacle to the enforcement process. Senior market players[1450] also have strong links with the politicians. This allows them to influence the policy decisions in the business sphere and relevant regulation.[1451] Given this situation, the leakage of inside information is likely to be endemic as long as family relationships or friendships (whether with politicians or other influential market players) dominate[1452] the markets. Business managers and owners often "have arm-length relations[1453]" that are capable of covering up their abuses and mistakes. This is something that *Mohammad Tash*, the JSC Chairman, considered to be an acute problem posing real challenges to the JSC enforcement actions and which it would take a considerable time to change.[1454] It is a situation of overly lax regulatory grip which explains why the market is fostering the interests of the powerful[1455] without being accountable.

To summarise, there are many contributing factors shaping the JSC's ineffectual enforcement process:

1) problems of independence: undue political and economic influences, mainly at a local level;

2) human capital: the lack of experienced and skilled persons, either on the JSC staff or among senior managers of firms;

3) transparency issues on all levels, especially in JSC enforcement actions;

4) the lack of clarity of the SL of 2002, with no further elaboration from the JSC, and the lack of clarity in publishing details of investigations and enforcement.

[1450] Harabi (n 1096) Note that Harabi, in his working paper, focused on the situation in Jordan, among other countries.
[1451] Ibid
[1452] Ibid. Harabi states in this regard: "Ownership concentration implies that the corporate takeovers only take place in a friendly environment."
[1453] Ibid
[1454] In his interview cited in the Jordan Times (n 1373)
[1455] Ibid, *Mohammad Tash*, the JSC Chairman, refers to this as a dominant culture in the market that must change. According to him, this is another challenge to the JSC.

5.3 Section 3: Assessing the Effectiveness of Enforcement Actions against Insiders and Abusers - credible deterrence through the criminal or civil route?

Considering the lack of any financial statistics and empirical research in this area, a definite answer would be impossible. But the FSA measures for market cleanliness could shed some light. The measure for takeover analysis shows a decline in suspicious movements prior to a takeover announcement. This measure fell from 30.6% in 2009, when the FSA started using its criminal enforcement powers more vigorously, to 21.2% in 2010, and then to 19.8% in 2011, which is the lowest level since 2003.[1456] This suggests that the criminal regime provided a sound and more credible deterrent than the civil market abuse regime. Support for this argument can be found in the legal and economic academic arguments presented hereunder.

In the area of regulatory enforcement there has been a long dispute between proponents of deterrence and compliance models.[1457] Supporters of deterrence argued that corporations' compliance would not be achieved except through aggressive sanctions, while those favouring compliance believed that persuasion would best secure compliance.[1458] In 1992, *Ayres* and *Braithwaite* presented the "responsive regulation" theory which proposed an interesting balance between compliance and deterrence theories.[1459] The crux of their responsive or "tit-for-tat" approach to regulatory enforcement was to secure compliance through persuasion first, but if and when the regulated firms failed to comply, regulators should use more punitive deterrent measures.[1460] In that process, regulators' actions to secure compliance would escalate upwards through a pyramid of sanctions, starting from the pyramid base (education and persuasion) and then, by degrees, to the top where criminal prosecution or loss of license[1461] could occur. This escalation, of course, requires the regulator to hold a variety of sanctions in his armoury.[1462]

Although the responsive approach seemed to provide an effective enforcement mechanism, the question still arises whether it would be effective against financial

[1456] See FSA Annual Reports for the years 2010/2011 and 2011/2012
[1457] Ayres I and Braithwaite J, *Responsive regulation: Transcending the deregulation debate* (Oxford University Press 1992) 20-25
[1458] Ibid; Baldwin and Black, 'Really responsive regulation' (n 1212)
[1459] Ayres and Braithwaite, *Responsive regulation* (n 1457) 20-25
[1460] Ibid
[1461] Ibid
[1462] Ibid

insiders and abusers. *Ayres* and *Braithwaite* had not examined their responsive approach in the financial areas and their enforcement pyramid was a two player game (the regulator and regulated) with a rationale that dialogue and persuasion would be more fruitful than reaching the pyramid top.[1463]

The two player game is hard to conceive of as applied to the financial industry, where financial transactions are numerous and market players are difficult to identify personally.[1464] Arguably for this reason, *Ayres* and *Braithwaite* concluded that the enforcement pyramid is "inapplicable to banking or affirmative action regulation.[1465]" Also insiders and abusers arguably do not care about compliance; rather they care about securing their illicit profits[1466]. As the prominent economist *Becker* said, they will not be deterred by persuasion or even civil penalties unless the coast of punishment exceeds the expected gain.[1467] In line with this, *Braithwaite* argued that mere persuasion fails with business actors who are motivated by profits. He added that they will also exploit the policy of persuasion because of *Becker'*s economic calculation, and because they do not care about breaking the law.[1468]

Thus, it can be concluded that the *"benign big gun"* regulator who speaks softly with the industry while carrying a big stick will not deter insiders and abusers unless he shows he can use the stick. This takes us on now to examine whether the financial civil sanctions under the market abuse regime would offer an effective deterrent or not.

Monetary sanctions are probably the most widely used tools in society for punishment, deterrence and compensation, starting from "fines for breaking the speed limit, to compensation for injury or assault."[1469] The effectiveness of monetary sanctions in deterring crime is confirmed by economic analysis of the criminal law.[1470] *Becker's*

[1463] Baldwin and Black, 'Really responsive regulation' (n 1212); Braithwaite J, 'The essence of responsive regulation' (2011) 44 U.B.C. Law Journal 475

[1464] The same reason was used to explain why responsive regulation did not work in the securities markets. See: Smith D, 'A harder nut to crack? Responsive regulation in the financial services sector' (2011) 44 U.B.C. Law Review 695

[1465] Ayres and Braithwaite, *Responsive regulation* (n 1457) 36

[1466] Support for this argument can be found in: Posner R, 'An economic theory of the criminal law' (1985) 85 Columbia Law Review 1193

[1467] Becker G, 'Crime and punishment: An economic approach' (1968) 76 Journal of Political Economy 169

[1468] Ayres and Braithwaite, *Responsive regulation* (n 1457) 24,30; Braithwaite (n 1463)

[1469] O'Malley P, *The currency of justice: Fines and damages in consumer societies* (Routledge 2009) 1

[1470] The analysis was rife in the eighteenth and early nineteenth century, stimulated by the work of Beccaria and Bentham and their deterrence theory. For more see: Beccaria C and Bentham J, An essay on crime and punishment, (Philadelphia: Philip H. Nickin, 1819) The book was translated from Italian to French then English. An e-copy is available at: <http://constitution.org/cb/crim_pun.htm> Accessed:

work on the economics of crime concluded that a fine is the most efficient penalty.[1471] He explained that deterrence could be achieved optimally without costs by imposing fines. On the other hand, penalties like imprisonment simply add the costs of imposing such a punishment to the costs of the harm already caused by the offender.[1472]

Economists confirm that the costs of regulatory inspections, collecting evidence, criminal trials and imprisonment itself are massive. Fines, however, are costless: they transfer the illegal profit from the offender back to society. [1473] Accordingly, imprisonment should not be used unless the offender is unable to pay the fine,[1474] or if the maximum possible limit of fine is inadequate[1475] to the offence.

Becker argued that public policy in combatting illegal behaviour depends on two variables. The first of these are the aforementioned expenditures that the state and society will encounter.[1476] Applying this variable to the case of insider dealing and market abuse, *Becker's* argument seems coherent, considering the difficulties of proof and the risks of not securing a conviction after a long process of investigating, collecting evidence, deploying highly skilled human capital, and trials. Even if the prosecution succeeds, the imprisonment itself, as argued, is costly. This argument will be further assessed hereunder.

The second of *Becker's* variables is the size of the imposed fine, which is considered of great importance because of its close link with the deterrence strategy. The nub of this economic argument, according to *Becker*, is that an offender who contemplates committing a crime will not be deterred unless his expectations of the punishment costs exceed his expected gains.[1477] Applying this perspective to a case of insider dealing, a potential insider will be calculating the illegal financial benefits he might secure from insider dealing, bearing in mind the possibility of being caught, compared with the legal gains he can make if he uses his time, skills, resources and other activities legally. Thus, he will not be deterred unless the imposed fine exceeds his profit expectations. At this

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15/1/2013; Bentham J, *An introduction to the principle of moral and legislation* (Dover Publications 2007) The book was first published in 1780.

[1471] Becker (1467)

[1472] Ibid

[1473] Ibid; Werden G and Simon M, 'Why price fixers should go to prison' (1987) 32 Antitrust Bulletin 917

[1474] Becker (1467)

[1475] Polinsky M and Shavell S, 'The optimal use of fines and imprisonment' (1984) 24 Journal of Public Economics 89; Werden and Simon (1473)

[1476] Becker (n 1467); Posner (n 1466)

[1477] Becker (n 1467); Coffee J, 'No soul to damn: No body to kick: An unscandalized inquiry into the problem of corporate punishment' (1981) 79 Michigan Law Review 386

point, *Becker* concludes that, *"some persons become criminals, therefore, not because their motivation differs from that of other persons, but because their benefits and costs differ.*[1478] *"*

Becker's economic variables, arguably, could provide a coherent justification for the FSA's tendency towards using fines prior to and post the banking crisis. The question is, therefore, did fines under the civil market abuse regime effectively deter abusers and insiders? Assessing *Becker's* economic argument will be the starting point in trying to provide an answer.

As for the argument that imposing fines is costless, it could be argued that any enforcement process in a case of market abuse and insider dealing costs a great deal of money, whether pursued under the civil law or the criminal law. The costs mount up, not just the costs of recruiting professional, highly skilled persons and specialists in those sophisticated cases, but the costs of the software and technical systems that the regulator will use for analysis of financial markets.[1479] Another consideration in relation to the argument about 'costless' fines is what if the perpetrator is unable to pay?[1480] Isn't that yet another cost to society in addition to the illicit gains ripped off by the offender and the enforcement process costs? It could be argued that imposing fines is far from costless for regulators and an injured society.[1481]

As for the amount of fine levied, *Becker's* economic calculation would be sometimes difficult to apply, given a requirement for proportion between the amount of the fine and the offender's wealth.[1482] Sometimes it would be difficult to calculate the amount of fine because the offender managed to hide part of his illegal wealth. Therefore, the imposed fine would be less than the offender's illegal gains, which reduces the fine's deterrent effect. On the other hand, what if the imposed fine exceeded the wealth ceiling of the offender? It would be a serious problem in regard to deterrence, unless as Coffee said, deterrence was achieved by incarceration.[1483] *Coffee* clarified this:

[1478] Becker (n 1467)
[1479] For example, in Sep 2012 the FSA bought SMARTS (market surveillance system) from NASDAQ, to further enhance market monitoring and detection of suspicious insider dealing and market abuse. See NASDAQ, 'NASDAQ OMX to Provide UK Financial Services Authority (FSA) with SMARTS Integrity to Enhance Market Surveillance Capabilities', 10 Sep 2012 at: <http://ir.nasdaqomx.com/releasedetail.cfm?ReleaseID=705876> Accessed: 1/4/2013. Although the price was not stated, such software is usually very expensive.
[1480] This is what Coffee described as the deterrence gap. Coffee , 'No soul to damn' (n 1477)
[1481] Support for this argument can be found in: Werden and Simon (n 1473)
[1482] Ibid
[1483] Coffee, 'No soul to damn' (n 1477)

> "*Wealth boundary seems an absolute limit on the reach of deterrent threats… If the "expected punishment cost" necessary to deter a crime crosses this threshold, adequate deterrence cannot be achieved*[1484]"

The discussion on the deterrent effect of fines from an economic perspective deserves an attempt to address the issue from the insider's angle. The insider, as mentioned, will make his economic calculation and reach his decision on committing the offence or not. He might consider any imposed fine, if he is caught, as some sort of business cost or levied tax that should be paid as part of the normal course of events. In the same vein, the *Times* stated:

> "*The threat of fines from the FSA is seen as a footling expense, just another cost of doing business, no different from paying the quarterly phone bill… There is not much shame in being on the receiving end of a fine… In some areas, this has proved inadequate in providing better behaviour*[1485]"

Based on this discussion of the fine as a deterrent tool, it can be concluded first that fines are not costless, and second, that the economic calculation of the amount of fine would not be efficient in practice. This would be the case particularly in cases where the regulator escalates the fines but discovers that "no financial deterrent can make compliance economically rational." [1486] Therefore, it can be argued that criminal sanctions, especially imprisonment, would provide better deterrence.

Corrupt insiders are arguably no better than thieves. They intend simply to steal from investors and consumers to secure illegal profits when they should be, as corporate insiders, trustees for their money. Insiders, through their dealings, damage market integrity and erode investors' confidence, specifically when investors see their savings being transferred illegally to insiders.[1487] Why, it should be asked, is a thief sent to jail whereas an insider is not? Both behaviours are similar: stealing money owned by others. Insiders are even more harmful than common thieves: their illegal dealings do not merely affect investors but can have an adverse effect on the national economy.

[1484] Ibid
[1485] The Times, Donovan J, 'High time to hit the City cheats very hard', 7 July 2009 at: <http://royaldutchshellplc.com/2009/07/07/high-time-to-hit-the-city-cheats-very-hard/> Accessed: 2/5/2013; Armour J, Mayer C and Polo A, 'Regulatory sanctions and reputational damage in financial markets' (2011) at: <http://ssrn.com/abstract=1678028> Accessed: 4/4/2012
[1486] Braithwaite (n 1463)
[1487] Werden and Simon (n 1473)

Sending insiders and abusers to jail would be the optimal deterrent. Imprisonment would not be a material thing (money) that the insider could tolerate losing; rather it would be the loss of his personal freedom if he was jailed.[1488] The sanction would reach him physically. It would also include the humiliation of reputational damage resulting from public exposure.[1489] As *Young* stated:

> "*It is the prison that is seen as the proper punishment; penal values shift from the focus on resources to… body… and attack that aspect which is most highly valued… autonomy… freedom*.[1490]"

This sanction should apply also to corporate individuals. After all, a firms' work is carried out through decision making strategies and operational controls that senior managers put in place.[1491] Otherwise, the shareholders would suffer from the imposed fine. As *Martin Wheatley*, the FCA Chief, stated: *"To be honest, for the banks that make billions of pounds in profits, whatever the level of fine, it will get passed on to the shareholder.[1492]"*

Further support for this argument, although from different area, can be found in *The English Traffic Law Review Report.* This highlighted the hazards of allowing corporations to pay traffic infringements on behalf of their employees. It reported that the meaning of the fine was abolished: instead of being a punitive it became merely business expenses.[1493] Thus, to achieve credible deterrence, corporate employees should not merely be fined but included in the imprisonment ambit.[1494]

It could be argued, therefore, that spending time in jail and the stigmatization of being criminally convicted would be the most effective deterrent. If the argument for stigmatization is applauded in cases involving white-collar criminals,[1495] why not invoke it for insiders and abusers? Their misconduct is arguably no less harmful. This

[1488] O'Malley (n 1469)
[1489] Armour *et al*, 'Regulatory sanctions and reputational damage in financial markets' (n 1485)
[1490] Young P, 'Punishment, money and a sense of justice' in Carlen P and Cook D (eds), *Paying for crime* (Open University Press 1989) Although Young's argument relates to crimes of passion and 'base' human behaviour (rape, for instance), his justification of imprisonment is equally pertinent to insider dealing and market abuse cases.
[1491] Coffee, 'No soul to damn' (n 1477)
[1492] From his press conference cited in the Guardian (n 1282)
[1493] Home Office, Road Traffic Law Review Report, 12 Apr 1988, p.133, cited in: O'Malley (n 1469)
[1494] In corporate literature there are two main 'schools' in the debate over whether to penalize corporate offenders or the corporation itself. The Chicago school favours corporate punishment, arguing that if penalties are sufficiently severe, the corporation will be deterred. Coffee, for the second school, favours penalizing corporate individuals. See: Coffee, 'No soul to damn' (n 1477)
[1495] It was suggested that stigmatization is the optimal deterrence for middle class perpetrators. See Blumestin A and Nagin D, 'The deterrent effect of legal sanctions on draft evasion' (1977) 29 Stanford Law Review 241

was indeed highlighted during the passage of the Companies Bill of 1979 which introduced the criminal insider dealing offence in the UK for the first time. It was stated that insider dealing is not just grossly unfair to investors and shareholders, but it deeply threatens public confidence in corporate directors and the securities industry.[1496] During the Bill's passage, the Parliamentary debate explored the reasons for criminalizing insider dealing: inter alia, the necessity of achieving credible deterrence. Insider dealing was described as "*an abuse which needs to be deterred by the force of crime*.[1497]" Although criminalizing insider dealing was controversial at that time, the government was in favour of criminalization[1498]. This stance is supportive evidence for the criminal regime's efficacy in tackling insiders and abusers more effectively than the civil regime.

The threat of reputational damage[1499] and stigmatization, let alone the prospect of imprisonment itself, would change the calculations of any insider intending to commit a crime. Such criminal sanctions would deter not just the individual, but would also send an effective deterrent message to the whole industry. As *Werden* and *Simon* argued, the prison sentence is, apart from its effect on the offender himself, more newsworthy than fines.[1500] It attracts huge media coverage, by which the deterrent message is best conveyed to other market players. In addition, such coverage would arguably enhance investors' confidence when they know that offenders will be reliably sanctioned.[1501] In fact the FSA has used the policy of "naming and shaming" not just in publishing its final notices for market misconduct but also through the media, especially when it came to its dawn raids on insiders.

As for the high costs of imprisonment sentences compared to fines, the additional imposed fines and disgorgement could cover these costs at least partially. In addition, the prison sentence should not be for too long a period of time. As *Coffee* stated, the period is irrelevant, considering that the stigmatization in itself is sufficient deterrent.[1502] Consequently, the costs of imprisonment can be minimized by imposing short sentences.

[1496] HC Deb., Companies Bill (Second Reading), Oct 1979, Vol.972, cc.94
[1497] HC Deb, Companies Bill [Lords] (Second Reading), Oct 1979, Vol.972, cc.77, cc.52, 160. Also see: White Paper, Company Investigations, Aug 1990 (Cm 1149) at 18, in which the government argued that criminalizing insider dealing was necessary to protect the public interest.
[1498] HC, Companies Bill (Second Reading), 20 Nov 1978, Vol.958, c.953, cc.929-1056
[1499] For further discussion of reputational damage, see: Armour *et al*, 'Regulatory sanctions and reputational damage in the financial market' (n 1485)
[1500] Werden and Simon (n 1473)
[1501] Ibid
[1502] Coffee, 'No soul to damn' (n 1477)

In sum, the recommendation can be made that credible deterrence would be best served through the criminal regime. In the financial markets where greedy insiders and abusers are driven by the power of money and the size of their bank accounts, monetary sanctions should exist but be accompanied by criminal sanctions. Any potential insider should be mindful of the threat of imprisonment which the regulator has every intention of using. In other words, his calculations of the crime should include risking his freedom and reputation. The FSA found from its experience in dealing with market misconduct that the civil market abuse regime was not effective in providing sound deterrence. *Margaret Cole*, then the FSA Director of Enforcement, emphasised this:

> "*Hector, Callum and I recently appeared before the Treasury Select Committee to give evidence about market abuse. We were asked whether we felt that the City of London takes market abuse seriously enough. Sadly our response was "No"… We felt that the threat of civil fines hasn't worked as well as we would have liked. We're very convinced that the threat of a custodial sentence is a much more significant deterrent.*[1503]"

[1503] From Margaret Cole speech, 'How enforcement makes a difference' (n 1249)

5.4 Summary

This chapter examined the challenges facing the enforcement processes and actions of the FSA and the JSC. The discussion of the two regulators' enforcement experiences addressed the most critical areas that influence the effectiveness of the enforcement process. It was found that both regulators, to varying levels, have problems regarding their independence (political, economic and financial) which in turn affect their implemented approaches to regulation and enforcement. The political context was found to have most impact. As it was stated: *"A regulatory agency that is legally able but politically unwilling to fire its big guns might get enormous mileage in management of the appearance of invincibility."*[1504]

This issue of the political will influence was very challenging for the FSA. The FSA's changed approach and policy towards enforcement in the aftermath of the banking crisis proved that, regardless of all the challenges discussed in the chapter, the FSA was capable of enforcing regulation effectively when it decided to. Significantly, this occurred when the FSA was given the green light to tighten its grip on market misconduct.

The nature of regulation itself raised challenges for both regulators. In the UK, consideration of market abuse of criminal nature exposed difficulties in proving the offences as with the case of criminal insider dealing offence. Similar challenges are found in the Jordanian regime.

In addition to these challenges common to both countries, the JSC have more difficulties. The Jordanian prohibition regime as a whole suffers from a lack of clarity which makes it difficult first to understand and then to enforce.

In regard to the importance of having skilled human capital, it was found that not only do the JSC cadres need training but also the senior managers of firms. While this is the situation, it will be difficult to have proper compliance and enforcement of regulation. Human capital inefficacy was not a problem in the UK. The FCA, and formerly the FSA, both acknowledged the need to employ highly skilled specialists and experts for market surveillance and for the enforcement process. Both agreed on the need to attract

[1504] Ayres and Braithwaite (n 1457) 45

and retain "professionals and dedicated staff, equipped with skills and knowledge to tackle the difficult and sophisticated issues like insider dealing and market abuse[1505]".

The JSC also lacks transparency in clarifying its implemented approaches and in publishing its enforcement actions.

All of these considerations go towards explaining one of the research issues: why the JSC did not take enforcement actions against insiders and manipulators.

As for the second research issue, namely the effectiveness of the FSA's enforcement actions, and whether using the criminal route enhances the level of deterrence, Section 3 contended that credible deterrence will best be achieved through the criminal regime. This indeed is what the FSA used to do and the FCA is intending to do. Therefore, the question over the effectiveness of the UK regulator's enforcement actions is answered, suggesting that a criminal regime provides a better level of deterrence.

This section therefore sums up the answers to two research issues: the lack of enforcement actions against insiders in Jordan, and the effectiveness of the UK civil and criminal prohibition regimes.

[1505] FCA Approach to Regulation (n 1197)

Chapter 6 Conclusion and Recommendations

6.1 Outline of Thesis Conclusions

The aims of this thesis were to present a critical analysis of Jordan's insider dealing and market abuse prohibition regime, then to assess the effectiveness of that regime. To achieve these aims, the study adopted a comparative-analytical methodology to compare the UK and Jordanian prohibition regimes. Using this methodology, it was possible to view the Jordanian prohibition regime in a wider context, and subject it to deeper scrutiny. For this, the UK and Jordanian prohibition regimes were compared in terms of "law on the books" (statutory prohibition) and "law in action" (enforcement). This included an assessment of the argument, by law and finance scholars, that the key determinant of an effective and sound legal regime is the legal environment within which it sits.[1506]

In conducting the critical analysis of "law on the books" (statutes) and "law in action" (enforcement in practice), four Comparison Criteria were employed throughout:

(i) the financial regulator's independence

(ii) the clarity of regulation

(iii) adequacy of human capital

(iv) regulatory transparency (with regard to proposing and promulgating statutory prohibition, and promptly disclosing inside information to market investors on an equal footing)

The subject choice for this thesis was influenced by the need to logically examine prohibition regimes in the UK and Jordan in order to answer the Research Questions (section 1.5).

Chapter 2 explained how and why the UK and Jordanian financial regulators and prohibition regimes developed, and how they currently exist. It described the historical events in their legal context, as well as factors which affected the creation of the financial regulators in each country. It was found that each country had different reasons for creating and developing its financial regulatory model: the Twin Peaks structure in the UK, and the Institutional Structure in Jordan.

[1506] Siems M, 'Legal origins' (n 36) ; Berkowtiz *et al* (n 37); Pistor *et al* (n 40)

In the UK, the reasons were: financial scandals (insider dealing); the way financial services were conducted (the move towards integration); the dominance of self-regulation in the 1980s; and the prominent global position of the UK financial market, and the need to maintain this by implementing globalization requirements.

By contrast, in Jordan, the main reason was the need to conduct financial reforms prescribed by the *WB* and the *IMF* financial reform programs, in order to be granted aids and loans. The study showed how these international reform programs carried with them the same globalization requirements – for market integrity and investor confidence – that were found in the UK. As the chapter recognised, this represents a form of legal transplantation, which, as law and finance scholars contend,[1507] can have adverse effects.

Apart from national differences in factors that influence the choice of financial regulator structure, the political will in both the UK and Jordan has adversely affected regulator independence in both countries. This was highlighted using Comparison Criterion (i) – the financial regulator's independence – which also showed (in Chapter 5) how the enforcement approaches and actions of both regulators were affected.

The Chapter then discussed the theoretical genesis of the UK and Jordanian prohibition regimes to counter insider dealing. It found that prohibiting insider dealing in both countries had initially stemmed from fiduciary theory, then developed to be based on the parity of information. However, in contrast to Jordan, developments in the UK were more clearly linked to financial reforms of statutory prohibition. Key indicators of regulatory transparency in the UK, which were missing in Jordan, included: government proposals for regulations and their reform; Parliamentary debates during the passage of legislation; and consultations and discussions between government and the financial industry. The absence of such transparency in Jordan posed challenges throughout this study. By identifying the evolution of Jordan's financial regulator and the development of its prohibition regime, the study answered Research Question 1) – *Why was insider dealing prohibited in Jordan?* – International financial reform programs were the most influential factors in creating the regime.

Chapter 3 examined the disclosure regimes enforced by the UK and Jordanian financial regulators. The disclosure regime was considered the front line in tackling insider dealing. Therefore, the main aim was to identify the extent to which disclosure regimes

[1507] Berkowtiz *et al* (n 37)

control and prevent possible leakages – to ensure prompt disclosure of new information to the market, equally and in a timely manner. In other words, to identify the level of transparency provided under each regime. It was found that, although both countries have enforced disclosure obligation on issuers many deficiencies and loopholes were identified in the Jordanian regime. In addition, there was a lack of regulatory mechanism to ensure timely disclosure, and this rendered the disclosure policy hollow. Under the current Jordanian disclosure regime, the imposed obligation on issuers does not either: cover all persons having access to inside information effectively; control how this information is handled within the issuer; or control its subsequent release through regulatory channels. Thus, parity of information is compromised, as leakage is likely, and, more critically, the time at which an offence was committed is difficult to determine. If, under the disclosure obligation, the exact time that inside information was disclosed to the market cannot be determined, how can the regulator decide whether behaviour was based on inside information prior to, or post disclosure? The chapter posed this key question, and linked it directly to ill enforcement actions and to issues of human capital, arguing that low levels of experience and skill among staff in the Jordanian regulator (the JSC) were a critical weakness in implementing an effective disclosure regime.

The question of professionalism was also raised during the substantive analysis of the Jordanian prohibition regime (legal rules) in Chapter 4, which showed how legal institutions were unfamiliar with the prohibition regime that had initially been created to fulfil the requirements of international reform programs. Such problems did not exist in the UK, because the establishment of the prohibition regime benefitted from the UK's long experience in regulating financial markets, and the need to maintain investor confidence in their integrity. The UK disclosure regime therefore provided better control over the release of new inside information to the market, and better levels of transparency. In this respect, the UK disclosure regime can inform, inspire and shed light on proposals to reform the Jordanian regime.

Chapter 4 analysed substantively the UK and Jordanian statutory prohibition of insider dealing and market abuse / manipulation. The main purpose was to assess the clarity and effectiveness of the enacted legal rules – "law on the books". When analysing the UK and Jordanian regimes, it was found that the nature of the UK prohibition regime was clear – criminal and civil – though the civil nature of market abuse had been challenged. By contrast, in Jordan the sanctions for offences, under the SL of 2002,

were the only way the nature of those offences had been defined. Because of this, it was found that similar abusive behaviours were considered both criminal *and* civil, which, it was argued, raised barriers to proving offences and enforcing the regime. In terms of clarity as well, the analysis showed that the statutory requirements for offences under the CJA of 1993 and the FSMA 2000 were clearly defined, unlike those under the SL of 2002. Unclear drafting of the SL of 2002 affected the understanding of its meaning, and of the ambit of statutory prohibition. It is most likely contributed in the lack of enforcement.

Chapter 4 also highlighted the inefficacy of the legislator, and its unfamiliarity with this area of market misconduct. Inefficacy was identified in the JSC's misinterpretation of its prohibition ambit, through its use of incorrect statutory definitions – of '*insider*', '*inside information*', etc. – and in its failure to issue any instructions to explain and detail the scope of statutory prohibition, despite being required to do so by the SL of 2002. Inexperienced staff and lack of professionalism were attributed to the fact that the creation of Jordan's prohibition regime had been influenced by the *IMF* and *WB* financial reform programs, not by local financial needs.

By contrast, evidence from the FSA illustrated the financial regulator's vital role in elaborating and explaining the general prohibition ambit of the FSMA of 2000. The FSA not only issued a Code of Market Conduct, but also – through its newsletters, market watch and other documents – provided guidance to market players on the prohibited behaviours that would constitute market misconduct.

The aforementioned critical role of the financial regulator should therefore be recognised and reappraised in Jordan, particularly because, as in the UK, Jordanian statutory prohibition is principle-based. In this respect, regulation merely provides the broad scope of prohibition, and leaves further explanation and elaboration to the financial regulator. This gives the regulator the flexibility to develop its actions in line with the development of financial markets. The chapter argues that the concept of principle-based regulation was not appreciated by the JSC.

In Chapter 4 the comparisons between the two prohibition regimes highlight the following major differences:

1) Insider dealing is comprehensively regulated in the UK (CJA of 1993 and Part VIII of the FSMA of 2000), while in Jordan few articles (108,109,110 of the SL

of 2002) relate to this type of behaviour. Those few articles are arguably not enough to tackle insider dealing, considering its major negative impact on investor confidence and market efficiency.

2) The definition of 'Insider', under UK regulation, is precise and specific, and includes primary and secondary insiders, whereas the SL of 2002 definition of 'Insider' retained the classical view, that fiduciary duty could be the basis for prohibition. In fact, though the SL of 2002 used the term "person", not insider, the analysis in this chapter showed that insider definition was the benchmark for the JSC.

3) The concept of 'tippees', and liability requirements, are well established under UK regulation, while the SL of 2002 is ambiguous about this issue.

4) Insider dealing in the UK constitutes a form of market abuse behaviour, in addition to being a criminal offence, and thereby extends the scope of prohibition and the ability to impose criminal *and* civil sanctions. In Jordan, by contrast, insider dealing is a criminal offence and expected to be challenging, in terms of securing evidence more than the case in the UK.

5) The meaning of inside information is explicit in UK regulation, i.e. non-public price-sensitive information. However, the SL of 2002 use of more than one term for 'information' (material, confidential and inside information) in different articles, together with weak drafting, all made it difficult to decide what was intended by the regulator. In this way, the chapter answered Research Question 2) – *Is the recently introduced Jordanian law effective?* – on the effectiveness and clarity of Jordanian statutory prohibition.

Chapter 5 attempted to identify the underlying factors that influenced the approaches of the UK and Jordanian financial regulators, to enforcing statutory prohibition, and their enforcement actions. In order to consider these factors, the chapter assessed the effectiveness of the UK and Jordanian prohibition regimes in tackling insider dealing and market abuse.

By analysing UK prohibition regimes (criminal, civil and the FSA's disciplinary regime), the study found that the most important factors impacting the effectiveness of prohibition regimes were: problems associated with regulator independence; the very wide-ranging remit of the FSA in regulating the business of a massive industry; the controversial nature of the market abuse regime; and blind faith in the ECMH.

Nevertheless, political and economic factors were arguably the most influential. Neo-liberalism and global competitiveness – which the political climate fostered – leading to lax regulation and enforcement prior to the banking crisis, were the FSA's key problems. In evidencing this, the chapter argued that although the previous factors remained in the aftermath of the banking crisis, the FSA did manage to enforce the prohibition regime very effectively (when the 'political will' encouraged this).

This conclusion answered Research Question 3), on the effectiveness of the UK prohibition regime and whether enforcement provided credible deterrence – *After decades of prohibiting insider dealing, has the UK legal framework succeeded in tackling insider dealing and market abuse effectively?*

The same problem of independence was seen to affect JSC enforcement policy and actions. However, the chapter argued that problem of independence was more acute in Jordan. Political resistance to moving reforms from paper to action was highlighted. The role of politicians in freezing the enforcement of prohibition was a result of their conflicting roles as decision makers on the JSC Board, or as managers of elite issuers. Another aspect of independence that was seen to be common to both UK and Jordanian regulators, was their limited financial resources, which impacted on their enforcement actions.

The chapter showed how independence was not the only factor affecting JSC enforcement. Lack of regulation clarity, the problems of inexperienced and unprofessional staff, and regulatory transparency, had all contributed, and resulted in lack of enforcement actions against insiders and abusers.

The chapter finally within the assessment of the effectiveness of enforcement under the civil and criminal regimes advanced using the criminal regime if to achieve better credible deterrence and reduce the rate of insider dealing. This aimed at answering the research question 4): whether the UK prohibition regime is effective in tackling insider dealing.

In light of all of this, and based on the findings identified above, this study is able to conclude with insights into two key issues:

1) To explain why the prohibition regime to counter insider dealing was established in Jordan, yet not enforced. This goes to the heart of the Research Questions, and was the main reason for undertaking this study.

2) To test the findings of comparative studies undertaken by law and finance scholars – specifically the argument that countries with common law systems, like the UK, provide more effective legal rules than those countries with civil law systems, like Jordan.

In assessing this latter argument, and whether it applies to insider dealing and market abuse prohibition regimes in the UK and Jordan, it was necessary to examine both legal rules in statute, "law on the books", and "law in action". It was found that the UK provided a more effective prohibition regime than Jordan, not only because of differences in the origins of their legal systems, but more significantly because of differences in the legal environment in which each regime is set. It was found that, as regards financial market regulation, argument about legal origins recede into insignificance. This is because, as described, globalization mandated the adoption of minimum unified international standards for financial markets. In this, *IOSCO*, of which the UK and Jordan are members[1508], required the implementation of minimum standards for financial markets, and this ensured market integrity and investor confidence[1509].

In general, therefore, the statutory prohibition regimes established in each country were found to be largely similar, regardless of their different legal origins. In light of this, the focus of the study shifted to considering the legal environment in each country – in particular:

1) the political will and economic forces around the market, which, among other things, played a vital role in the establishment of financial regulation and its enforcement;

2) the experience of legislators and financial regulators in regulating and dealing with insider dealing and market abuse – in particular their familiarity with the needs of national markets and how to address them; this is also closely linked to the effectiveness of legal institutions in providing sound prohibition regimes, and enforcing them effectively;

3) the structure of financial markets, transactions and investors, and how they conduct business and take investment decisions.

These points helped explain why the UK has a sound, effective, prohibition regime, while Jordan has not. As scholars of law and finance point out, the emphasis in any

[1508] See member states of IOSCO at: http://www.iosco.org/lists/display_members.cfm Accessed: 5/9/2013
[1509] These are listed under the IOSCO objectives that member states should fulfill.

comparative-analysis should be on "law in action", rather than "law on the books".[1510] Only when the law is in action, can its effectiveness be tested, and a judgement made as to whether enforcement has achieved the goals and objectives set for it. The study recognised that it was never going to be possible to transplant the UK experience of prohibiting insider dealing, to Jordan; rather, the UK experience was examined for inspiration in the framing of recommendations to enhance the effectiveness of the Jordanian regime – albeit recommendations tailored to the Jordanian legal environment.

6.2 Recommendations

The recommendations presented here are classified in accordance with the adopted Comparison Criteria (see section 1.7). The recommendations are mainly intended to address weaknesses in the Jordanian prohibition regime, but will address the UK regime where appropriate.

6.2.1 Regulator independence

The recommendation that the financial regulator be independent of political policy is difficult to achieve. The vital role of the financial markets, and their contribution to the national economy, mean that politics is closely linked to legal reform. For example, political influence was evident in the reforms to financial regulation in the UK, and in Jordan to a greater extent. Recommending total independence is not therefore realistic, however political influence can be minimized. This can be achieved when national political policy considers all investor interests, not just the interests of market elites.

The study found that politicians in the UK did consider the opinions and economic interests of elite market players, and that sometimes their interests affected both the proposed reforms and the approach adopted by the regulator. Giving consideration to all market investor interests is essential, particularly where the aim of the UK financial regulator is to ensure market integrity and maintain investor confidence in the financial system. Otherwise, if normal investors believe political policy is favouring only the interests of elites, they will lose trust in the market, withdraw their savings, and thereby the national economic prosperity will be affected. Investor confidence in market integrity should flow from the protection of consumers in general, and not be hijacked by "allowing the financial industry too much power over regulatory design.[1511]"

[1510] Siems, 'Legal origins' (n 36); Berkowtiz *et al* (n 37)
[1511] The World Development Movement case study (n 262)

Arguably, regulator independence could be ensured by greater transparency, not only with the financial industry, but also with investors and consumers.[1512] The FCA seems to be mindful of the importance of transparency, and is looking to be more open and engaged with consumers, than was the FSA.[1513] The FCA acknowledges that being more cooperative and transparent with external stakeholders, consumers and the public, as well as with the financial industry, will promote investor confidence and maintain market integrity.[1514] For this reason, the FCA uses the media, focus groups, and other methods, to ensure face to face interaction with consumers and the general public[1515].

It could be argued, therefore, that there should be no contradiction between attracting foreign and regional investments, and having a sound financial system. Corrupt and uncontrolled financial systems have adverse effects, because, even if governments succeed in attracting those investments, they will tend to be short-term. Uncontrolled financial systems are something that the JSC should try to minimize, as should decision makers when drawing up general investment policy.

The need to monitor executive authority when introducing provisional laws, is also highly recommended. The study showed how, under the Jordanian Constitution of 1952, the SL of 2002 was a 'provisional law', yet the constitutional requirements (exceptional circumstances) for such a law were not fulfilled. The political factors caused the executive authority to bow to pressure from international reform programs, and rush in the SL of 2002. Political influence did not stop there: it continued to affect the whole regime, both in its loose drafting, and in its enforcement.

The problem of financial regulator independence in Jordan is endemic, and requires reforms to the entire national legal system. These reforms should start by reducing the exceptional role of executive authority, and minimizing opportunities for political patronage – when filling important roles in the market – by ensuring that candidates have sufficient experience of market mechanisms, and of regulating them.

To minimize political influence on the JSC, total separation should also be established between JSC financial resources and the General Budget. The JSC can then augment its financial resources by increasing fines levied, or by increasing registration and listing fees, for example.

[1512] Ibid
[1513] FCA Approach to regulation (n 1197); FCA Discussion Paper (DP13/1**), Transparency, Mar 2013
[1514] Ibid
[1515] FCA Approach to regulation (n 1197) 25

6.2.2 Regulatory transparency

The lack of transparency was recognised in all aspects of this study. Regarding transparency in the process of proposing laws, it is recommended that the legislator and the government be more open and transparent with the nation, as well as with those directly affected by new laws. This will enhance confidence in the legal system and demonstrate that the government is working in the public interest. It will also underpin accountability for legal institutions, and minimize corruption, as decision makers will be aware that their decisions will be reviewed and monitored.

Transparency will also improve public awareness: when market players and investors know about insider dealing, and why it is prohibited, awareness of its adverse effects on market integrity will be enhanced, and investor confidence – in the regulator and in financial market regulation – increased. Investors will know that prohibition is intended to protect their interests. The benefits of this sort of openness can also be of great importance to legal intermediaries (like lawyers) and judges. For all of these reasons, it is recommended that the JSC be open with the financial industry and investors in general, and conduct consultations with them, to justify and clarify its activities and actions.

In the spirit of transparency, the JSC should publish its enforcement actions promptly and in detail. Its current practice of publishing summaries in appendices to its Annual Reports undermines enforcement and, critically, reduces the likelihood of deterrence. Providing details of enforcement cases to the public and industry will have multiple benefits: it will educate the industry, enhance public awareness, and also send out clear signals to deter future offenders. The JSC will be taken more seriously by the financial industry, and potential perpetrators (mainly insiders) will think twice before being stigmatized – not least because such news and awareness spreads quickly, given the personalized nature of the financial markets. Even if the JSC is reluctant to send 'borderline' or difficult cases to court, because, as with its own staff, judges lack the knowledge and experience to deal with them,[1516] publishing its enforcement actions will still have a strong deterrent effect.

As for the level of transparency provided under the JSC disclosure regime, the study found that the JSC overlooked some key areas, the most important of which is the

[1516] This was mentioned in: MENA Corporate Governance Workshop (n 1114); NASD Market Surveillance Assessment (n 1348); Harabi (n 1096)

enforcement of timely disclosure, so that the exact time inside information is disseminated can be established.

In addition to the general, if critical, issue of regulatory transparency, the following reforms are recommended for enhancing the Jordanian disclosure regime:

1) Identify clearly what information is subject to disclosure, especially regarding the offence of insider dealing. The information currently subject to disclosure is 'material information', while 'inside information' is the essential requirement for the offence. The disclosure regime should be amended forthwith, not only to ensure that the right type of information is disseminated to the market, but also to ensure the effectiveness of the prohibition regime. The current situation provides a loophole in the prohibition regime, and could be challenged, either in disclosure breaches or when committing an offence.

2) Enforce timely disclosure through regulatory channels, without giving latitude to issuers to choose where, and to whom, they disclose – particularly in cases were disclosure is required from different entities, such as the Central Bank and the Corporates Controller. In this regard, the JSC and those entities should consider establishing memoranda of understanding between them, relating to the disclosure of inside information.

3) Expand the definition of 'insider', so that disclosure obligation covers all those having access to inside information by virtue of their business or profession, regardless of their ability to make managerial decisions.

4) Include 'connected persons' in the same definition of 'insider'.

5) Regulate 'selective and delayed disclosure', as the interests of issuers may be affected if prompt disclosure is always required.

6) Require issuers to hold and maintain updated lists of their insiders.

7) Provide guidelines that illustrate disclosure requirements from a practical perspective.

8) Ensure that PDMRs – and other employees having access to inside information, or handling it internally – are aware of their regulatory duties and responsibilities, and of the sanctions that may be imposed if any misuse of that information occurs, whether for their own benefit or the benefit of others.

9) Require issuers to implement procedures and systems to identify and control

inside information.

10) Review current methods for dealing with rumours, as the mechanism adopted by the JSC increases the possibility of leaking inside information.

11) Publish details of enforcement actions in cases of disclosure breaches, not only for reasons of transparency, but also to enhance industry awareness of the offence.

6.2.3 Regulation clarity

The SL of 2002 should explicitly define the nature of the prohibition regime, from the outset. The study found that, under the offence of market manipulation, the same misbehaviours may be regarded as either civil or criminal, depending on the applicable article – which hinders enforcement. The legislator should consider redrafting the entire prohibition regime, to clarify the statutory requirements for each offence, and to ensure conformity between the glossary provided, and the regulated offences. For example, the definition of an '*insider*' should be expanded to include all types of insider (primary and secondary), because the current limited definition was used to interpret the meaning of '*person*' incorrectly.

The legislator should avoid using different variants of the term '*information*' (inside, material and confidential) and consider, for example, adopting the term '*information not generally available*', for consistency and to allow markets enough time to react to fresh information, while at the same leaving time for the information to be assessed by investors.

Instead of regulating the insider dealing offence by requiring "dealing in or using inside information", it is suggested that offence be based on '*misuse of information*', akin to the FSMA of 2000, with its ability to encompass any improper act, whether relating to action or inaction, as long as it was on the basis of information not generally available. In this way, the improper disclosure offence can fit easily under the '*misuse*' offence, without the need for separate prohibition. Improper disclosure will thereby be the same order of offence as insider dealing (criminal).

As the study discussed, further consideration should also be given to improper disclosure, since a number of other factors can influence the likelihood of tipping or leakage of inside information. These factors include: market size, companies' structures (mostly family-based), and unorthodox investment motives (based on kin relationships, for example, rather than financial considerations). Adding to these factors, the media

can also contribute to the dissemination of inside information and the spreading of rumour. Unfortunately, the role of the media in improper disclosure was overlooked, and may need to be regulated.

In the case of market abuse/manipulation (depending on the nature of the behaviour), the regulator should consider issuing further explanation and guidance on the offences – for the benefit of market players and those responsible for monitoring and enforcing the law.[1517] The JSC can benefit from FSA experience of this, and might also consider publishing details of its disciplinary actions, so that the industry, judges and lawyers can better understand what constitutes violation and how the JSC deals with such cases[1518].

To summarise, the lack of precision and well-structured provision in Jordan allows different interpretations to be applied whenever a case of insider dealing or market manipulation is brought to court. Such imprecision can allow wrongdoers to manipulate the regulation, and avoid prosecution and conviction.

6.2.4 Human capital

The earlier recommendations cannot be successfully implemented unless those involved in the regulatory process and in its enforcement, are sufficiently professional in regulating the financial markets, and have the skills and experience appropriate to this area of market misconduct. Overcoming the challenges impeding JSC enforcement will require real reform in its cadre and in its approach to the industry. JSC staff should be appointed based on their skills and experience, not for being part of elite, political and market-player lobby.

In the meantime, the current level of JSC staff skills can be enhanced through training workshops on investment issues, market mechanisms, market misconduct, proper monitoring, investigations, and the enforcement process. In addition JSC might consider cooperating with its counterparts (the Banking Regulator and Companies Monitoring department for example), as well as with prosecutors and judges, to enhance skills and improve understanding of insider dealing and market manipulation offences.

However, holding workshops or providing assessments for the JSC and its staff will be futile unless there is a real will to implement the recommendations, and then to initiate

[1517] This was recommended to the JSC in 2005, see: Kulczak NASD Assessment of Jordan (n 30). Also see Chapter 4, s.2
[1518] Was discussed in Chapter 5, s.2

substantive reform. This is said because some of the deficiencies discussed in this study were brought to the attention of the JSC in 2003, yet there has been no change since.[1519] This is yet more evidence that the key to real reform lies with the resilient elites of senior market players and politicians. Curtailing their power needs to be at the top of any list of reforms.

6.2.5 Public awareness

The earlier recommendations highlight the importance of enhancing awareness of offences, across the financial industry, but particularly to those involved in regulating the regime (as legislators and regulators) and enforcing it (as regulators and judges), and to the legal professions (lawyers, legal advisors). Awareness should also extend to the general public. As *Mohammad Tash*, the JSC Chairman, said, their old investment mentality should change from personalizing their investment decision, to basing it on real financial information and analysis. In other words, making general investors aware that their investment decisions could be based on inside information which tipped from their friends or relatives, and thereby violating the law.

6.3 Further Recommended Studies

This study provides a general overview of the Jordanian insider dealing regime, based on critical analysis which explores the failings of the regime, and why it has not once been enforced in 17 years. The dearth of Jordanian scholarly studies in this area prompted this study. It is hoped that, as a first contribution to the Jordanian literature on the subject, this study will inspire more detailed studies. The nature of this comparative-analysis of the UK and Jordanian prohibition regimes, and the necessary limitations noted in the scope (section 1.4), make it impractical to tackle every aspect of each regime in full detail. Instead, these can be the basis for new research and further studies – for instance, into political influence on legal regimes.

Typically, most studies discuss and critically analyse the relationship between law and economics, or law and finance. This study demonstrates that the relationship between law and politics is no less important and equally worthy of consideration.

Also, the JSC disclosure regime could be the subject of further study, since sound and effective disclosure obligation is on the front line when tackling insider dealing.

[1519] See (n 1516) listing some of the assessments, reports and workshops undertaken since 2003.

Enforcement processes and actions are another area ripe for consideration. In this respect, throwing light on the forces and reasons which underpin enforcement brings this dry subject to life – enhancing our understanding of the historical events which led to its establishment and development.

These are suggestions for future studies and as was said earlier, any aspect of this study can be nuclear for further thorough studies.

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