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NEW CHALLENGES AND UNDERTAKINGS FOR ADMINISTRATIVE AND REGULATORY REFORM: A GLOBAL WATCH WITH CHINESE PERSPECTIVE

AN EXAMINATION OF LEGAL REGULATIONS FOR INSIDER DEALING IN THE UK AND THE LESSONS FOR CHINA

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Abstract The UK’s position as a leading international financial center depends not only on the openness and competitiveness of its market, but also on its reputation as a clean and fair place to do business. Market confidence will be undermined where participants and users believe markets are susceptible to abuse. Thus, the main convincing justification for controlling insider’s abuse of power is based on the harm principle, which it causes to investor confidence and securities markets. An insider ought not to be able to take advantage of his position either to breach a confidence or to achieve an unfair advantage in the market place; particularly the market place should, as far as possible, provide equality of opportunity to people entering it. Insider dealing has been regulated by the criminal law involved under Part V of the Criminal Justice Act 1993 in the UK. It has become clear that the traditional criminal penalty was limited by the criminal standard of proof required, while self-regulatory regimes are thought as toothless tigers. Although various potential common law civil remedies for breach of fiduciary duty and breach of confidence relating to insider dealing do exist, they are ineffective remedies and beset by so many complexities. As a response, the Financial Services and Markets Act 2000 came into force and marked an important development in the regulation of market abuse in creating civil penalties, which also contained misuse of confidential insider information. Later, the main substantive changes to existing civil market abuse regime have been taken effect within the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005, 2011 and 2014. Regarding to the regulatory framework, the range of regulatory powers of the Financial Services Authority, which has been replaced by the Financial Conduct Authority in April 1, 2013, available in combating market abuse is one of the most fundamental innovations of the FSMA 2000 and plays a significant role in defining the law in practice through a Code of Market Conduct. China has also exerted great efforts in regulating insider dealing. Under the

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current Chinese legal framework, insider dealing is governed by the Criminal Law of the People’s Republic of China, the Securities Law of the People’s Republic of China 2005 and some other regulations. The China Securities Regulatory Commission (CSRC) is the regulatory body for supervising and penalizing insider dealing in China. Although China has made progress in legislation in terms of the regulation of insider dealing, there are still much room for improvement, such as the enforcement of the civil penalty and the enforcement power of the CSRC. Due to the fact that the UK has rich experience in regulating insider dealing, it is of great significance for China to learn from the UK’s successful practices. Insider dealing could be well controlled with innovative and effective legal regulations. This article focuses on an in-depth examination on the regulations in the UK and a brief introduction of regulations in China in order to figure out an answer to what has been achieved in the UK and what are the most important aspects that China could learn from the UK’s experiences. The aim of increasing the deterrent effect by reducing the obstacles to imposing suitable sanctions, whether criminal, civil or regulatory, should enable regulators to police a more efficient manner in the field of financial markets.

Keywords  insider dealing, criminal prosecution, civil penalty, regulatory sanction, market abuse

INTRODUCTION .................................................................................................................... 526

I. PART V OF THE CRIMINAL JUSTICE ACT 1993 FOR THE CONTROL OF INSIDER DEALING................................................................................................................. 531
   A. General Overview of Part V of the Criminal Justice Act 1993 ................................ 531
   B. Extensions of the Scope of Part V of the Criminal Justice Act 1993 .................... 533
   C. Problems Associated with Part V of the Criminal Justice Act 1993 .................... 534
      1. Uncertainties of the Provisions ........................................................................ 534
      2. Difficulties of the Criminal Prosecution ......................................................... 536
   D. Criticisms on Part V of the Criminal Justice Act 1993 ....................................... 538
   E. Concluding Remarks ....................................................................................... 539

II. PART VIII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000 AND ITS RECENT AMENDMENTS FOR THE REFORM OF INSIDER DEALING ......................................... 540
   A. A Civil Penalty System and Its Effectiveness: Filling the Gaps in the Insider Dealing Regulations ................................................................................................. 541
   B. UK’s Major Amendments to Civil Market Abuse Regime .................................. 543
   C. The Role of the Code of Market Conduct .......................................................... 544
   D. Concluding Remarks ....................................................................................... 545

   A. Detection ........................................................................................................ 546
   B. Investigations .................................................................................................. 547
   C. Regulatory Sanctions .................................................................................... 549
INTRODUCTION

For several years the subject of insider dealing has attracted a lot of attention in the world’s press. It is perceived as a problematic issue facing the securities markets in most countries and the general trend has been to make it illegal. As developed, legal regulations for insider dealing became an important issue in the field of financial markets.

Historically, the insider dealing regulation dates from the 1930’s in the US.\(^1\) Under the federal law, the Securities Act 1933 and the Securities Exchange Act 1934 were passed in response to insider dealing, fundamentally they are civil statutes, but they impose criminal liability where they have been willfully violated.\(^2\) In the European Community, rapid developing investments markets, the desired harmonization of the relevant laws and a number of scandals in the investment sector resulted in call for an insider dealing law on investor protection within each member state; therefore, following a number of unsuccessful attempts, insider dealing became a criminal offence in the UK for the first time in 1980 under Part V of the Companies Act 1980.\(^3\)

Regulation contains an assortment of criminal, civil and regulatory law. Each set of proceedings possesses its own characteristics and purposes. Generally, the criminal law has always been concerned to distribute blame, the civil proceeding may permit to compensation for private wrongs and the regulatory sanction may protect the integrity of public markets.\(^4\) A person who engages in conducting insider dealing may find that it is in breach of the provisions of several rules. Under such circumstances, there is a choice as to whether to commence a criminal proceeding or to take a civil action against this person.

Reference to the UK context, when trying to find the starting point of an examination of legal regulations for insider dealing in the field of financial markets, it is necessary to consider how insider dealing should be regulated and how effective insider dealing laws

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are. Despite the amount of law that has been created, there is considerable skepticism as to whether it does offer sufficient protection for investors and the markets. Indeed, the imposition of regulation is fraught with difficulties which may stem from different stages reached in the development of measures and of policy formulation.

Since 1980, one of the most intractable problems in the development of insider dealing regulations in the UK, which is associating with the failure to pursue only a handful of cases, is the difficulties of obtaining evidence which will warrant criminal proceedings. A civil penalty system has not been regarded as a necessary means for the control of insider dealing. Due to the absence of an effective procedure, bringing successful criminal prosecutions requires a large number of matters to be established.

Before examining the development of legal regulations in details, it may be helpful to mention the legislative intention and approach underlying the legislation. The first attempt to enact legal regulation of insider dealing as a criminal offence in the UK was the mentioned Part V of the Companies Act 1980. Thereafter, the relevant provisions were subsequently reenacted with minor amendment in the Company Securities (Insider Dealing) Act 1985 (hereinafter “CSIDA 1985”) which entered the statute book on March 11, 1985 and came into force on July 1, 1985. However, it might lack a comprehensive regulation of the financial services industry as it affected investors. In order to modify the CSIDA 1985 and, in particular, prove much needed investigation powers where insider dealing is suspected, the Financial Services Act 1986 (hereinafter “FSA 1986”) was adopted regarding to the consideration of investor protection. It established an entirely new regulatory structure for the financial services industry based on the Securities and Investment Board as the overall regulators with a number of self-regulating organizations which are responsible for particular sectors of the industry. In addition, it is important to note the impact of Sections 61 and 62 of the FSA 1986 as mechanisms for offering civil redress for those “on the wrong side” of insider transactions on public markets.

The impetus for further legislative reform came from within the European Community when in 1989 the Council of the European Communities agreed on a Directive to co-ordinate regulations on insider dealing throughout the member states.

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6 See Suter, fn. 1 at 378.
9 The Financial Services Act 1986, Clause 60.
10 See Hannigan, fn. 7 at 15.
13 See Brazier, fn. 3 at 97.
It was designed to impose and grant for a minimum and equivalent standard of investor protection and for greater interpenetration of national securities markets in the member states. Each of those states must take measures to comply with the Directive before June 1, 1992. Therefore, implementation will be necessary to the law of the UK and the Criminal Justice Bill is largely a response to the requirement of the Directive.\textsuperscript{14} Subsequently, the UK Government’s further consultation led to the amendment and restatement of the law on insider dealing contained in Part V of the Criminal Justice Act 1993 (hereinafter “CJA 1993”) which was brought into force with effect from March 1, 1994.\textsuperscript{15} That Act brought about the repeal of the previous statement of the UK law of insider dealing which, subject to the FSA 1986, was set out in the CSIDA 1985.\textsuperscript{16} Meanwhile, two ancillary statutory instruments came into force at the same time which were called the Insider Dealing (Securities and Regulated Markets) Order 1994 (hereinafter “Order 1994”) and the Traded Securities (Disclosure) Regulations 1994.\textsuperscript{17} These two statutory instruments are aiming at dealing with the protection of securities markets and the imposition of disclosure obligations respectively.\textsuperscript{19} There is no doubt that the above regulations of insider dealing in the UK are designed to make it in line with the European Communities Directive on the subject which requires all member states to make insider dealing illegal.\textsuperscript{20} It could be said that Part V of the CJA 1993 is the most significant amendment and the centerpiece of the anti-insider dealing regime in the UK. Unfortunately, the fundamental nature of the UK’s approach to the regulation of insider dealing is unchanged and makes no provision for the civil regime as an aid to enforcement. Insider dealing is still a criminal offence, the prosecutor bears the burden of proof and it could be difficult to make a conviction. Not surprisingly, few prosecutions have been instituted since insider dealing controls have been on the statute book.

In the above context it should, from the outset, be recognized that the UK has relied on a scheme of criminal enforcement. In fact, during the debates on the CJA 1993, there was an academic discussion on the arguments surrounding legal regulation of insider dealing and the case for the imposition of civil regimes which was forcefully rejected by the UK Government.\textsuperscript{21} The Government is unwilling to reconsider a position relating to civil remedies. They have traditionally believed to regulate insider dealing on the basis that it constituted a wrong to the market and it was appropriate to utilize the criminal law

\begin{thebibliography}{99}

\bibitem{15} Alistair Alcock, \textit{Insider Dealing: How Did We Get Here?}, 15 Company Lawyer, 67 (1994).
\bibitem{16} See Stallworthy, fn. 14 at 210.
\bibitem{17} The Insider Dealing (Securities and Regulated Markets) Order 1994, SI 1994 No. 187.
\bibitem{19} Id.
\bibitem{20} See Brazier, fn. 3 at 129.
\end{thebibliography}
to restrain it. Criminal offences prosecuted in the courts should remain the primary means of action against insider dealers. Notwithstanding regulators constantly seek to increase standards of compliance in the interests of investor protection, it is fair to say that the previous legislation had only limited success. The thorny problem is that it is difficult to detect at the investigation stage and is cumbersome to prove at the court stage. In other words, it may be easy to detect a suspicious movement in the market, but proving the link in insider dealing is difficult. Consequently, there is a big attraction in introducing civil enforcement options in the form of penalties with a lower standard of proof.

In any case, common law is accordingly prepared to afford civil remedies to a person whose rights over information are abused, such as liabilities of breach of fiduciary duty and breach of confidence. Nevertheless, it is likely to be fraught with some problems in practice; many uncertainties and difficulties lie in the path of a successful action by a shareholder or a company against an insider. For example, if a shareholder wishes to sue a director who has used inside information in breach of his fiduciary duties, it would involve only insider dealing in face-to-face transactions and grant no remedies to those dealing in public markets. Equally, if a company is against an insider, it is not clear whether an insider who sells shares on the basis of inside information which he has obtained by virtue of his position is liable to account if he sells so as to avoid a loss. It seems that the remedies are more theoretical than real, and, as a corollary, they are rarely used.

An appropriate starting point to approach the question of how best insider dealing should be regulated is of great importance. It is significant to emphasize that the criminal penalty system has shown the responsiveness in a number of key areas to specific problems. In addressing those problems at a late stage in the legislative process, the government seeks to set up a workable regime for further regulation, the availability of a civil penalty system in the UK does not remain doubtful. As a response, the Financial Services and Markets Act 2000 (hereinafter “FSMA 2000”) represents an important extension of the powers currently available to regulators to combat market abuse through a comprehensive set of criminal and civil sanctions. It governs three categories of behavior which may amount to market abuse and insider dealing can take place in all three categories. Most significantly, further amendments to civil sanctions of the FSMA

23 See Ashe & Counsell, fn. 8 at 25.
24 Id.
26 See Percival v. Wright [1902] 2 Ch. 421.
28 See Rider, Alexander & Linklater, fn. 5 at 53.
2000 met the first time in June 2004. These are the draft regulations so as to comply with
the European Union Market Abuse Directive. 29 Finally, they were brought into force in
July 1, 2005. There were also other amendments conducted later, most notably in the year
of 2011 and 2014.

In respect of a single regulator of the Financial Conduct Authority (FCA), it is an
independent non-governmental body for the UK financial services industry which has
been given statutory powers by the FSMA 2000. The crucial point is that the Authority
may take regulatory action, either on a civil basis or as a criminal prosecution. 30 Besides,
the FCA has integrated measures into the various rules, guidance and codes, in particular,
the Code of Market Conduct (hereinafter “Market Code”) which it has produced and
designed to ensure that regulated persons have adequate systems in place for prevention
and detection of financial crime. 31

The Chinese legislation also attaches great significant in regulating insider dealing.
The Criminal Law of the People’s Republic of China (PRC) 1997 has provided criminal
penalties for serious crimes concerning insider dealing. In addition, more detailed
provisions are provided in the Securities Law of the PRC 2005. Since the financial market
in China is quite new comparing to that in the UK, the Chinese legislations on insider
dealing are not as comprehensive and mature as the UK. In particular, the civil regime is
very weak. The regulatory body, namely the China Securities Regulatory Commission
(CSRC) also has the power to investigate, detect and penalize activities concerning
insider dealing, however, it has no power to impose civil sanctions. This has limited its
supervisory power.

The first objective of this article is to set out and examine legal regulations for insider
dealing in the field of financial markets. As it will be seen, the dissertation does not
canvass all previous and existing laws; rather, it focuses primarily upon legislation that
specifically goes under the CJA 1993 and the FSMA 2000 for the control of insider
dealing in the UK. The second objective of this article is to briefly introduce the legal
regulations for insider dealing in China and to figure out the most important aspects that
China could learn from the UK’s experiences in order to improve its legal framework and
enhance the supervision for the securities market.

To achieve the above objectives, the article will explicate in four chapters, along with
the introduction and conclusion. In brief, the first chapter is to provide a short overview
of Part V of the CJA 1993, extensions of the scope compared to previous regulations,
problems associated with that Act and criticisms on its effectiveness. The next chapter

30 Howard Davies, Law and Regulation, 3 Journal of International Financial Markets, 171 (2001); Howard
Davies, Global Financial Regulation after the Credit Crisis, 2 Global Policy, 185 (2010).
will proceed to explore Part VIII of the FSMA 2000 market abuse regime for the reform of insider dealing law through a new civil penalty system, filling the gaps left by the criminal law and self-regulatory organizations and mechanisms, and furthermore recent amendments to this civil market abuse regime. Following this, the third chapter is devoted to outline regulatory powers of the FCA, and examine how it may play an important role in the fight to deter and penalize market abuse under the FSMA 2000, and application of the CJA 1993. The final chapter will focus on China’s legal framework and regulatory body as well as the lessons that can be learnt from the UK.

I. PART V OF THE CRIMINAL JUSTICE ACT 1993 FOR THE CONTROL OF INSIDER DEALING

Part V of the CJA 1993 continues the UK’s historical commitment to the use of the criminal law as a primary weapon in combating insider dealing. It represents extensions of the basis of scope for the insider dealing, compared with the previous regulations. This chapter examines the general overview of the legislation, enactment to the regime subsequent to relevant problems and principal criticisms to which the CJA 1993 is subject.

A. General Overview of Part V of the Criminal Justice Act 1993

Basically, Part V of the CJA 1993 is a short section which provides an elaborate statutory structure for the regulation of insider dealing in the UK. It carries on the meaning and the characteristics of insider dealing and answers the following questions: What is inside information; related to when is information public? Who is an insider? How relevant information is to offences of insider dealing and defenses which may be available, and which securities are covered?

Regarding to the definition of inside information, it is an essential element of the statutory provision. The first characteristic of inside information as being set out in the CJA 1993 makes obvious that information which relates to a specific sector is contained, as well as that which relates to a specific security. It is constrained by the second and third characteristics that dictate the information must be specific or precise and has not been made public. Fourthly, the information must potentially have a more than trivial impact on the price of any securities.

Additionally, Section 58 of the CJA 1993 grants guidance as to the meaning of the phrase in two categories of information within the definition of “made public.” The first

32 See Rider & Ashe, fn. 22 at 30.
33 See the CJA 1993, s 56(1)(b).
34 See the CJA 1993, s 56(1)(c).
category enumerates four situations in which information is completely to be treated as having been made public, whilst the second category sets out five situations where information may, depending on the conditions, be regarded as made public despite of certain features which confine its circulation.\footnote{36}

In respect to the definition of “has information as an insider,” it is clarified by Section 57 of the CJA 1993, which comprises the concept of inside source. The primary insider usually obtains inside information through being a director, employee or shareholder of an issuer of securities or any person who has information because of his employment or office. A secondary insider obtains inside information either directly or indirectly from a primary insider.

The basis for liability under the CJA 1993 is where an insider has inside information and engages in activities restricted by the statute.\footnote{37} These activities regard to dealing in certain types of securities on a regulated market, or off-market or in reliance on a professional intermediary.\footnote{38} The activities may also regard to individuals engaging in three basic offences of dealing under particular circumstances: first, dealing in price-affected securities on the basis of inside information; second, an individual who has information as an insider to encourage dealing; third, disclosing inside information.\footnote{39} The restrictive activities referred to above relate to a definition of securities. Pursuant to Schedule 2 of the CJA 1993, those include shares, debt securities, warrants, depositary receipts, options, futures and contracts for differences.

A coherent range of defenses in the CJA 1993 is targeted to cover specific transactions, what may be briefly described as, motive in Section 53 and also with particular market situations in Schedule 1. These are designed with the object of attempting to ensure that particular innocent transactions and bona fide market practices are not prevented by the laws curbing insider dealing.\footnote{40} Section 53 provides a number of relatively general defenses which may be applicable in certain circumstances of securities. An individual is not guilty if he shows that he did not expect the dealing to result in a profit or to avoid a loss attributable to the fact that the information in question was price-sensitive information regarding to the securities.\footnote{41} Similar defenses are available in the case of an insider encouraging another person to deal with securities\footnote{42} and a person who discloses such information giving rise to dealing in securities.\footnote{43} Furthermore, three

\footnote{36} Id. at 295.  
\footnote{38} See the CJA 1993, s 52(3) and s 60(1).  
\footnote{39} See the CJA 1993, s 52(1) and s 52(2).  
\footnote{40} See Rider & Ashe, fn. 22 at 22.  
\footnote{41} See the CJA 1993, s 53(1).  
\footnote{42} See the CJA 1993, s 53(2).  
\footnote{43} See the CJA 1993, s 53(3).
supplemental special defenses are governed in Schedule 1 which may apply to the dealing and encouragement offences. Two of the defenses are specific, one for market makers and one for price stabilization activities, while the more general defense concerns market information.

Regarding the penalties and the criminal prosecution for insider dealing in the CJA 1993, if an individual is convicted of insider dealing after the summary trial, he is responsible for a fine not exceeding the statutory maximum or a term of imprisonment not exceeding six months, or both.\(^44\) Alternatively, if convicted on indictment, there is no maximum limit on the fine and the insider dealer may be jailed for up to seven years.\(^45\) Taking note of the restrictions on the territorial scope of the measure: The offences connected with dealing under Section 52(1) of the CJA 1993 may only be committed where defendant was in the UK at the time when any act constituting part of dealing took place on a relevant regulated market or by a professional intermediary operating in the UK.\(^46\) Paragraph 5 of Schedule 1(a) to the CJA 1993 was amended in 2014, which provides that an individual is not guilty of insider dealing by virtue of dealing in securities or encouraging another person to deal if he shows that he acted in conformity with Article 5 of EU Regulation No 596/2014 on market abuse regulation and other applicable rules under that Article as well as under the Section 137Q(1)(b) of the FSMA 2000.\(^47\)

\section*{B. Extensions of the Scope of Part V of the Criminal Justice Act 1993}

The CJA 1993 is capable of applying in a broad ambit. As it will be seen, the following sequence does not canvass all extensions of the scope of the CJA 1993; rather, it focuses primarily upon aspects that specifically go under inside information, insiders and specific types of securities.

In relation to the range of inside information, it is sufficient that the information is price-sensitive concerning any securities, not just the securities of the issuer about which the insider has the information. Besides, information is treated as relating to an issuer of securities which is a company “not only where it is about the company but also where it may influence the company’s business prospects.”\(^48\) Thus, liability is extended to dealing in the shares of companies in the same sector of business.\(^49\) For example, if Company A invents a new process which grants Company B’s product out of date, this is the information about Company A which is also price-sensitive related to Company B’s

\(^{44}\) See the CJA 1993, s 61(1)(a).
\(^{45}\) See the CJA 1993, s 61(1)(b).
\(^{46}\) See the CJA 1993, s 62(1) and s 62(2).
\(^{48}\) See the CJA 1993, s 60(4).
\(^{49}\) See Walmsley, fn. 25 at 509.
securities as it affects Company B’s business prospects.\textsuperscript{50} It should be said that a person who is an insider related to Company A may no longer deal in securities of Company B.

With regard to the section of the insiders, the CJA 1993 abolishes the requirement for a connection between a primary insider and the company to which his information relates — it is sufficient that the insider has access to the information by virtue of his employment, office, or profession.\textsuperscript{51} It is noticeable that a significant extension of the law is to catch improper conduct by persons who are not linked to a company but nonetheless have direct access to price-sensitive information about it.\textsuperscript{52} Moreover, the liability of secondary insiders is widened to cover information from these access insiders as well as from those connected with the company. Hence, a person acting on a “tip” from an analyst who has no connection with the subject of the tip will also commit an offence under the CJA 1993.\textsuperscript{53}

As for specific types of securities, the CJA 1993 is no longer being concerned with simply corporate securities so that not only corporate securities and instruments based on such securities are contained but also gilts, local authority stock and instruments derived from corporate securities.\textsuperscript{54} In order to be caught, the securities must satisfy conditions formulated in the Order 1994. It states that a security must be officially listed in a state within the European Economic Area (EEA) or admitted to dealing on, or has its price quoted on or under the rules of a regulated market.\textsuperscript{55} Furthermore, the Order 1994 provides what is a regulated market for the purposes of insider dealing, listing the main exchanges of the states of the EEA because of the extended scope of securities covered.\textsuperscript{56}

\textbf{C. Problems Associated with Part V of the Criminal Justice Act 1993}

Criminal prosecution is part of the regulatory regime in the UK, but it has been recognized that the use of criminal law to prosecute and deter insider dealing has been ineffective as a measure of control. Practical problems may arise particularly in connection with uncertainties of the provisions and difficulties of the criminal prosecution in the context of the CJA 1993. These issues will be discussed in more details.

1. Uncertainties of the Provisions. — Of all the changes introduced by the CJA 1993, the definition of what amounts to inside information is probably the most significant and worrying. Commentators have acknowledged that the statutory definition of inside


\textsuperscript{51} See the CJA 1993, s 57(2).

\textsuperscript{52} See White, fn. 50 at 165.

\textsuperscript{53} Id.

\textsuperscript{54} See the CJA 1993, sch 2.

\textsuperscript{55} See the Order 1994, Art. 4.

\textsuperscript{56} See the Order 1994, Art. 9.
information is a difficult and vague concept to define in practice. Whatever the correct approach for inferences, whether information is of a specific or precise nature may still be an open question to be assessed by the courts. For example, whether a person with knowledge of a specific or precise market rumor can be treated as having inside information. As the rumor is specific, concerning a particular issuer and price-sensitive it may be inside information. Rather, if the rumor turns out to be wrong there could be an argument that it was never inside information at all. Alternatively, the fact that a rumor is distributing may itself be inside information — whether the rumor proves to be true or not. Further, information is relevant to the possibility of a takeover may be treated as specific information and will likely rank as precise, given that it is more than a mere rumor.

Moreover, the decision whether such information has actually been made public rests with the courts. According to Section 56(1)(c) of the CJA 1993, it states that information is not capable of being inside information if it has been made public. Although Section 58 of the CJA 1993 enumerates certain examples, the time when information will be regarded by the law as having been made public is vague. It therefore follows that dealings may take place immediately after information has been made public and whether or not the market has had time to absorb and respond to the information. Generally, prices of securities do not always adjust immediately upon the release of material information in the financial markets. It is noteworthy that this might lead to greater uncertainty as the market takes varying amounts of time to absorb facts in different circumstances.

Furthermore, Section 57 of the CJA 1993 sets out the circumstances in which an individual is to be treated as an insider. It makes easier to prosecute people who learn inside information via their work rather than directly from a company, but a problem occurs in this area. A person, who works in a public place, overhears inside information being exchanged by two directors of a company. It could be argued that the person has acquired that information by virtue of his profession under the CJA 1993. In effect, the person who works in the public place will always be an insider since he will have got the inside information indirectly from other people whom he knows to be insiders. On question of whether it was reasonably likely that a person in the position of the alleged insider would obtain that inside information. It retains to be resolved by the courts.

In addition, the components of each offence are complex. More specifically, the

57 See Rider, Alexander & Linklater, fn. 5 at 38.
60 See Stamp & Welsh, fn. 58 at 100.
61 See Rider, Alexander & Linklater, fn. 5 at 44.
62 See Stamp & Welsh, fn. 58 at 102.
encouraging offence which creates under Section 52(2)(a) of the CJA 1993 can be problematic for the members of a jury.\(^63\) It does not list any constituent elements for encouraging offence. Thus, on question of what constitutes encouragement should be addressed by the jury in any case. Further, the UK law remains premised on liability on the part of natural persons only. Both the offence of encouraging and dealing may only committed by an individual, as opposed to a corporate entity. However, either an individual or a corporate entity might manage the actual dealing to which the encouragement relates.

Finally, the scope of defense, and how it relates to the offences is rather obscure. Such as a general defense of wide disclosure, it contemplates that information may be disclosed sufficiently enough to afford the accused a defense while at the same time not being made public within the meaning of Section 58 of the CJA 1993.\(^64\) In respect of a specific defense of market makers, a market maker must act in good faith in the course of his business or employment. On one hand, if the rumor turns out to be false there could be an argument that it was never information at all and thus cannot be inside information.\(^65\) On the other hand, the fact that the rumor is circulating may itself be inside information.\(^66\) Under such circumstances, whether or not the rumor proves to be true. Once the rumor is properly treated as inside information and provided an insider dealt with the benefit of knowing the rumor, the good faith need in the market maker defense considered is likely to be difficult to satisfy.\(^67\)

From what has been outlined above, the uncertainties of the outcome have left many problems, notwithstanding a number of important aspects of the CJA 1993 are wider than its predecessor. It is submitted that as a significant loophole in the legislation, in the absence of such guidance the provisions should be interpreted cautiously.

2. Difficulties of the Criminal Prosecution. — Accordingly, it is important for the successful prosecution of each of the insider dealing offences under the CJA 1993 to show not only that the relevant information was inside information, but also that the accused knew that it was from an inside source.

It is obvious that it will require actual knowledge, but proving actual knowledge is notoriously difficult. This has been a problem in a number of cases. In fact, it should be highlighted another major obstacle is to prove that having the inside information.\(^68\) In the case of the sub-tippee, circumstances arise where information has been passed through several hands and has consequently lost some of the qualities that made it inside information with the result that it may be hard to prove that the tippee has inside

\(^{63}\) Id. at 107.
\(^{64}\) Id. at 111.
\(^{65}\) Id. at 113.
\(^{66}\) Id. at 114.
\(^{67}\) Id.
\(^{68}\) See Rider & Ashe, fn. 22 at 54.
information. 69 Aside from establishing the tippee’s state of knowledge, it may be hard to establish that the information is in fact inside information because at this stage it may have lost much of its accuracy and novelty.70 Besides, even if the information, after being passed through several hands, still remains its accuracy and novelty, it may be hard to show that the sub-tippee knew that the inside information was from an inside source. 71 Additionally, whether or not information has been made public and that may also lead to prosecutions more unlikely. As Mr. Anthony points out, information becoming public is crucial because it decides whether the action taken before or after is legal or illegal in the coverage of insider dealing regulation. 72 If someone possesses inside information and intends to make it public, but deals during the time, that is insider dealing; while, if that person is in receipt of inside information and makes it public so that it is in the public domain when he deals, that is not insider dealing. 73 It is felt that it is possible for someone to exonerate any liability by a simple assertion, and then the chances of a successful prosecution will be reduced.

In recent years, it has been recognized that the use of criminal law to prosecute and prohibit insider dealing has been ineffective. From the introduction of the criminal offence since 1980, approximately 104 cases of insider dealing have been investigated by the Surveillance or Insider Dealing Unit of the London Stock Exchange and of that number, only 33 cases had led to the subject of a criminal prosecution and around half that number had resulted in convictions as at January 1994. 74 Generally speaking, the need to prove the prosecution case beyond all reasonable doubt leads to the absence of successful prosecutions of insider dealing under the criminal law. 75 The burden of proof may be regulated so high as to make it impossible for the prosecution to meet.76 For instance, on indictment, the jury will be told by the judge that, unless they are satisfied beyond reasonable doubt on all the evidence that the accused in question committed the offence charged, they must acquit him. 77 It seems that the criminal justice system is not the most suitable instrument. If civil law proceedings were introduced, then there could be a real disincentive against insider dealing. 78

In fact, the issue of whether provisions should be made for a civil penalty system is

69 See Rider, Alexander & Linklater, fn. 5 at 66.
70 Id.
71 Id.
73 See Brazier, fn. 3 at 121.
74 See Stamp & Welsh, fn. 58 at 92.
76 See Hannigan, fn. 7 at 76.
77 See Ferguson v. R [1979] 1 All ER 877.
78 See Morris, fn. 35 at 298.
one of the most controversial aspects of insider dealing regulation. During the passage of the CJA 1993 through the UK parliament, recommendation were made by the Trade and Industry Select Committee for the introduction of civil penalties for insider dealing and the establishment of an enforcement agency to monitor compliance with the law as well.\textsuperscript{79} The arguments against solving insider dealing by civil means rest largely on the absence of a plaintiff, and do not survive the postulation of a state body with a duty to pursue a civil action for a penalty.\textsuperscript{80} Eventually, the UK government’s response stated that:\textsuperscript{81}

\begin{quote}
...The regulator’s action would be to impose a sanction on the basis 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.
\end{quote}

It is clear that additional civil enforcement mechanisms therefore seem unlikely at present during debates on the new law of the CJA 1993. As a result, criminal sanctions are still retained to prevent and punish insider dealing and this is reflected in the legislation.

\section*{D. Criticisms on Part V of the Criminal Justice Act 1993}

The legal regulation of the CJA 1993 has attracted an extraordinary amount of criticisms during its brief existence. No new civil penalties are introduced, no new investigative powers are conferred and no new regulatory bodies are set up, although the scope of regulation is considerably extended to cover a wider range of instruments, markets and individuals.

In detail, the CJA 1993 represents an improvement in the previous legislation, but criminal sanctions are only one aspect of a fragmented regulatory network and the practical effect may not be particularly significant, beyond those limited ones already existing.\textsuperscript{82} Moreover, the changes to the burden of proof may go some way to supporting the exacting task of those who are engaged in the processes of investigation and prosecution, but evidential problems still remain.\textsuperscript{83} Additionally, the range of the context to which the CJA 1993 applies is considerably wider than that to which the previous legislation applied, but it has resulted in the widespread concern that the CJA 1993 is too broad in ambit and unclear, such as the broad-based approach to the definition of inside information, together with an expanded approach to who is an insider.\textsuperscript{84} Besides, an extension of the basis of liability for the insider dealing offences creates a raft of rather

\begin{enumerate}
\item See Stallworthy, fn. 37 at 453.
\item Id.
\item See Rider & Ashe, fn. 22 at 31.
\end{enumerate}
technical and complicated defenses, and, as a result, it may leave difficulties in securing convictions when cases come to the courts.  

Turning to detection and enforcement, the most disappointing part of the CJA 1993 is that it utterly fails to address these issues. It does not alter any of the sanctions or enforcement procedures, notwithstanding the courts have been prepared to find non-executed contracts based on inside information voidable. It assumes that the relatively few successful convictions in the UK are indicative of a low incidence of insider dealing and the successful of initiatives aimed at ensuring market transparency. The harsh reality, however, is probably the examples of insider dealing are likely to be detected, only the least sophisticated examples of insider dealing are enforced and of those many fail to result in convictions because of the complexities of the CJA 1993.

Rider argues that the criminal justice system standing alone under the CJA 1993, as it traditionally has in this area, is not sufficiently efficient or effective. As mentioned, the numerous problems afflict this area of legal regulation. Thus, it has been much public concern that there can be achieved by introducing heavy civil penalties as an alternative to the criminal law. The adoption of a civil action would have two massive advantages. One is that the use of civil sanctions would ease the evidential burden, since prosecutions would be made under the lower standard of proof. It means that the prosecutor in insider dealing cases will no longer be required to prove beyond reasonable doubt something so nebulously defined that it carries doubt within its very nature. The second is that the accused insider dealing will no longer be able to take the great benefit which criminal procedure accords him by not requiring him to plead his case prior to the commencement of the hearing. Under such circumstances, it seems that handing over control from a civil penalty system might lead to more efficient investigations, and ultimately more successful prosecutions. A civil regime may play a crucial role in the legal system and “the criminal law cannot be treated as wholly separate from the operation of regulation.”

E. Concluding Remarks

The UK government has followed the Directive in producing a restrictive regulation

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87 See Stamp & Welsh, fn. 58 at 126.
88 Id.
90 See Hannigan, fn. 80 at 204.
91 Id.
92 See White, fn. 50 at 169.
for the control of insider dealing. The resulting provisions primarily contained in Part V of the CJA 1993, also offers a broader basis and more coherent framework than under the previous legislation. Nonetheless, the only real sanction for insider dealing is still a criminal sanction. It is admitted that it has not fulfilled the hopes of legislators alike and the reliance on traditional criminal prosecution is not the most appropriate mechanism for the regulation of the securities market in general.94 There are a number of problems to be posed in each case by the members of a jury. Many prosecutions are likely to fail under the CJA 1993 as they did in the past under the previous legislation.

The CJA 1993 has tended to make professionals about the full extent of the context and, paradoxically, will make successful prosecutions hard to secure convictions.95 A more effective remedy might be the confiscation of the profit gained in the insider dealing plus a civil penalty.96 On a theoretical level, the policy underlying legislation must not be forgotten in seeking to implement the law; meanwhile, on a practical level, the consideration and resolution of legal uncertainties and difficulties must be proposed to avoid regulatory gaps and obsolescence.97 Because insider dealing is such a pervasive issue, the introduction of new regulation has perhaps highlighted the weaknesses in the criminal penalty system and illustrated that a new regime would be timely.98

II. PART VIII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000 AND ITS RECENT AMENDMENTS FOR THE REFORM OF INSIDER DEALING

As the Economic Secretary put it:99

There is a gap in the protections of the financial markets. The criminal law covers all market participants, but only a narrow range of serious criminal offences. The regulatory regime is capable of dealing with a wider range of damaging behaviours, but applies only to the regulated community.

A legal framework of the FSMA 2000 complements the existing criminal offences of insider dealing that is set out in the CJA 1993. Part VIII of the FSMA 2000 has made significant changes in the regulatory framework dealing with insider trading by introducing the civil offence of market abuse alongside the existing insider dealing regulations.100 A flexible civil penalty system may put the UK in line with the other countries. Under this chapter, it is exploring the effectiveness of the civil penalty system, filling the gaps left by the criminal law and self-regulatory organizations and mechanisms,
and recent amendments to this civil market abuse regime.

A. A Civil Penalty System and Its Effectiveness: Filling the Gaps in the Insider Dealing Regulations

A concept of civil offence for insider dealing is emerged in the guise of the market abuse regime of Part VIII of the FSMA 2000. Under the FSMA 2000, Section 118 governs definitions of market abuse and covers behavior in relation to misuse of information, creating false or misleading impressions and market distortion. Besides, it offers a regular user test. Additionally, it provides that the FCA must offer a Code encompassing appropriate guidance to those determining whether or not behavior amounts to market abuse and listing factors are to be taken into account in making such decisions.\(^{101}\) And then, the FCA has produced drafts of a Market Code, which set out helpful guidance on this obligation.\(^{102}\) The Code directly influences on the innovative powers given to the FCA to bring civil action against those who commit the civil offence of market abuse.\(^{103}\)

As the new civil offence of market abuse, it applies not only to the regulated individuals, but also generally to the members of the public in the financial services marketplace.\(^{104}\) Clearly, it covers any person or firm who engages in market abuse through insider dealing. It is important to note, however, that purely private deals, even involving securities covered by the CJA 1993, fell outside the scope of the offence.\(^{105}\)

Moreover, the extension of the tippee liability is reflected under Part VIII of the FSMA 2000. It makes no distinction between primary and secondary insiders, nor requires the alleged insider to be connected directly or indirectly with the company whose securities are traded.\(^{106}\) Consequently, under both the CJA 1993 and the FSMA 2000, where the person disclosing the information has access to it through their employment, it is not necessary to show that the person was in a position like employment, office or profession which might reasonably be expected to give him access to such inside information.\(^{107}\)

As mentioned previously, few successful prosecutions under the CJA 1993 are applied to the tribunal or the court. The CJA 1993 applies to cases of insider dealing of any seriousness, not only a high standard of proof should be met, but also it should be proved

\(^{101}\) See Wright, fn. 75 at 20.
\(^{103}\) See Wright, fn. 75 at 20.
\(^{104}\) See Filby, fn. 100 at 363.
\(^{105}\) See Rider, Alexander & Linklater, fn. 5 at 47.
\(^{106}\) Id. at 69.
\(^{107}\) Id.
beyond reasonable doubt.\textsuperscript{108} It seems that the offence of insider dealing is too complicated and technical to be regulated to the criminal standard of proof. Furthermore, the self-regulatory schemes are weak with its limited application in the financial services industry. The UK government is not satisfied with the reliance on the criminal law.

Therefore, the legislature is attempted to enact the civil regime of market abuse in order to tackle the problems of the current criminal regulations. Part VIII of the FSMA 2000 fills the gaps left by the existing criminal offence of insider dealing and the self-regulatory system.\textsuperscript{109} Civil penalties and restitution are complemented. A civil burden of proof is comparatively easy and less expensive to prosecute. Although the offences may overlap with criminal offences, the proceedings for policing market abuse do not require the expense of a jury trial.\textsuperscript{110} In addition, the standard of proof on the balance of probabilities could apply as opposed to the criminal standard of beyond reasonable doubt.\textsuperscript{111} It would likely to increase the number of successful cases brought before the courts. The FCA specifically states in literature which aimed at consumers that market abuse is not itself a criminal offence.\textsuperscript{112} Thus, market abuse is to be proved to a civil standard.

In a sense, burden of proof is a crucial factor in determining whether an act of insider dealing should be pursued, and what sanctions should be applied. The civil burden of proof regarding to market abuse is on the FCA. Section 123 of the FSMA 2000 stipulates that the FCA must be satisfied that behavior amounting to market abuse has taken place. However, the application of the standard of proof in cases of market abuse is likely to be fraught with difficulties. It has a controversy lies in determining to what extent the FCA should be satisfied. With the confusion, the appropriate interpretation would be onerous depending on the seriousness of the case or standard. For example, the Financial Services and Markets Tribunal (hereinafter “Tribunal”) may expect in individual cases may be on something of a sliding scale: The more serious the allegation, the more will be required to discharge the burden of proof.\textsuperscript{113} Similarly, this approach was later confirmed in the case of\textit{R. v. Hampshire County Council}\textsuperscript{114}, it was held that “the standard is flexible…the more serious the alleged offence against discipline, so the greater the degree of probability is required.” It is submitted that if the standard of proof depends on a sliding scale, this could potentially limit the effectiveness of the market abuse regime. It would come to be seen as a kind of financial police authority that investigates suspected breaches of regulation by seeking information. The FSMA 2000 would suffer the same fundamental

\begin{footnotes}
\item[109] See Filby, fn. 100 at 366.
\item[110] See Morris Crisp, fn. 31 at 220.
\item[111] See Filby, fn. 100 at 363.
\end{footnotes}
limitation to its effectiveness, which has prevented Part V of the CJA 1993 from engaging in more prosecutions. Hence, a lower standard of proof would be preferential in these instances, as this would permit a higher proportion of sanction proceedings by the FCA to succeed. It is felt that the civil regime with the lower standard of proof rather than criminal proceedings is generally well covered by filling the gaps and towards addressing the problems in the insider dealing regulations. It may provide an effective measure for the protection of the financial markets.

B. UK’s Major Amendments to Civil Market Abuse Regime

Major amendments of civil market abuse regime in the Financial Services and Markets Act 2000 (Market Abuse) Regulations were conducted in 2005, 2011 and 2014 respectively. The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 substitutes the existing Section 118 of the FSMA 2000 market abuse regime. There are seven categories of abusive behavior which are more accurate descriptions compared with the existing three categories. In particular, the new Section 118(2) to (4) enumerate the certain prohibitions of insider dealing. Furthermore, it inserts new definitions of insider and what comprises inside information respectively in Sections 118B and 118C. In respect to the Market Code, Section 119 is supplemented to offer that it may include descriptions of behavior that are acceptable market practices in line with the EU Market Abuse Directive. It is submitted that extensions of the scope of the aforementioned context are important to ensuring that the UK has a flexible insider dealing regime. In fact, beginning with draft regulations, the UK government is going to take the approach of maintaining the current scope of the UK’s regime where it is wider than the EU Market Abuse Directive.

In the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2011, the Regulations amend Sections 118 and 118A of the Financial Services and Market Act 2000 which were substituted, together with the Sections 118B and 118C, for the original Section 118 by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005. The definitions of market abuse are broader than those in the original Section 118 because the Sections 118(4), 118(8), 118 A(2) and 118 A(3) retain the definitions of market abuse.

In the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2014, Subsections (4) and (8) and the definition of “regular user” in Section 130A(3) cease to have effect on and Subsection (1)(b) is then to be read as no longer referring to those subsections. Thus Sections 118, 118A and 130A replaced and expanded the definition

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115 See Explanatory Memorandum to the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005. This Explanatory Memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.


117 See FSMA 2000, s 118.
of market abuse under the 2000 Act as enacted to bring the prohibition on market abuse under the 2000 Act into line with the EU Directive.\textsuperscript{118} The latest amendment was conducted in 2016, from which the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 came into force on July 3, 2016. Part 8 of the 2000 Act, namely the civil market abuse regime, were amended in the following areas. First, the headline of Part 8 substitute “Provisions relating to Market Abuse.”\textsuperscript{119} Second, Sections 118 (market abuse) to 122 (effect of the code) were omitted before the Section 118 and Section 119.\textsuperscript{120} Most importantly, there are several amendments concerning the power of the FCA. Before the Section 123(b) which grants the FCA power to impose penalties in case of market abuse, the new amendment inserted the power to require information and supplement provisions before this section.\textsuperscript{121} This part of the amendment will be analyzed in the following section of the FCA’s regulatory power.

C. The Role of the Code of Market Conduct

As the aforementioned, the FSMA 2000 includes the legal definition of market abuse and needs the FCA to create a Code that sets out detailed standards to be observed by everyone who uses the UK markets.\textsuperscript{122} The FCA has the parallel duty of pursuing its objectives of promoting market confidence and integrity by deterring and detecting market abuse. It does so by interpreting and applying the principles and requirements of the Market Code. Accordingly, the Code was issued by the Financial Services Authority (FSA) board on July 19, 2001 and came into effect on December 1, 2001.\textsuperscript{123} The Market Code is central to the civil regime and expands on many of the key phrases in the FSMA 2000 which is an important aspect of the maintenance of standards. A comprehensive set of varying circumstances has been tackled in the Code, providing greater clarity and guidance than any statute interpreted through jurisprudence, such as given guidance to those who may determine whether or not behavior amounts to market abuse.\textsuperscript{124} Besides, the FCA has enumerated nine specific safe harbors in the Market Code. Otherwise the Code may be relied upon so far as it indicates whether or not that behavior should be taken to amount to market abuse.\textsuperscript{125} The Code focuses on demonstrating the regular user test and three forms of market abuse, which refers to as misuse of

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{123} See Rider, Alexander & Linklater, fn. 5 at 171.
\textsuperscript{125} See The FSMA 2000, s 122(2).
information, false and misleading impressions and distortion.

In details, the Code confirms that the standard of the regular user is not that of an actual user, but rather that of a hypothetical user. Even if a particular market accepts behavior falling within one of the three forms of abuse, it can still be market abuse. Furthermore, the Code confirms the objective nature of the regular user test and that abuse does not generally need an intention or purpose to be present in order for behavior to fall below the objective standards.

In respect to the misuse of information, it is different from the definition of inside information and the category of defense under the crime of insider dealing. The Code does not need information to be specific or precise or indeed price-sensitive, but they are elements that the FCA will consider along with how current and reliable it is and what other information is available. Besides, it is not a defense that the person did not expect a profit to be made from the information.

Regarding to the false or misleading impressions, the Code sets out that it will occur when a person engages in artificial transactions which based on the objective principal effect being to generate a false or misleading impression, whether deliberately or negligently, but with a subjective defense of having a legitimate principal rationale. Similarly, where information is to be disseminated through an accepted channel, the person responsible for its submission remains under a positive obligation to take reasonable care to ensure that it is not false or misleading. Thus, accidental misreporting of transactions could be market abuse unless the person can prove he has taken sufficient care to try and prevent such mistake. Equally, the prohibition applies to engaging in a course of conduct which is likely to provide a false or misleading impression.

Conclusively, it is worth noting that the FCA has issued this Code that is legally binding and improves market transparency by defining a market abuse. Indeed, the FCA has responded to the practice of market in endeavoring to create a workable Code. Now, the Code is highly recognized because it provides helpful guidance and clarity for the users of the markets.

D. Concluding Remarks

It is difficult to reach an overall conclusion on the effectiveness of Part VIII of the

126 See Alcock, fn. 108 at 144.
127 See the Market Code, Para 1.2.5.
128 See Alcock, fn. 108 at 144.
129 Id. at 145.
130 See the Market Code, Para 1.5.18.
131 See Alcock, fn. 108 at 145.
132 See the Market Code, Para 1.5.21.
FSMA 2000. Nevertheless, it establishes a new scheme for filling the gaps left by the criminal law and self-regulatory organizations and mechanisms. One must admit that it is one of the most significant supplements under the FSMA 2000, which presents more advantages than the previous regimes. More specifically, advantages of the civil regime are the task of proving the offence becomes easier than imposing the criminal offence, the range of remedies available becomes wider, and the private litigation is encouraged.\textsuperscript{133} As a corollary, it might demonstrate in many of the cases. Under practical circumstances, civil actions can increase the deterrent effect of the law, while at the same time providing compensation for victims of the activity. Recently, UK amendments to civil market abuse regime may provide a broad structure for insider dealing law and thereby to promote confidence in the field of financial markets even beyond the current EU Market Abuse Directive. Part VIII of the FSMA 2000 and its amendments would be possible to achieve the effective and desirable legal regulation for the control of insider dealing. In effect, the civil penalty system has a significant contribution to regulating the UK investment markets and to improving investor protection.

\section*{III. Regulatory Powers of the Financial Conduct Authority Under the Financial Services and Markets Act 2000 and Application of the Criminal Justice Act 1993}

As a regulatory measure, additions and changes made to the FCA, which was later transferred its functions to the newly established regulatory body known as the FCA, are invested with regulatory powers to deal with a broad range of offences in the field of financial markets. The powers are related to detection, investigation and enforcement of the new insider dealing regulations under the FSMA 2000, and application of the CJA 1993’s criminal offence.\textsuperscript{134} It means that the duty of the FCA ranges from detecting insider dealing, through investigating suspected instances, to applying regulatory sanctions and criminal enforcement.\textsuperscript{135} This chapter will outline these processes, and examine how the new powers conferred to the FCA may be utilized to enhance detection rates, reinforce the process of investigations, and then permit regulatory sanctions to be applied in more situations than under the CJA 1993 alone.

\subsection*{A. Detection}

The FCA which may approach to detect insider dealing has been created by three primary ways. First, the FSMA 2000 offers the FCA must ensure that persons regulated by the Act are complying with it.\textsuperscript{136} The FCA intends to carry out this demand through


\textsuperscript{135} Id.

\textsuperscript{136} See the FSMA 2000, s 6.
supervision of authorized firms, but the only instance would be the internal compliance procedures of an authorized firm were to detect the insider dealing, and then refer the details to the FCA.\textsuperscript{137} The effectiveness of this mechanism would depend on the efficiency of the individual compliance procedures and the honesty of authorized firms.\textsuperscript{138}

Moreover, market surveillance takes a form of monitoring and supervising the exchanges. It is difficult to assess the efficiency of this system, the London Stock Exchange has been reluctant to disclose the detail of their monitoring measures, as maintaining a veil of secrecy around the process prohibits insider dealers from identifying loopholes.\textsuperscript{139}

The third way by which the FCA detects insider dealing is when it obtains information about a possible market abuse from an informant.\textsuperscript{140} The FCA may exercise its power under the Section 122A to gather information and documents from an issuer, a person discharging managerial responsibilities, a natural or legal person to support its functions. Although it plays a minor role compared with market surveillance, the FCA has taken steps to enhance this means of detection.\textsuperscript{141} The FCA was calling for the “introduction of a whistleblowing culture to help clean up the Square Mile,” and then it released a consultation paper to explore the industry’s views on the matter. As a positive response in April 2000, the FCA declared a policy statement on whistleblowing. The whistleblowing policy was based on the Public Interest Disclosure Act 1998\textsuperscript{142} (hereinafter “PIDA 1998”), which was passed to protect employees who reported matters of public interest from victimization by their employers.\textsuperscript{143} To be protected under the PIDA 1998, the whistleblower must reasonably believe the information and allegation in it are authentic, and must reasonably believe that the FCA is liable for the issue in question.\textsuperscript{144} Also, the whistleblower must be aware that insider dealing is a criminal offence, and, as a result, the number of potential whistleblowers may be diminished on a large scale.\textsuperscript{145}

\textbf{B. Investigations}

After a possible incidence of insider dealing has been detected, provided there are

\begin{itemize}
\item \textsuperscript{137} See Filby, fn. 134 at 334.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} See Filby, fn. 134 at 334.
\item \textsuperscript{140} Id. at 335.
\item \textsuperscript{141} Michael Filby, \textit{Will the Whistleblowers Play for the FSA?}, 152(7044) New Law Journal, 1247 (2002).
\item \textsuperscript{142} See the Public Interest Disclosure Act 1998, cl 23.
\item \textsuperscript{145} See Filby, fn. 134 at 336.
\end{itemize}
conditions suggesting insider dealing is taking or has taken place, the following step for the FCA will be investigated. The FCA is empowered to conduct a general investigation of a firm under Section 167 of the FSMA 2000. But in particular cases of suspected insider dealing, the specific power is granted by Section 168(2) of the FSMA 2000. The power under this subsection is broad which the FCA can appoint one or more investigators where there are conditions suggesting that insider dealing in the CJA 1993 sense has taken place. The FCA also has the power to decide which powers, or combination of powers, are most proper to use. The FCA has pointed out that it will inform only a person investigated that there is an investigation in progress, and then the investigator can require the person who may be able to give information which should be relevant to the investigation to offer that information to him. Moreover, the power can be used to require such a person to answer questions, provide documents or documents of a particular description to the investigator, relevant to the investigation, at a specified time and place. This person can also be required by the investigator to give all reasonable assistance in connection with the investigation. If the investigator is attempting to obtain a document, but the person fails to produce the document, he or she can be required to state to the best of his or her knowledge and belief where the document is. The range of the power of investigation is widened to a third party, in particular auditors, employees, lawyers and accountants by Section 175 of the FSMA 2000. When the document is being held by a third party on behalf of the person being investigated, the investigator can require the third party to produce and explain the document in circumstances in which he could have required the original person to do so.

It is certainly clear that the FSMA 2000 confers strong degrees of investigatory powers depending upon the basis of the investigation. Although similar powers were previously held by the Department of Trade and Industry (hereinafter “DTI”), there are differences between the FCA and the DTI which may influence on the effectiveness of these powers. For example, the DTI only had the option to pursue insider dealing as a criminal offence under the CJA 1993, as a result, it is not sufficient in the context of the securities markets. Now that the FSMA 2000 has produced civil sanctions applicable to

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146 Id.
147 See the FSMA 2000, s 168 (2)(a).
150 See the FSMA 2000, s 173 (2)(b).
151 See the FSMA 2000, s 173 (3).
152 See the FSMA 2000, s 173 (4).
153 See the FSMA 2000, s 175 (3).
154 See Rider, Alexander & Linklater, fn. 5 at 187.
155 See Filby, fn. 134 at 338.
insider dealing in the market abuse sense, investigations need no longer be curtailed by an inability to collect proof to the criminal standard.\textsuperscript{156}

It is submitted that by equipping the FCA to have the wider powers to investigate and to obtain evidence is compatible with maintaining market confidence and reducing financial crime. This is a strong link in the detection, investigation and enforcement chain. It seems likely that if the FCA is able to efficiently use the units from the supervision, the market surveillance or whistleblowing are precise enough to give the Authority reasonable grounds to suggest insider dealing, the incidences of insider dealing would be regulated on a significant scale.

\textit{C. Regulatory Sanctions}

The FCA’s regulatory sanctions introduced by the FSMA 2000 are completely new and require their own set of procedures.\textsuperscript{157} The main regulatory tools applied by the FCA include financial penalties, suspensions, restrictions, conditions, limitations, disciplinary prohibitions and public censures. If the decision is made to apply regulatory sanctions by the FCA, a suspected insider dealer will receive a warning notice stating the amount of penalty from the Regulatory Decisions Committee (hereinafter “RDC”) which is a body outside the management structure of the FCA. For example, in practice, when the FCA believes that it is necessary to ask the issuer to publish certain kinds of information or a specific statement, it will issue a writing notice to the issuer. Meanwhile, the statutory defenses are available to the alleged insider dealer to persuade the FCA. It is on the alleged insider dealer to prove that if he had a reasonable belief or took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within Section 123(1) of the FSMA 2000, he will not be subjected to a penalty by the FCA, and can even avoid restitution.\textsuperscript{158} With successful defenses, the RDC must issue a notice of discontinuance. Without successful defenses, a decision notice will be issued by the FCA with the amount of any penalty.\textsuperscript{159} And then the alleged insider dealer has a choice: to accept the judgment of the FCA or to refer the matter to the Tribunal.\textsuperscript{160} On one hand, the person who is subject to the notice by accepting the judgment of the FCA, the FCA will then publish a final notice, which must include the terms of the statement, order, penalty or other action to be taken and offer details of when the action takes effect.\textsuperscript{161} If the person fails to pay any financial penalty, the FCA can only recover the amount due as a

\textsuperscript{156} Id.
\textsuperscript{157} See Rider, Alexander & Linklater, fn. 5 at 191.
\textsuperscript{158} See Jain, fn. 133 at 140.
\textsuperscript{160} See the FSMA 2000, s 127 (4).
\textsuperscript{161} See the FSMA 2000, s 390.
civil debt. On the other hand, if the case is referred to the Tribunal, the FCA must draft a statement of case detailing the reason and under which authority the action proposed by them is being taken within 28 days of the date.\textsuperscript{162} Appeal from a decision of the Tribunal is to the Court of Appeal in England and Wales or the Court of Session in Scotland.\textsuperscript{163}

It is apparent that the consequence of thoroughness and accountability of the process may potentially take a long period of time to impose sanctions.\textsuperscript{164} Thus, the FCA has been provided powers so as to resolve this problem. First, there is a power to impose an unlimited financial fine in a civil capacity is contained by Section 124(2) of the FSMA 2000. Further, the FCA may apply to the court to enforce the amount of such penalties on the defendant.\textsuperscript{165} In any event, the FCA can also request the court to serve an injunction or a restitution prior to any finding of insider dealing has been made.\textsuperscript{166} In other words, the FCA has the power to ensure that the insider dealer is removed from the market, fined and ordered to make restitution.

It is felt that from an enforcement standpoint, the powers of the FCA can generally be regarded as an effective tool to achieve its statutory obligations, leaving the criminal law for the more serious conduct for which it is intended. It has afforded a higher priority than previous regulatory bodies. Of particular importance is that these powers are available to deal with insider dealing which may prevent further adverse impact on the public.

\textbf{D. Criminal Enforcement}

Although the FSMA 2000 is a civil regime of market abuse, it overlaps in certain important respects with the criminal offences of insider dealing for which the FCA would have criminal prosecution powers.\textsuperscript{167} So under certain circumstances, there will be some cases of market misconduct which may involve a violation of the criminal law and the market abuse at the same time. The FCA has the power to decide whether to process to the criminal procedures or to impose a sanction under the market abuse realm. According to Section 402 of the FSMA 2000, the FCA can initiate proceedings for insider dealing by applying Part V of the CJA 1993. A statutory obligation has been placed on the FCA to issue a statement of detailed policy in the Enforcement Manual.\textsuperscript{168} This policy comprises several factors which are to be regarded as guidance for the FCA to set out whether to prosecute rather than take a civil action.\textsuperscript{169} Amongst these factors, the FCA’s Handbook

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{162} See the Financial Services and Markets Tribunal Rules 2001, r 4(2).
\item \textsuperscript{163} See the Financial Services and Markets Tribunal Rules 2001, r 23(1).
\item \textsuperscript{164} See Filby, fn. 134 at 339.
\item \textsuperscript{165} See Morris Crisp, fn. 31 at 222.
\item \textsuperscript{166} Id. at 221.
\item \textsuperscript{167} See Alcock, fn. 108 at 142.
\item \textsuperscript{168} Michael Ashe & Lynne Counsell, \textit{The Crime of Being Something in the City-Part Two}, 150(6952) New Law Journal, 1381 (2000).
\item \textsuperscript{169} See Enforcement Manual 15.
\end{itemize}
\end{footnotesize}
stipulates that the seriousness of misconduct will be judged by whether criminal prosecution is likely to lead to a significant sentence.\footnote{170}{See Enforcement Manual 15.7.2(1).}

Moreover, on question of whether there are loss-suffering victims due to the action of the insider dealer, the criminal law is more likely to be applied where the misconduct has caused substantial loss or loss has been suffered by a substantial number of victims.\footnote{171}{See Enforcement Manual 15.7.2(3).} Protecting the victims is compatible with one of the aims of the FCA granted by the FSMA 2000.

Additionally, the FCA will consider an issue of the impact of the behavior on the market. Whether the misconduct has led to a detrimental effect on the market or has seriously damaged market confidence.\footnote{172}{See Enforcement Manual 15.7.2(4).}

In relation to determining the possibility that the misconduct may be continued or repeated, which could apply to the situations where the FCA has a convinced reason to believe an insider dealer is repeatedly dealing, and that he has accrued such profits that a fine by itself would not be a sufficient punishment to dissuade him from continuing to deal.\footnote{173}{See Filby, fn.134 at 340.} The imposition of a financial penalty is not an effective weapon in the fight to deter and penalize the further crime of insider dealing.

As for the next factor, the Handbook governs that the criminal regulations should be used to a person who has been previously warned or convicted regarding to market misconduct or has been subjected to civil or regulatory action in respect of market misconduct.\footnote{174}{Id. at 341.} One may suggest that this additional factor should not only be specially placed on market misconduct, as this can be carried out to prosecute the insider dealing under Section 56 of the CJA 1993.

Other further factors are related to the conduct of the person. The FCA will take into account any remedial and cooperative action taken. How quickly and completely redress has been offered to the victims, and whether the steps have been taken voluntarily.\footnote{175}{See Enforcement Manual 15.7.2(7).} It reveals that the FCA may focus on protecting the victim and punishing the dealer as well.

In short, the FCA will consider each of these factors in different conditions and then decide whether it is suitable to take a criminal prosecution. Once the FCA selects to prosecute under the criminal regulation, the proceeding will be the same as prosecutions under the CJA 1993 before the passing of the FSMA 2000.\footnote{176}{See Filby, fn. 134 at 341.} Of course, this could lead to some of the problems being apparent, such as the difficulties associated with proving the offence to the criminal standard, notwithstanding the investigation powers available to
the FSA are only slightly stronger than those available previously to the DTI.177

There is no doubt that the more the insider dealer can be manifested to possess an
tention to abuse the market, the more likely criminal law will be taken as an alternative
to regulatory actions. Nevertheless, the FCA should be considering as its primary
deciding factor the likelihood of whether the prosecution is likely to succeed in the
criminal courts.178

As Ashe suggests, the FCA, in deciding whether to prosecute using the criminal
procedures, could take an approach relating to use civil procedures in most circumstances,
and will only prosecute in particularly serious cases.179 It is worth mentioning that the
FCA does not intend to subject persons to the double jeopardy rules of both criminal and
regulatory sanctions, it must ensure that there is a fairly high likelihood that the case will
succeed, or it will risk letting the insider dealer go unpunished.180

E. Concluding Remarks

To sum up, various regulatory powers afford the FCA the flexibility to adapt to
different situations. The civil law enforcement powers may offer a more effective
response to insider dealing. The FCA has the power to set its own sanctions, and provide
an appeal procedure through an independent tribunal. It may impose financial penalties
and restitution orders administratively or may exercise its disciplinary powers with regard
to authorized persons. Furthermore, it may apply to the civil courts for injunctions and
restitution orders and request the court to impose a financial penalty, or receive power to
prosecute criminal offences of market abuse.181 Obviously, the civil law enforcement
powers complement rather than supersede the criminal law. The FCA clearly regards the
imposition of a criminal proceeding as more appropriate for serious cases application of
the CJA 1993’s criminal regime.

The creation of the market abuse offences reflects that the FCA has afforded the
regulation of market abuse a higher priority than previous regulatory bodies. Not only
will resources be put into investigations but also a more flexible system of punishment is
available and this can be seen as a useful weapon for insider dealing cases.

IV. REGULATING INSIDER DEALING IN CHINA: LEARNING LESSONS FROM THE UK
REGULATORY EXPERIENCES

In contrast with the UK’s rich experiences in regulating the stock markets, China’s

177 Id.
178 Id.
179 Michael Ashe, Fraud: Its Enforcement in the Twenty-First Century-Insider Dealing, Institute of
Advanced Legal Studies, Apr. 29, 2002.
180 See Filby, fn. 134 at 341.
181 See Rider, Alexander & Linklater, fn. 5 at 184.
regulations and regulatory mechanisms in stock exchanges are relatively new. China’s
two major stock exchange platforms, namely the Shanghai Stock Exchange and the
Shenzhen Stock Exchange were established in the early 1990’s. The first Securities Law
of PRC was carried out in 1999 and the current Securities Law came into effect in 2005.
The CSRC was the regulatory body for the securities market and insider dealing is mainly
regulated by the Criminal Law of the PRC, the Securities Law of the PRC as well as other
regulations.

A. China’s Regulation on Insider Dealing

Insider dealing is regulated by the securities laws, the Criminal Law 1997 of the PRC
and other relevant regulations in China. The first Securities Law which came into effect
in 1999 provides five articles to insider dealing, and later the Securities Law was
amended in 2005, which clarifies some vague terms and enhances several shortcomings
with respect to administrative liabilities and fines. The latest amendment of the
Securities Law of the PRC was conducted in 2014.

In terms of the scope of the insiders, the Securities Law 2005 of the PRC has listed
several types of persons who are prohibited from conducting securities trading. The types
of the persons include the persons who possess high positions in the corporation such as
officers, directors, managers, shareholders with more than 5% of the shares in a company
and persons who can get access to the insider information because their employment are
also prohibited from securities trading. These types of persons are similar to the
primary insiders that set out by the CJA 1993. In addition to the above types, persons who
obtain inside information by illegal means are also prohibited from securities trading.

Under the Securities Law 2005 of the PRC, insiders may violate the law not only by
trading stocks on the basis of inside information, but also by tipping or advertizing the
third party to buy or sell the relevant securities.

Regarding to insider information, it not only includes the information that is gathered
from the company, but also the information from the governmental sources, such as the
policies. Generally, all the information should have a price-sensitive nature. This is
similar to the characteristics of the inside information in the UK legislation.

In respect to the civil penalty for the insider dealing in China, the Securities Law 2005

182 LIU Duan, The Ongoing Battle against Insider Trading, 12 Duquesne Business Law Journal, 139
(2009).
Art. 74.
184 See LIU, fn. 182 at 140.
185 See fn. 183, Art. 75.
186 MIU Jianxiang, 警戒内幕交易罪的认定——基于刑事推定的展开 (Determination of Securities Insider
Dealing Crime — Based on Unfolding Criminal Presumption), 4 比较法研究 (Journal of Comparative Law),
93 (2013).
of the PRC has provided in its Article 76 that the insiders who may violate the law by conducting insider dealing, will have to bear the civil liability and pay for the compensation for the investors who suffered losses from the same securities dealing. However, no detailed judicial interpretation or other regulations about the civil penalty mechanism are carried out. Therefore, “the civil liability provisions in the Securities Law 2005 of the PRC state only that there are ‘liabilities of compensation’ for a violation of the insider dealing law, but provide no details on how these liabilities should be quantified.”\(^{187}\) As a matter of fact, is it difficult to implement the civil liability provision. Therefore, unlike the strong civil penalty system for insider dealing in the UK, the civil regime in China is still weak.\(^{188}\)

In addition, insider dealing was prohibited by the Criminal Law 1997 of the PRC. Unlike the CJA 1993 of the UK, the Criminal Law 1997 of the PRC has not provided any detailed definitions of the relevant terms, such as insiders, inside information, etc. The Criminal Law 1997 of the PRC prohibits insider dealing by providing the penalties in the law and the detailed definitions of the relevant terms are referred to other securities laws and regulations.\(^{189}\) According to Article 180, if the circumstances are especially serious, the person concerned shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years and shall also be fined not less than one time but not more than five times of the illegal gains.\(^{190}\) It is shown from this article that only when the offence is especially serious, will the criminal sanctions apply for insider dealing.\(^{191}\)

B. The China Securities Regulatory Commission

The regulatory body for the securities market in China is the CSRC which was established in 1992. The CSRC is a ministerial-level public institution directly under the State Council. It is mandated to play a unified regulatory function over the securities and futures market of China in order to maintain the securities and futures market order, and ensure a legal operation of the capital market.\(^{192}\) In the Chapter 10 of the Securities Law 2005 of the PRC, the regulatory body, namely the CSRC enjoys the power to formulate policies, supervise the securities market, and impose penalties for the illegal conducts and other powers that are granted by the State Council.

In order to exercise the above powers, the CSRC has the right to require information

\(^{187}\) See LIU, fn. 182 at 147.

\(^{188}\) GENG Lihang, 证券内幕交易民事责任功能质疑 (The Doubt about the Function of Civil Liability of Securities Insider Trading), 6 法学研究 (Chinese Journal of Law), 77 (2010).


\(^{190}\) Id.


\(^{192}\) About CSRC, please see http://www.csrc.gov.cn/pub/csrc_en/about/ (last visited Apr. 1, 2017).
or documents from the relevant institutions or persons, investigate and penalize the activities that violate the securities laws and regulations. In general, these powers are similar to the FCA. But the CSRC mainly imposes the administrative penalties. According to the Notice of General Office of the State Council on Forwarding Opinions of CSRC and Other Departments on Cracking down and Preventing Insider Dealing in the Capital Markets issued in 2010, the CSRC shall investigate and penalize insider dealing in a timely manner, and if the cases will lead to serious consequences, which amount to criminal offence, the CSRC shall process the cases to the public security authorities.

As it is outlined, most of the powers that can be exercised by the CSRC are in the administrative regime. However, this power is not as efficiently used as the FCA. According to the statistics generated from 2001 to 2012, the administrative penalties were imposed to 477 cases by the CSRC, while only 45 of them are cases of insider dealing, consisting of less than 10% of the total amount. In addition, the CSRC has no civil enforcement power, which has been proved as a powerful tool to prevent insider dealing, and this has limited its functions in reducing insider dealing.

In addition, there is a lack of competent staff in the CSRC. Comparing to the large extent of stock exchange market activities, the number of highly qualified staff is small and the resources allocated for facilitating the functions of the CSRC are inadequate.

C. Lessons That Can Be Learned from the UK’s Experiences

The UK has a long history in prohibiting insider dealing and many experiences can be learnt by China. As it is shown from the previous sections, many aspects concerning insider dealing in the Chinese legislation should be improved. However, the biggest challenges for combating insider dealing in China exist in the weak civil regulatory regime and the weak enforcement power of the CSRC. Therefore, the following paragraphs will focus on providing suggestions for these two challenges.

In the legal perspective, it is urgent for China to legislate on the civil regime to regulate insider dealing. Although the Securities Law 2005 of the PRC provides that

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the right to civil compensation can be used, there is a lack of detailed implementation
guide. As a result, it brings difficulties for the legal practitioners or even the court to
follow the rules and to seek civil compensation. In order to solve this problem, China
should establish an effective civil action mechanism through legislation.

Given that the civil regime for regulating insider dealing in the UK is quite mature,
many experiences from the FSMA 2000 can be learnt by the Chinese legislative body.

First, the CSRC should be granted the power to issue a code concerning civil penalty
of insider dealing to assist the implementation of the Securities Law. The FCA is obliged
under the FSMA 2000 to formulate a code to make detailed and clear legal interpretation
of FSMA 2000, with appropriate guidance to determine whether or not certain
behavior amounts to market abuse and providing elements that are taken into account for
implementing the law. Accordingly, it is proposed to formulate a detailed code by CSRC
similar to the Market Code, which will clear vague clauses or parts that require further
explanation in the Securities Law. The code should include but not limited to the content
of developing clear and unified standards which will clarify (1) what constitute the
circumstances contained by the terms such as “on the basis of inside information”
“otherwise than in the proper course of the exercise of his employment, profession or
duties” in concepts relevant to insider dealing, which acts as the premise while
determining whether or not certain behavior amounts to insider dealing, and (2) the kind,
extent and strength of punishment that people with certain illegal acts of insider dealing
will receive, which is of the same importance and can provide market participants with
deterrence and direction. Rather than scattered in various regulations and judicial
interpretations, being included in one single code enables the standards to be complete
and systematical.

Second, provisions of restitution orders should be stipulated into the Securities Law.
FSMA 2000 expressly grants the court and the FCA power to make restitution orders,
imposing civil sanction to those whose behaviors are regarded as market abuse. Accordingly, it is suggested that the Securities Law should learn from the UK’s
experience by stating that (1) Restitution orders serve as an important guarantee for
investors who have suffered loss due to market abuse to obtain indemnity. The amount
paid in pursuance of restitution order must be paid to or distributed among qualifying
persons; (2) while determining the sum of the restitution order, “the profits accrued

198 See the FSMA 2000, s 118(2).
199 See the FSMA 2000, s 118(3).
200 See the FSMA 2000, s 382(1) and s 384.
201 See the FSMA 2000, s 383(5).
to”202 insider dealers and “the extent of the loss or other adverse effect”203 suffered by the investors should be taken into consideration. Since the principle of indemnity is the essential principle of civil remedy, the sum of the restitution order should be limited to the loss of the investors; (3) as the aforementioned, if a person fails to pay any financial penalty required by the restitution orders, the amount due will be recovered as a civil debt, which is beneficial to protect the legal rights and interests of investors through legal proceedings.

Third, the CSRC should also be granted the power to provide an enforcement guide on the civil penalty, especially on restitution orders. Just like the Enforcement Guide formulated by FCA which describes the FCA’s approach to exercising the main enforcement powers given to it by FSMA 2000 and by other legislations,204 a similar enforcement guide should also be formulated by the CSRC in order to assist the effective operation of the civil regime regulating insider dealing, especially the implementation of restitution orders. The Enforcement Guide has listed factors which the FCA should consider while determining whether to exercise powers to obtain restitution, including but not limited to whether the profits is quantifiable, whether the losses are identifiable, the number of persons affected, costs of securing redress, can persons bring their own proceedings, etc.205 Accordingly, it is suggested that while it is difficult to find out how much profit and to whom the profits are owned or it is hard to establish the number and identity of those who suffered losses as a result of the market abuse, it may be inappropriate for the CSRC to exercise its power to obtain restitution. Moreover, only when the breach of relevant requirements results in significant losses, or losses to a large number of persons which collectively are significant, and when the cost of exercising the power to obtain restitution compared with the size of sums that might be recovered as a result is worthy can the CSRC exercise this power.

In terms of the enforcement power, FCA has taken various active measures to prevent the occurrence of insider dealing. Considering the functional advantage and the supervision experience of the FCA, the CSRC shall learn from it and improve its functions in the following aspects:

First, more independent power shall be granted to the CSRC. Take the example of the FCA, it can exercise its power independently, so it is able to successfully avoid the interference from the executive authorities and judicial organs. The power of the FCA is originally comes from the FSMA 2000 and other relevant laws. Therefore, it is very convenient for the FCA to exercise its power independently. The CSRC is a department established under the State Council. Although it has certain kinds of independent power,

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202 See the FSMA 2000, s 383(6)(a).
203 See the FSMA 2000, s 383(6)(b).
204 See Enforcement Guide 1.1.1.
205 See Enforcement Guide 11.2.1.
directing by the executive authority, its power will have to be restricted by the State Council and be influenced by the political elements. The CSRC should be given more independent powers in order to better protect the securities market.

Second, more supervisory power shall be granted to the CSRC. Supervisory power of the CSRC should not be confined to areas and persons associated with securities activities, but involve all market activities. Only in this way can the CSRC master comprehensive information about the market and thus improve its supervisory function. Moreover, since the civil regime in China’s regulation on insider dealing is relatively weak and difficult to implement, the CSRC should have the power to impose civil sanctions or to apply for the court to penalize the civil abuse of insider dealing. This would be more effective in terms of civil enforcement and it will help to improve the supervisory power of the CSRC.

Third, a perfect supervisory system should be established. While cracking down on insider dealing, the CSRC should not only rely on its own resource and power, but also cooperate with and transfer some pressure to companies and market participants. Companies’ initiative should be fully aroused to reduce the occurrence of insider dealing from the source. For example, companies should be required (1) to conduct training activities to raise staff’s awareness of professional ethics, especially of obeying stock exchange rules; (2) to improve the information confidentiality mechanism and develop advanced insider information protection system; (3) to report to the CSRC in time when a suspicious transaction is found. Furthermore, the CSRC should take advantage of the disclosures from the whistleblowers. According to the UK’s experience, raising market participants’ enthusiasm to disclose insider dealing is beneficial to unlock potential, reduce cost as well as improve efficiency of supervision. Although the CSRC has taken measures to encourage market participants to provide information concerning illegal behaviors, there is still room for improvement in processing the above information. For example, the CSRC should publicize its process of handling disclosures, which will not only increase the credibility of the government, but also raise public awareness towards insider dealing. Moreover, it is necessary for the CSRC to enhance the power of supervision, investigation and information gathering from companies or individuals.206 As it is discussed in the previous section that there is a lack of professional staff in the CSRC, a committee consisted of experts should be established while regular trainings for improving their occupational skills and professional ethics should be conducted as well in order to deal with the professional issues.

CONCLUSION

This article has examined how effective the legal regulations are, which are available to protect investors against insider dealing in the field of financial markets in the UK and

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briefly introduced China’s regulations on insider dealing and lessons that China could learn from the UK. In the UK, it involves the two primary pieces of legislation which are the provisions against insider dealing in the CJA 1993 and the market abuse and insider dealing provisions of the FSMA 2000. The FCA is responsible for regulating the UK financial services sector and the promotion of the objectives set out in the FSMA 2000. In China, insider dealing is prohibited in the Criminal Law 1997 of the PRC and the Securities Law 2005 of the PRC. The CSRC is the counterpart to the FCA.

While in the UK, the legal regulations are those set above, paucity of successful prosecutions carried out on the part of insider dealing under the criminal penalty system have been characterized. The criminal sanctions alone have not operated as effectively as they had originally been planned. The criminal laws may suffer from inherent problems, such as uncertainties of the provisions and difficulties of the criminal prosecution under the CJA 1993. Due to these facts that this kind of system has been criticized by practitioners for being too complicated and difficult to apply, it is unlikely to have much deterrent effect on persons who are contemplating trading on the basis of inside information. Thus, it is reasonable to expect that civil regimes and regulatory sanctions should be pursued which will parallel criminal offences as alternatives to insider dealing proceedings. In particular, civil or regulatory type actions might overcome the difficulty of having to prove the main elements of the crime beyond reasonable doubt. In a word, the failure of some notable prosecutions, the enforcement of insider dealing rings, and the need to implement a civil penalty system, are all pressures for change in the existing regulations.

Part VIII of the FSMA 2000 market abuse regime has made an enormous progress. A comprehensive regime for civil liability is available for those investors who had suffered a diminution in value of their securities as a result of dealing on the basis of inside information. Its recent amendments provide a broad structure for deterring insider dealing and the reform of insider dealing law as well. If the market abuse regime continues to be regarded as civil law, and the standard of proof applied is of the balance of probabilities, the gaps left in the existing law will certainly be well covered by the market abuse regime. Notwithstanding these results are not exactly what the UK government designed, it would be premature to write off the legal regulations as a failed attempt to strengthen the regulation granted by the CJA 1993.

Respecting to the state body of the FCA, it is empowered by the FSMA 2000 to institute proceedings for insider dealing offences. It is important in the scope of its work

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208 See Alcock, fn. 15 at 72.
210 See Filby, fn. 100 at 370.
to regulate persons being aware of the risks of involvement in the financial markets, and taking appropriate steps to prevent, detect and monitor the financial crime. Indeed, the statutory objectives of the FCA contain the maintenance of confidence in the financial system and the reduction of financial crime.\textsuperscript{211} The FCA views the proportionate and effective use of its enforcement powers as playing an influential role in helping it to achieve its statutory objectives.\textsuperscript{212} Additionally, the FCA has professed a concern to ensure that its powers are exercised in a manner that is transparent and consistent and to this end has published the Enforcement Manual which lists its policy and criteria governing the exercise of its powers.\textsuperscript{213}

In China, insider dealing is regulated mainly by the Securities Law 2005 of the PRC, which provided detailed provisions on the definitions and penalties regarding insider dealing. The Criminal Law 1997 of the PRC has also provided regulation on this matter. In general, there are administrative sanctions, civil penalties and criminal penalties provided under the Chinese legal framework. However, the civil penalty regime is weak and difficult to implement due to the lack of implementation guide. In terms of the power of the CSRC, it can detect, investigate and penalize insider dealing. However, it does not have the power to impose civil sanctions.

In summary, it can be safely concluded that market participants and the general public would greatly benefit from the improvement of these legal regulations both in the UK and China. However, the practicability and the effectiveness of the regulations for the control of insider dealing require that the legislators should consider what has been achieved and what will be developed in the future. An endeavor will be devoted to ensure that the availability of effective actions against insider dealing is sufficient and cogent on a criminal, a civil or a regulatory footing in the field of financial markets.

If there is no equal access of information for all potential investors in the market, the market will be seen as unfair and this will be damaging to investor confidence. Not only must legislators crack down on insider dealing but also they must be seen to be doing so effectively in the financial services industry. A pragmatic consideration should be carried out with protecting investors who go to the market expecting it to be free and fair, and a financial market of integrity. Everyone has equal access to all material information. This is the ideal position in the theory of market egalitarianism promulgated by the economists.\textsuperscript{214} There may still be a long way to go.

\textsuperscript{212} See Morris Crisp, fn. 31 at 319.
\textsuperscript{213} Id.
\textsuperscript{214} See Brazier, fn. 3 at 83.