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Criminal and administrative risk in market misconduct cases: A comparative study of the law and practice in the UK, Italy and France

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Abstract

This paper is a comparative study of the law and practice of market misconduct cases failing under the Market Abuse Directive regime and/or the criminal regime in the UK, Italy and France. It examines a person's risk of prosecution as against their risk of administrative sanction in each of those jurisdiction.

Keywords: market abuse, insider dealing, administrative proceedings, criminal proceedings, sanctions, FSA, CONSOB, AMF

INTRODUCTION

The Market Abuse Directive[1] (the Directive) was adopted in 2003 with the intention of creating a uniform regime for the treatment of market misconduct across the European Union.

This paper is a comparative study of the law and practice of market misconduct cases falling under the Directive regime in each of the UK, Italy and France. It examines a person's risk of prosecution as against their risk of administrative sanction in each of those jurisdictions. The position varies considerably. In the UK the Financial Services Authority (FSA) has the power to pursue market misconduct cases either as criminal prosecutions or by way of administrative sanction. The position is different in

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Italy and France, where the national financial markets regulators, Commissione Nazionale per le Società e la Borsa (CONSOB) and the Autorité des Marchés Financiers (AMF) respectively both have the power to investigate market misconduct and to impose administrative sanctions. Neither, however, has the power to prosecute criminal offences.

THE UK

The UK implemented the Directive as of 1st July, 2005 by way of amendment to Part 8 of the Financial Services and Markets Act 2000 (FSMA). The UK already had provisions in both its criminal and civil law dealing with market abuse, including insider dealing. These were, and remained after implementation of the Directive, focused on the FSA as the regulatory body tasked with enforcement of this body of law.

Criminal jurisdiction

Criminal market misconduct falls under two headings. Firstly, criminal insider dealing is an offence under Part 5 of the Criminal Justice Act 1993 (the CJA), which creates offences of dealing, encouraging another to deal and disclosing inside information. The offences carry a maximum sentence of seven years' imprisonment, a fine or both. Until 2001 the Department of Trade and Industry (DTI) was the main body responsible for prosecuting these offences. Section 402 FSMA came into force on 1st December, 2001 and empowered the FSA to institute proceedings for offences under Part 5 CJA. Since then, while the Crown Prosecution Service and the DTI or its successor government departments retain the power to prosecute insider dealing, the expectation has been that the FSA would be the principal prosecutor of the offence.[2]

Secondly, section 397 FSMA creates criminal offences under the general heading 'misleading statements and practices'. Broadly, these offences cover, in relation to investment activity, the dishonest or reckless making of statements, promises or forecasts that are materially misleading, false or deceptive (or the concealment of material facts in the same context) and the creation of false or misleading impressions as to the market in or price or value of relevant investments. The maximum sentence is imprisonment, a fine or both. Again, the FSA has the power to prosecute these offences.

Administrative jurisdiction

Both the insider dealing and misleading statements and practices offences overlap with the behaviours specified in the Directive. Insider dealing is addressed in articles 2 and 3 of the Directive. The section 397 FSMA offences would fall within the definition of 'market manipulation' in article 1(2) of the Directive, and article 5 requires member states to prohibit any person from engaging in market manipulation.

Part 8 FSMA implements these provisions of the Directive in the law of the UK. By section 123 FSMA it is the FSA that is empowered to impose a penalty on a person whom it is satisfied is or has engaged in market abuse, or who has required or encouraged another to engage in behaviour amounting to market abuse if done by him. The FSA may impose a penalty in cases of market abuse with no limit as to the amount. The FSA's remit in market abuse cases extends further than its criminal jurisdiction since the Directive provisions, as implemented in FSMA, cover more types of behaviour than those that also fall within the criminal jurisdiction.

The FSA's election between criminal and administrative proceedings

The practical result of the UK's implementation of the Directive in 2005, alongside the existing criminal law in relation to insider dealing under the CJA and misleading statements and practices under FSMA, therefore, is to provide the FSA with a dual jurisdiction. Arising out of the same conduct, the FSA has the power either to prosecute a person or to impose a penalty for market abuse.

FSMA is silent as to the exercise of this dual jurisdiction. However, that it is an either/or choice is made clear in the FSA's published policy. Paragraph 12.10 of the FSA's published Enforcement Guide provides that:

> 'It is the FSA's policy not to impose a sanction for market abuse where a person is being prosecuted for market misconduct or has been finally convicted or acquitted of market misconduct (following the exhaustion of all appeal processes) in a criminal prosecution arising from substantially the same allegations. Similarly, it is the FSA's policy not to commence a prosecution for market misconduct where the FSA has brought or is seeking to bring disciplinary proceedings for market abuse arising from substantially the same allegations.'

In relation to criminal and administrative risk in market misconduct cases, ie those cases that are susceptible both to prosecution for insider dealing or misleading statements and practices offences and regulatory proceedings for market abuse, this provides certainty to the person under investigation that only the one route will be followed. For the FSA to begin a prosecution against a person, but then to discontinue it some way down the road and start disciplinary proceedings instead, or vice versa, would breach its own policy. The FSA must elect.

During the investigation phase, that election will not of course have occurred. Where conduct may amount to either a criminal offence or market abuse, the FSA's practice is to appoint investigators to investigate both under section 173 FSMA. A person may be interviewed under caution,[3] given the possibility of future criminal proceedings, but then find himself subject to disciplinary proceedings for market abuse instead. The FSA investigators must keep the position under review and if they come to the conclusion that the case will not proceed as a criminal case then that should be communicated to the person under investigation.

When deciding to institute a criminal prosecution, as with all Crown prosecutions, the FSA must apply the principles set out in the Code for Crown Prosecutors, which involves the application of separate evidential and public interest tests. However, uniquely among prosecutors, the FSA has the alternative of disciplinary proceedings for market misconduct. The FSA only has the option of prosecuting if the Code tests are met. Assuming that is the case, however, it must go through an additional exercise of considering whether it ought nevertheless to divert from prosecution by the market abuse route.

The FSA's Enforcement Guide gives guidance as to the matters the FSA will consider in deciding between the two.[4] Some of these matters duplicate some of the public interest considerations in the Code for Crown Prosecutors, such as the seriousness of the misconduct, the abuse of a position of trust, whether the person in question was a ringleader and his personal circumstances. Others are specific to the financial markets context: the effect of the misconduct on the market, the extent to which redress has been provided to those

who suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems and controls that gave rise to the misconduct[5] and the effect that a criminal prosecution may have on the prospects of securing redress for those who have suffered loss.

In practice: recent cases

As noted above, the FSA obtained its dual criminal and administrative jurisdiction in market misconduct cases in 2001 with the coming into force of the relevant provisions of FSMA. However, until 2008 the FSA had exercised its criminal prosecution powers only once. In 2005 two former company directors of AIT Group plc were convicted of the reckless statement, promise or forecast offence under section 397 FSMA and sentenced to 18 months' and nine months' imprisonment respectively. The FSA began its second prosecution under section 397 FSMA in January 2010 against four former directors of iSOFT Group plc.

Since January 2008 the FSA has begun five prosecutions for insider dealing, the first of which came to trial in March 2009. Christopher McQuoid, the then General Counsel of London Stock Exchange listed TTP Communications plc, and his father-in-law, James Melbourne, were convicted of one count each of insider dealing and sentenced to eight months' imprisonment each.[6]

The sentences in the TTP case were upheld by the Court of Appeal on 10th June, 2009.[7] The Lord Chief Justice made the following comments as to insider dealing:

> 'This kind of conduct does not merely contravene regulatory mechanisms. If there ever was a feeling that insider dealing was a matter to be covered by regulation, that impression should be rapidly dissipated. The message must be clear: when it is done deliberately, insider dealing is a species of fraud; it is cheating. Prosecution in open and public court will often, and perhaps much more so now than in the past, be appropriate. Although those who perpetrate the offence may hope, if caught, to escape with regulatory proceedings, they can have no legitimate expectation of avoiding prosecution and sentence.'

The recent prosecutions mark a change in approach for the FSA. From 2001 it had focused its efforts on regulatory market abuse cases (the AIT prosecution aside). Recently the FSA has stated publicly that it intends to make more use of its criminal jurisdiction in order to combat market misconduct and that is apparent from the cases that are already in the public domain. The Lord Chief Justice's comments in the TTP appeal quoted above will surely reinforce that resolve.

ITALY

Italy implemented the Directive in 2005 by amending Legislative Decree 24th February, 1998 no. 58, *Testo Unico della Finanza* (TUF), the Consolidated Law on Finance.

The Directive leaves to Member States the discretion to introduce administrative and criminal sanctions and the Italian legislature decided to pursue both options. As will be seen later in this paper, both administrative and criminal sanctions can be applied to the same individual for the same behaviour. However, the procedures for the application of the sanctions are separated, as in Italy only Public Prosecutors have the power to carry out criminal investigations and to bring prosecutions, whereas the power to take administrative action lies with the

Commissione Nazionale per le Società e la Borsa (CONSOB).

According to Article 184 of TUF, individuals responsible for trading while possessing inside information, or for disclosing inside information, which they have obtained by virtue of their position or of criminal activities can be punished with a prison term ranging from two to 12 years and a fine of between €40,000 and €6m. According to Article 187-*bis* of TUF, individuals responsible for the same behaviour can also be punished with a pecuniary administrative sanction of between €100,000 and €25m. The administrative sanction may also be applied to secondary insiders (those to whom a disclosure is made — tippees). Both the criminal fine and the pecuniary administrative sanction can be increased to an amount of up to ten times the profit arising from the infringement. Similar sanctions are also provided for a company on behalf of which the individual acted.

The main difference between criminal and administrative insider trading is that no criminal sanction is provided for tippees; moreover, while the criminal offence requires that the individual acted with criminal intent (*dolo*), for an administrative infringement it is sufficient to have acted with negligence (*colpa*).

In addition, under Article 185 of TUF, individuals responsible for information-based, action-based or trade-based manipulation are punishable with a prison term ranging from two to 12 years and a fine of between €40,000 and €10m. Under Article 187-ter of TUF, individuals responsible for the same behaviour can also be punished with a pecuniary administrative sanction of between €100,000 and €25m. The same administrative sanction is also provided for other behaviour, such as the dissemination of information, rumours or false or misleading news giving or likely to give false or misleading signals as to financial instruments. Again, both the criminal fine and the pecuniary administrative sanction can be increased to an amount of up to ten times the profit arising from the infringement. Similar sanctions are also provided for the company on behalf of which the individual acted.

As with the insider trading provisions, the crime of market manipulation requires that the individual acted with criminal intent (*dolo*), while for the administrative infringement it is sufficient to have acted with negligence (*colpa*). In terms of the behaviour required, the administrative infringement is wider than the crime, as several factors that fall within the administrative provision do not constitute the crime. Moreover, the Italian Supreme Court (VI Criminal Section, 3rd May, 2006, no. 15199) has ruled that the crime of market manipulation, as opposed to the administrative infringement, requires fraudulent or deceptive behaviour, which is extremely likely to produce a significant alteration in the price of financial instruments.

Notwithstanding some differences between the crime and the administrative infringement, it is clear that the sanctions provided for insider trading and market manipulation overlap and subsequently can both be applied to the same individual. Since the Italian Financial Market Regulator, CONSOB, does not have criminal prosecution powers, the overlapping sanctions imply overlapping enforcement procedures.

The role of CONSOB in relation to market misconduct

In general terms, CONSOB has a duty to oversee compliance with the financial market provisions and specifically with the market abuse provisions. To assist it in carrying out this duty, CONSOB has developed software, called Saivim, to mon-

itor the financial markets as well as individual financial instruments admitted to trading on an Italian regulated market. When the software generates an 'alarm' (the alarm occurs when the trading activity in a financial instrument fulfils at least three specific conditions, called alerters — price, quantity, number of traders, etc), CONSOB will commence an investigation. Other triggers for CONSOB investigations are suspicious transactions reports (the filing of which is a duty on financial institutions and market management companies according to Article 187-*nonies* of TUF) and claims filed by private individuals or entities.

As a result of the Directive, CONSOB now has very wide powers with regard to the enforcement of market abuse provisions. It can, for example, require the production of information, data, documents or phone records or carry out personal interviews and inspections at the premises of any individual or entity involved in potential misconduct, as provided for by Article 187-*octies* of TUF. A regulatory investigation will be carried out using these powers.

It is worth noting that any individual or entity involved in such an investigation is under a duty to comply with the requests of CONSOB, regardless of any confidentiality or privilege claim. Failure to comply with a request could amount to the crime of obstructing the exercise of regulatory powers by CONSOB (punishable by a term of imprisonment ranging from one to four years, pursuant to Article 2638 of the Civil Code). As a point of difference, during a criminal investigation an individual has the right not to self-incriminate and subsequently can, for example, refuse to be interviewed.

The role of the criminal authorities — an overlapping jurisdiction

Since the results of a regulatory investigation could be the starting point for a criminal investigation, the interplay between the regulatory and the criminal investigation (and specifically when a criminal investigation has to be started) is a very delicate and sensitive issue. No guidance exists on this issue, which must be dealt with on a case by case basis.

CONSOB, is a public body, and its officers are under a specific duty to report to the Public Prosecutor's Office the commission of a crime as soon as they acquire knowledge of it. Again, no real guidance exists on what 'knowledge' means and this issue must be decided on a case by case basis (the Courts have rendered several decisions on this issue, but a generally applicable ruling is yet to be available). CONSOB will usually complete its regulatory investigation before filing a report with the Public Prosecutors Office, but this cannot be taken as a general rule.

At the end of its investigation, if it considers that there has been misconduct, CONSOB will start enforcement proceedings in relation to the behaviour insofar as it constitutes an administrative infringement and will simultaneously file a criminal report with the Public Prosecutor's Office with regard to the same behaviour if it also falls within the criminal provisions. From this moment, the two enforcement procedures go forward separately: the administrative enforcement procedure is governed by the TUF, while the criminal investigation, the prosecution and the criminal trial are governed by the Criminal Procedural Code. The charging bodies and the decision-making bodies also differ: within the administrative procedure CONSOB is entitled to impose an administrative sanction that can be contested by the individual before a Civil Court of Appeal (with CONSOB as the counterparty); with regards to the criminal procedure, the prosecution will be carried out by the Public Prosecutor's Office before the

Criminal Court of first instance (*Tribunale Penale*).

It is also to be noted that — while this is not common — a criminal report could be filed with the Public Prosecutor's Office, and subsequently a criminal investigation could start, before CONSOB has carried out its own regulatory investigation or before CONSOB has taken a decision about an ongoing regulatory investigation. In this case the Public Prosecutor's Office will immediately inform the Chairman of CONSOB, who will forward to the Public Prosecutor any documentation gathered during the course of the inquiry along with CONSOB's assessment (ref. to Article 187-*decies* of TUF).

In practice

CONSOB has recently published a Report on its activity for 2008. The Report highlights the results of its investigation and enforcement activity for that period. In summary:

- ten market abuse investigations have been concluded;
- misconduct has been indicated in six out of ten investigated transactions (two insider trading, three action-based or trade-based market manipulations and one information-based manipulation), involving eight individuals;
- for each of these six cases (and eight individuals) a crime report has been filed with the Public Prosecutor;
- for six individuals CONSOB also started enforcement procedures aimed at the application of administrative sanctions (for two individuals CONSOB did not, because the alleged infringement had been committed before 2005, when the new market abuse regime entered into force in Italy — so, the percentage of 'double' prosecutions within the market abuse regime is 100 per cent);
- CONSOB started procedures for administrative infringement only in relation to another 19 individuals (and 12 entities) involved in suspected transactions, because they were considered as tippees and no crime had been committed;
- with regard to enforcement procedures started in previous years, administrative sanctions have been imposed on five individuals and one entity for insider trading as tippees, for a total amount of €2.052m (and a total amount of €5.478m has been confiscated); and
- with regard to administrative sanctions imposed in previous years, the Courts confirmed the sanctions imposed in ten out of 12 cases.

FRANCE

The Directive has been implemented into French law by amending the Autorité des Marchés Financiers (AMF's) General Regulation. Implementing the Directive in this way has reinforced the overlap between administrative and criminal offences (and the potential to be sanctioned twice for the same conduct), a possibility confirmed by a decision of the Conseil Constitutionnel in 1989.[8]

Administrative jurisdiction

The AMF was established by the Financial Act of 1st August, 2003 and was formed from the merger of three former administrative authorities. The aim in amalgamating these bodies was to improve the efficiency of France's financial regulatory system and to give it greater visibility. The AMF is responsible for the supervision of financial investment advisers, the oversight of rating agencies, the supervision of direct marketers and the conduct of inspections

and investigations. In relation to the last of these, it has the right to impose sanctions and penalties. The Board is the AMF's decision-making body while the Enforcement Committee has exclusive powers to impose sanctions and penalties.

Administrative market misconduct falls under three main headings: market manipulation, insider trading and dissemination of misleading information (enshrined within Book VI of the AMF General Regulation).

Market manipulation is defined as 'transactions or orders to trade that employ fictitious devices, or any other form of deception or contrivance' (Article 631-1).

According to Article 621-1, insider trading is trading based on 'inside information, that is to say any information of a precise nature that has not been made public, relating directly or indirectly to one or more issuers of financial instruments, or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of the relevant financial instruments or on the prices of related financial instruments' (Article 621-1).

The dissemination of false information includes, according to Article 632-1 'voicing, by whatever medium, an opinion about a financial instrument, or indirectly about its issuer, while having previously taken positions in this financial instrument and subsequently profiting from the resulting position without having simultaneously disclosed the conflict of interest to the public in an appropriate and effective way'.

Criminal jurisdiction

The infringement of French criminal law is punished under the Criminal Code and specifically in the case of market misconduct, under the Monetary and Financial Code (Articles L.465-1 onwards). Market misconduct offences are prosecuted by the Public Prosecutor. The fundamental elements of the criminal offences are broadly the same as for the administrative offences. The main difference so far as the criminal offences are concerned arises out of the requirement for evidence of intention. The new definition of the administrative offences provided by the Directive does not require intention on the part of the wrongdoer. An offender can therefore be punished under the AMF's General Regulation even though he unknowingly committed market misconduct. This important difference does little to justify the autonomy of the two regimes, which represents the core characteristic of the French system for dealing with market abuse.

Procedure

Criminal and administrative proceedings are independent from each other. There is no reporting obligation between administrative and judicial authorities regarding the decision to launch proceedings. In practice, the Investigation and Market Surveillance Division of the AMF, which is responsible for controlling market transactions on a daily basis will be the first authority to decide whether an investigation should be initiated or not. When the Investigation and Market Surveillance Division decides to investigate, it prepares a report for the AMF Board. If the report identifies possible criminal offences, the Board will send the report to the Public Prosecutor. Where the report identifies suspicion of market manipulation such as price manipulation, misinformation or insider trading, the Board will send the report to the Public Prosecutor for the Paris regional Court, which has sole jurisdiction in such cases and which may afterwards, if necessary, petition the investigating judge to consider

the case in more detail.

In order to improve the management of available resources and allocation among authorities, it appears that, in practice, the Public Prosecutor and the AMF are now co-operating with each other. As noted above, the AMF Board is required (by Article L. 621-15-1 of the Monetary and Financial Code) to pass on reports of its investigations to the Public Prosecutor where they reveal criminal offences although the Public Prosecutor retains a discretion as to whether or not to prosecute. If he decides to launch criminal proceedings, he must inform the AMF, which can still pursue its administrative procedure. There is no doubt that the authorities communicate with each other, at least for the benefit of the judicial authority which will usually ask the AMF for any relevant information in its possession.

Generally speaking, both criminal and administrative proceedings follow the same pattern: an initial phase of investigation, leading to a decision as to whether to prosecute or not; a second phase during which further investigation is carried out either by the AMF Enforcement Committee or, if it is a criminal matter, by an investigating judge at the Public Prosecutor's request; and finally a decision will be taken as to whether to impose a sanction. The decision to impose a sanction will be taken either by the AMF Enforcement Committee and/or the Criminal Court.

During the initial phase of an investigation, the powers conferred on administrative investigators are similar to those of police officers. Article L. 621-10 of the Monetary and Financial Code provides that AMF investigators are entitled to have access to any type of document and to require copies; to summon and to hear any person likely to supply information; and to have access to firms' premises. The investigators' efficiency is ensured by the inapplicability of the principle of professional secrecy, with an exception granted to lawyers (Article L.621-9-3 of the Monetary and Financial Code). The legislature has recently decided to restrict the power of the AMF to conduct dawn raids. AMF investigators are no longer allowed, within the context of an investigation into suspected market abuse, to perform dawn-raids without authorisation from a competent judge.

Procedural guarantees of the due process of law do not apply to any significant extent in the initial phase of an administrative investigation. It is perhaps unfortunate that at the end of this phase a person should receive a statement of complaint, effectively the first act of indictment that lays down the legal basis of prosecution without having been given the opportunity of being heard. Criminal procedure does not allow for such a position: a person will not be charged without having been given the opportunity of being heard.

The second phase of an administrative investigation starts when the AMF Board serves a statement of complaint on the person whose conduct is in question. This effectively mirrors the procedure followed by an investigating judge in a criminal investigation. This statement will be referred to the Chairman of the AMF Enforcement Committee who appoints a Rapporteur. The Rapporteur is responsible for performing any further investigation and for submitting a complete file to the Committee. His function is thus quite similar to that of an investigating judge, ie to take into consideration both incriminating and exculpatory evidence. However, the Rapporteur does not take any decision at the end of the investigation. Although his report to the AMF Enforcement Committee assesses the relevant facts and determines, accordingly, the most appropriate sanction, this opinion is not binding

on the Committee. In this respect the decision that an investigating judge must take at the equivalent stage in a criminal proceeding, ie the decision to close the file or to transmit it to the Court (Tribunal Correctionnel) for judgment, is different.

Penalties

With regard to the penalties set out in Article L. 621-15 of the Monetary and Financial Code, any person who fails to comply with regulatory obligations risks being fined and may also face a disciplinary sanction if he is considered to be a professional, as defined in the Code. This sanction might be a mere warning, a reprimand or a permanent or temporary prohibition against providing regulated services.

The financial penalties that can be imposed by the AMF have been increased recently. Article L.621-15 of the Monetary and Financial Code sets out a maximum of €10m or the amount of the profit made, increased tenfold. It is surprising to note that even though criminal penalties are supposedly assessed on the same basis — they will also take into account the severity of the infringement and the profits made — fines in administrative matters can be much higher than those in criminal matters where market abuse is punishable with two years in prison and a fine of €1.5m. A criminal fine cannot be less than the profit made and cannot exceed ten times this amount.

The Monetary and Financial Code expressly provides that a legal entity can be convicted of market abuse. The entity is likely to be subject to a prohibition against providing regulated services (Articles 131-39 of the Criminal Code), as well as a fine that cannot exceed five times the amount prescribed for natural persons. Administrative penalties do not draw a distinction between legal entities and natural persons.

The practical consequences of an overlapping system

The most extreme consequence of the independence of the two systems for dealing with market abuse is that a person can be 'convicted' twice: by both the administrative and criminal authorities. The effect of a dual sanction may be weakened somewhat by the rule set out in Article L. 621-16 of the Monetary and Financial Code. This provides that when the AMF Enforcement Committee imposes a financial penalty that becomes final before the criminal judge has given a final ruling on the same or related facts, the latter may order that the administrative penalty be set off against the fine he imposes. The offender can also be required to compensate victims. However, only a judge is competent to decide the allocation of compensatory damages.

The possibility of dual sanction is, for the wrongdoer, the most serious consequence of the autonomy of administrative and criminal proceedings. However, current debate on the question of reform rather focuses on general improvements to the system in terms of efficiency of proceedings and respect for the rights of the wrongdoer. Commentators and politicians have for several years been considering reinforcing collaboration between administrative and judicial authorities, especially in relation to the investigation phase. Their latest proposal would require the Public Prosecutor to delegate its investigations to AMF investigators who would act under its control. This has not, to date, been implemented and it remains to be seen what, if anything, will be done about the real threat of dual sanction.

CONCLUSIONS

The criminal and administrative risk faced by persons in market misconduct cases therefore differs between the UK, Italy

and France. Whereas in the UK a person may only either be prosecuted or face administrative sanction arising out of the same conduct, but never both, in both Italy and France a person may face, in effect, a double jeopardy of concurrent proceedings both criminally and administratively, resulting in two penalties.

While the uniform market misconduct regime envisaged by the Market Abuse Directive may allow a person to know what is prohibited by law across each of these jurisdictions, the approach of the relevant criminal and administrative authorities tasked with enforcing that regime differs markedly.

References

(1) Directive 2003/6/EC of the European Parliament and of the Council of 28th January, 2003 on insider dealing and market manipulation (market abuse).

(2) The High Court recently affirmed that the FSA does not require the consent of either the Secretary of State or the Director of Public Prosecutions to institute proceedings for insider dealing in the case of *The Queen (on the application of Matthew Francis Uberoi and Neel Akash Uberoi) .v. City of Westminster Magistrates' Court* [2008] EWHC 3191 (Admin).

(3) Police and Criminal Evidence Act 1984.

(4) These factors are set out in paragraphs 12.7 to 12.9 of the FSA's Enforcement Guide, which is available on its website at www.fsa.gov.uk.

(5) This factor must be taken to refer only to the section 397 FSMA offences since a body corporate cannot be prosecuted for insider dealing.

(6) Mr Melbourne's conviction was suspended for a year.

(7) [2009] EWCA Crim 1301.

(8) Decision dated 14th January, 1989.