

EXPLANATORY MEMORANDUM TO
THE INSIDER DEALING (SECURITIES AND REGULATED MARKETS) ORDER
2023

2023 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 Part 5 of the Criminal Justice Act 1993 (CJA 1993) establishes the criminal offence of insider dealing. The offence applies to any security listed in Schedule 2 of the CJA 1993 or specified by the Treasury, where trading occurs on a regulated market as specified by the Treasury.
- 2.2 The UK also has a civil market abuse regime, the Market Abuse Regulation (MAR). MAR establishes civil offences for insider dealing, amongst other offences, and various disclosure requirements.
- 2.3 This instrument updates Schedule 2 of the CJA 1993, bringing the securities and markets on which an offence can be committed in the CJA 1993 broadly in line with MAR. The instrument replaces the securities listed in Schedule 2 with the list of financial instruments found in Part 1 of Schedule 2 to the Financial Services and Markets 2000 (Regulated Activities) Order 2001¹. It also replaces the list of named trading venues with references to the definitions for regulated markets, organised trading facilities and multilateral trading facilities as used in MAR and the Markets in Financial Instruments Regulation (MiFIR)².

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Economic Secretary to the Treasury, Andrew Griffith, has made the following statement regarding Human Rights:
- “In my view the provisions of the Insider Dealing (Securities and Regulated Markets) Order 2023 are compatible with the Convention rights.”

¹ S.I. 2001/544

² S.I. 2018/1403

6. Legislative Context

- 6.1 The UK has both a criminal and civil regime for market abuse. Insider dealing is a form of market abuse. The criminal regime is established by the Financial Services Act 2012 and the CJA 1993. The civil regime is established by MAR. This instrument deals only with the scope of offences under the CJA 1993, as the government considers the scope of the offences under the Financial Services Act 2012 to be appropriate and consistent with MAR.
- 6.2 The CJA 1993 establishes criminal offences and rules for drug trafficking, terrorist financing, proceeds of crime and insider dealing. Part 5 of the CJA 1993 establishes insider dealing as a criminal offence. The offence applies to anyone who has inside information as an insider and can be committed by dealing in securities whose price would be affected by the public release of the information on either a regulated market or via a professional intermediary. The offence can also be committed by encouraging such dealing or by disclosing the inside information outside the normal course of a person's employment, office or profession.
- 6.3 Section 60 of the CJA 1993 defines a regulated market as any market that is identified as such by an order made by the Treasury. Part 5, including the offence, applies to any security that is listed in Schedule 2 of the CJA 1993 or any security that satisfies the conditions applying to it by an order made by the Treasury.
- 6.4 Schedule 2 of the CJA 1993 lists a number of financial instruments as securities for the purpose of Part 5 of the CJA 1993, including shares, debt securities, futures and options.
- 6.5 The Insider Dealing (Securities and Regulated Markets) Order 1994 and subsequent 1996, 2000 and 2002 amendments to the 1994 Order, specify the securities to which the insider dealing provisions apply and identify regulated markets.
- 6.6 The EU Market Abuse Regulation forms part of retained EU law, by operation of the EU Withdrawal Act 2018. The regulation, as amended by Market Abuse (Amendment) (EU Exit) Regulations 2019³ and The Gibraltar (Miscellaneous Amendments) (EU Exit) Regulations 2019⁴, and forming part of retained EU law, is referred to as the Market Abuse Regulation or 'MAR'.
- 6.7 The insider dealing offence in MAR applies to all natural and legal persons engaged in behaviour related to a set of financial instruments. Those instruments are financial instruments admitted to a UK, EU or Gibraltar regulated market, or for which a request for admittance has been made. It also applies to financial instruments traded on a UK, EU or Gibraltar organised trading facility (OTF), as well as a multilateral trading facility (MTF), or for which a request for admittance for a multilateral trading facility has been made. MAR also applies to derivative instruments – instruments whose price or value depends on or has an effect on the price or value of the instruments captured in scope of MAR.
- 6.8 The definitions for these markets are provided for by MiFIR. "Financial instrument" is given the meaning of an instrument specified in Part 1 of Schedule 2 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO)⁵.

³ S.I. 2019/310

⁴ S.I. 2019/680

⁵ S.I. 2001/544

- 6.9 This instrument amends the scope of the securities and markets for the criminal insider dealing offence, to broadly align with the securities and markets in scope of the UK's civil market abuse offence.

7. Policy background

What is being done and why?

- 7.1 Insider dealing compromises the integrity and orderly functioning of UK markets, as it affects the price formation process and investor confidence. As such, insider dealing is both a criminal and civil offence in the UK.
- 7.2 Under the CJA 1993, a person who has information as an insider is guilty of the criminal offence of insider dealing if they i) deal in securities or ii) encourage another person to deal in securities, where the information they hold would influence the price of those securities. The offence applies where dealing occurs on a regulated market or through a professional intermediary. A person who has information as an insider is also guilty of a criminal offence if they disclose the inside information other than in the proper performance of their job. The offences apply to any security which is listed in Schedule 2 of the CJA 1993 or any security which satisfies any condition applied to it by an order made by HM Treasury. A 'regulated market' is any market that is identified as such by HM Treasury.
- 7.3 MAR sets out the civil regime for market abuse, including civil offences for insider dealing. To commit the offence under MAR, the security being dealt in on inside information must be listed in Part 1 of Schedule 2 of the RAO. The markets on which the dealing must occur are defined in MAR, closely mirroring the market definitions set out in MiFIR. This means that currently the set of securities and markets in scope of the CJA 1993 is narrower than MAR, which is an undesirable policy outcome.
- 7.4 The Fair and Effective Markets Review 2015 (FEMR), a joint HM Treasury, Bank of England and Financial Conduct Authority (FCA) review into structural risks in the fixed income, commodities and currency (FICC) markets, recommended that UK criminal sanctions framework for market abuse for individuals and firms be updated, through an extension to a wider range of FICC instruments (by including all of those covered under MAR).

Regulated Markets

- 7.5 There are 49 exchanges currently named as a 'regulated market' for the purposes of Part 5 of the CJA 1993. The current list is out of date, as a number the exchanges named have changed name, merged or ceased to exist. This is unsatisfactory, as someone trading on inside information on a market not listed is not committing a crime, and it is unclear whether someone dealing on inside information on a market which has changed its name is committing a crime.
- 7.6 This instrument replaces the list of named exchanges with general definitions for UK, EU and Gibraltar regulated markets, organised trading facilities and multilateral trading facilities. This aligns with the markets covered by MAR, and the use of a general definition will avoid the list becoming out of date in future and markets inadvertently falling out of scope. This will result in an expansion of markets to approximately 130 markets, 230 multilateral trading facilities and 75 organised

trading facilities. As firms should already be complying with MAR, this expansion should not impose any additional costs on firms.⁶

- 7.7 The existing list of markets includes the NASDAQ and the SWX Swiss Exchange for the purposes of the Part 5 offences. This instrument keeps these exchanges in scope and updates the name of the SWX Swiss Exchange to SIX Swiss Exchange. In addition, it adds the New York Stock Exchange (NYSE) to the markets covered by the insider dealing offences. This will ensure the FCA has the necessary powers to address the persistent trend of organised crime groups recruiting UK insiders to disclose inside information relating to securities traded on these markets.

Securities

- 7.8 Currently, the set of securities to which the criminal offence of insider dealing applies to is narrower than the securities covered by the civil insider dealing offences in MAR. The list of securities to which the offences are applicable is out of date and fails to cover an appropriate range of securities. For example, the following securities are not currently included: currency options, credit default swaps and units in collective investment undertakings, such as exchange traded funds. This is not optimal as it may lead to an inability to issue criminal sanctions to serious cases of insider dealing in these securities.
- 7.9 To address this, this instrument amends Schedule 2 of the CJA 1993, and replaces the current list of instruments with the list of financial instruments found in Part 1 Schedule 2 of the RAO.
- 7.10 This instrument also ensures that securities traded on a UK, EU and Gibraltar regulated market, OTF or MTF, as well as instruments whose value depends on or has an effect on securities traded on a UK, EU and Gibraltar regulated market, OTF or MTF, otherwise known as derivatives, are in scope of the criminal insider dealing offences.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no current plans to consolidate this legislation.

10. Consultation outcome

- 10.1 In preparing this instrument HM Treasury has worked with the FCA, the agency responsible for preventing, investigating and prosecuting market abuse under the CJA 1993 and MAR. No public consultation has been conducted. However, the FEMR involved extensive consultation with stakeholders.

11. Guidance

- 11.1 None.

⁶ Further details in the Impact Assessment published alongside this SI

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A de-minimis Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the [legislation.gov.uk](https://www.legislation.gov.uk) website.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The instrument does not include a statutory review clause. In line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Economic Secretary to the Treasury, Andrew Griffith, has made the following statement:

“It is not proportionate to include a review clause in this instrument because the estimated annual net direct cost to business is less than £5 million and the number of small businesses in scope is low.”

15. Contact

- 15.1 Charlie Graham at HM Treasury, (email: Charlie.Graham@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Tom Duggan, Deputy Director for Securities and Markets, at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Andrew Griffith, Economic Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.