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TACKLING MARKET ABUSE

Market Abuse was first introduced as part of the programme of developments brought in by the Financial Services and Markets Act 2000. Since then its definition has seen significant revision as a result of the Market Abuse Directive, which in turn led to changes in the relevant UK legislation. The essence of the statutory regime however has remained the same, which is that certain types of behaviour are deemed to be in breach of it and are dealt with under a civil enforcement regime, though in some cases the behaviour could alternately lead to criminal charges. This leaves the FSA with the power to take steps against FSA authorised persons and firms together with anyone else who has committed market abuse. The purpose behind the original statute and the subsequent Directive was the effective combating of certain types of economic crime. This was largely motivated by the lack of success the Criminal Justice Act 1993 (and the preceding law) had shown in prosecuting insider dealing.

One issue that arises is that of the nature of a civil offence. It is not an approach that has traditionally been a significant part of English law. Essentially, there is a civil burden of proof coupled with a potentially unlimited fine. It was believed by some observers that this would facilitate the pursuit of wrongdoers. However, a common misconception is that as it is a civil offence, the burden of proof is that of the balance of probabilities. To quote Denning LJ in *Bater v Bater:*

> *"A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."*

Therefore, in those cases where the market abuse alleged would also be a criminal offence, a higher burden of proof than the balance of probabilities will be required in the FSA tribunal. In most cases this has not become an issue as most of those facing market abuse charges have co-operated and accepted disciplinary action. However, in those casers where matters are disputed, proof may be less easy than some have supposed.

Inevitably, the recent developments in this area of law raise the issue of how effective the regime is. To determine this it is necessary to consider how common market abuse and insider dealing are. The FSA themselves have published an analysis which measured the extent to which share prices moved ahead of the regulatory announcements that companies are required to make. The analysis focused on two areas; those relating to takeover bids and announcements about trading performance made by FTSE 350 companies. An assessment was then made of the proportion of these that were preceded by abnormal share price movements. The research did not prove how much market abuse was taking place, but it did suggest that 28.9 per cent of takeover announcements and 21.7 per cent of trading announcements were preceded by transactions that were probably based on inside information.

This leads on to the real problem with the market abuse regime. It suggests that although there has been a clear acceleration in the number of insider dealing cases dealt with (most of the FSA market abuse actions have been insider dealing matters) little is being done that is effective in the context of the scale of the problem. The rate of the increase in the number of insider dealing cases dealt with since the market abuse regime came into effect is minimal in the context of these statistics. A fundamental appraisal of how evidence can be gleaned and such cases handled needs to be put in place. Such a programme should find it more effective to look at methods of advancing the process of obtaining details of who is behind the suspicious transactions referred to above rather than focusing on further changes in the law. The real problem facing the FSA is the extreme difficulty in ascertaining when market abuse/insider dealing occurs. The legislative system has probably done all that can be required of it in terms of the definition of the offence. It is the policing and analysis elements of the criminal behaviour concerned that is the Achilles heel of the whole regime.

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