

CLIENT ALERT

# Update to the UK criminal offence of insider dealing

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## AUTHOR

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## Summary

The UK has both a criminal and civil regime for market abuse, including insider dealing. This client briefing provides an update in relation to amendments made to the scope of the criminal offence in the UK. The Insider Dealing (Securities and Regulated markets) Order 2023 (the “Order”) came into force on the 15th June 2023 and significantly expands the number of regulated markets and type of securities to which the offence could apply and aligns the scope of the criminal offence with the civil offence under the UK Market Abuse Regulation (“**MAR**”).

## The UK criminal offence of insider dealing

Under the Criminal Justice Act 1993 (“**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” for the purposes of CJA 1993 is any market that is identified as such by HM Treasury.

Prior to the Order coming into effect the range of securities to which the criminal offence of insider dealing applied was considerably narrower than the range of securities covered by the civil insider dealing offences under MAR. This was because the CJA 1993 and respective orders made under it had taken the approach of naming specific regulated

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markets. Consequently that list had become out of date and did not match the definition of a regulated market under MAR. In addition the range of securities previously covered by the CJA 1993 is narrower than under MAR. This has led to an inability to issue criminal sanctions for some cases of market abuse and insider dealing to which the civil offence does apply.

MAR applies in respect of any abusive behaviour in respect of financial instruments admitted to a UK, EU or Gibraltar regulated market, or for which a request for admittance has been made. By way of example the London Stock Exchange is a regulated market. 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 an MTF 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 financial instruments in scope of MAR.

The definitions for regulated markets MTFs and OTFs under MAR are provided for by MiFID.<sup>1</sup> “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) and includes a wide range of securities, including transferable securities such as equities and debt, money-market instruments, collective investment schemes, derivatives and cfd's and which is broader than had been applied under the CJA 1993 and which now also aligns with the range of financial instruments under MAR.

Accordingly the Order replaces the current list of named exchanges (49 of them, some of which have ceased to exist) and instead says that the criminal offence will apply to any security admitted for trading or a security for which a request has been made for admission to trading on any of the following:

- A UK, EU or Gibraltar regulated market
- A UK, EU or Gibraltar MTF
- The NASDAQ
- The SIX Swiss Exchange
- The New York Stock Exchange; and
- To any security admitted for trading on an UK, EU or Gibraltar OTF.

The offence can also apply to any security not listed on one of the above if the price or value of it depends on, or has an effect on, the price or value of a security falling within the above. As the Order replaces the list of named exchanges with

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<sup>1</sup> Directive 2014/65 on markets in financial instruments

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use of the defined terms of regulated markets, MTFs and OTFs from MAR, this will expand the markets and trading venues now in scope to approximately 130 markets, 230 MTFs and 75 OTFs.

As the Order also updates the type of securities covered to be consistent with the RAO and MAR, securities such as currency options, credit default swaps and other derivatives and units in collective investment schemes such as exchange traded funds will also be in scope of the criminal offence.

This brings the scope of the criminal offence in line with the civil offence under MAR. Use of the defined terms regulated market, MTR and OTF rather than listing specific exchanges or other venues will ensure that the markets covered do not become out of date over time.

Whilst firms should already have procedures in place in respect of MAR this change to the scope of the criminal offence should not in practice result in changes being made to firm's current policies and procedures. However this update to the criminal regime provides an opportunity for firms to refresh and update their policies and training programmes.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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