

TO LOCK THEM UP; OR NOT

A BRIEF ANALYSIS ON WHETHER THE SANCTIONS FOR INSIDER DEALING SHOULD BE CRIMINAL ONLY, OR CIVIL ONLY, OR BOTH CRIMINAL AND CIVIL

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Gordon Gekko, the fictional wall street financier in the 1987 film “Wall Street” said, “the most valuable commodity I know of is information”¹. The notion of “insider dealing”² refers to the dealing of “a security based on asymmetric information the inside trader has but which has yet to be reflected in the security price”³. In précis, it refers to making a profit or avoiding a loss by trading based on a confidential “inside” information which is yet to become public. It gives an advantage for the “inside dealer” at the expense of the others who are yet to receive the information. That is,

perhaps, why the astute Gekko in advising a young greenhorn states that “If you're not inside, you're outside”⁴.

Illegalising insider dealing

Despite the academic quandaries as to whether “insider dealing” should be a punishable offence or not, the United States became the forerunner in illegalising, and criminalising “insider trading” following the “Great Depression”, and it is considered to be the country which “vigorously” regulates “insider

¹ Stanley Weiser and Oliver Stone, “Wall Street” - Original Screenplay by Stanley Weiser and Oliver Stone’(*Dailyscript*, 23 April 1987) <http://www.dailyscript.com/scripts/wall_street.html> accessed 15 April 2018

² or “insider trading” – as termed in the US

³ Colin Read, Market Inefficiencies and inequities of insider trading - an economic analysis. in Paul U

Ali and Greg N Gregoriou (eds), *Insider Trading: Global Developments and Analysis* (CRC Press 2009) 3

⁴ Stanley Weiser and Oliver Stone, “Wall Street” - Original Screenplay by Stanley Weiser and Oliver Stone’(*Dailyscript*, 23 April 1987) <http://www.dailyscript.com/scripts/wall_street.html> accessed 15 April 2018

dealing”⁵. After a few decades, the United Kingdom introduced criminal sanctions⁶, and much later introduced civil regulatory mechanisms⁷, through which EU directives⁸ and regulation⁹ on “insider dealing” were adapted.

In the US, the Securities Exchange Act of 1934 established the Securities and Exchange Commission (SEC), and section 10b of the Act empowered the SEC to enact rules against fraud in securities trading, and subsequently SEC enacted Rule 10b-5 - a broad anti-fraud provision. With no precise and substantive Federal Law particularly addressing “insider dealing”, the regulation of “insider dealing” was developed through regulations and enforcement by the SEC, and case law resulting in a complex legal framework¹⁰.

It was not until 1980 “insider dealing” was criminalised in the UK¹¹. Davies and Worthington note that the alternative approaches such as “mandatory disclosure” requirements, “prohibition of trading”, general law remedies for breach of “director’s fiduciary duties” and “breach of confidence” were “rarely an effective deterrent” of insider dealing¹². Hence, the Companies Act of 1980 specifically criminalised “insider dealing”¹³. Currently, the offence of “insider dealing” is stipulated in Part V of the Criminal Justice Act of 1993 (CJA) which implemented the EEC Directive¹⁴ on “Insider Dealing” in the UK¹⁵. The Financial Services and Markets Act of 2000 (FSMA) through which the EU

⁵ Harvey L Pitt and David B Hardison, 'Games Without Frontiers: Trends in the International Response to Insider Trading' [1992] 55(4) Law and Contemporary Problems 199 - 230 in 200

⁶ Part V, Companies Act 1980; Company Securities (Insider Dealing) Act 1985; Part V, Criminal Justice Act 1993

⁷ Financial Services and Markets Act 2000

⁸ Council Directive 89/592/EEC [1989] OJ L334/30; Directive of the European Parliament and of the Council 2003/6/EC [2003] OJ L096/16

⁹ Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1

¹⁰ Vantoruzzo Marco, 'Comparing Insider Trading in the United States and in the European Union: History and Recent

Developments' [2014] European Corporate Governance Institute (ECGI) - Law Working Paper No 257/2014 <<https://ssrn.com/abstract=2442049>> accessed 15 April 2018

¹¹ Part V, Companies Act 1980

¹² Paul Davies and Sarah Worthington, *Gower: Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) 1029 - 1031

¹³ Part V, Companies Act 1980

¹⁴ Council Directive 89/592/EEC [1989] OJ L334/30

¹⁵ Jane Welch, Matthias Pannier et al., *Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse* (The British Institute of International and Comparative Law 2005) 14 - 19

Directive¹⁶ was subsequently implemented¹⁷, (and since 2016, the EU Market Abuse Regulation¹⁸) also prohibits “insider dealing” as a part of its prohibition on market abuse. It established the Financial Conduct Authority as the principal regulator of the financial market. The FSMA is the civil regulatory measure, counterpart to the purely criminal approach in the CJA. Hence, the UK has both criminal, and civil regimes applicable in parallel in the cases of “insider dealing”.

In Sri Lanka, it was in 1987 insider dealing was criminalised under Part V of the Securities Council Act No 36 of 1987¹⁹ ²⁰. Section 32 of the SEC Act²¹ comprehensively defines the offence of insider dealing. Further, Section 33 exposes public servants or former public servants to liability for insider dealing, and Section 33A provides for summary

conviction, and fine and/or imprisonment for insider dealing.

Defining “Insider” – UK & Sri Lanka

United Kingdom

In the UK, Section 57 of the CJA defines “insider” as a person who has inside information and knows that it is inside information²²; and who has inside information and knows that he has it from an inside source²³. Under the CJA, only “individuals” can be prosecuted for “insider dealing”²⁴, implying that only natural persons can be “insiders”, thus, legal persons are excluded from the definition. And this definition also imposes a *mens rea* requirement that, the individual should “know that it is inside information”. In further elucidating, CJA stipulates three categories of “insiders”. 1) a person has information from an inside

¹⁶ Directive of the European Parliament and of the Council 2003/6/EC [2003] OJ L096/16

¹⁷ Jane Welch, Matthias Pannier et al., *Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse* (The British Institute of International and Comparative Law 2005) 20 - 27

¹⁸ Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1

¹⁹ Later following the Securities Council (Amendment) Act No 26 of 1991, renamed as the Securities and Exchange Commission of Sri Lanka Act.

²⁰ later renamed as SEC Act

²¹ Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

²² s.57(1)(a), Criminal Justice Act 1993

²³ s.57(1)(b), Criminal Justice Act 1993

²⁴ s.52, Criminal Justice Act 1993

source if and only if he has it through being a director, employee or shareholder of an issuer of securities²⁵; 2) having access to the information by virtue of his employment, office or profession²⁶. Individuals falling under these two categories are denoted as “primary insiders”²⁷.

The third category of “insiders” stipulated in the CJA is a person whose direct or indirect source of information is a person of the previous two categories²⁸. Persons in this category are denoted as “secondary insiders”²⁹ or “tippees”³⁰. This provision is broader than the US construal of “tippees”³¹ as it is not required that the tip was consciously communicated. A mere overhearing or eavesdropping of inside information would sufficiently fall into

this category³². *Mens rea* is a very important constituent of this definition. The person receiving the information from the “primary insider” should know that it is an inside information and it is coming a “primary insider”, therefore as Davies and Worthington point out, in case of a “sub-tippee or sub-sub-tippee” proving that they had known that it is from a primary insider can be problematic³³.

The FSMA³⁴ definition is broader in scope than the CJA definition. Section 118B of FSMA defines “insider”. There are two notable additions in the FSMA definition compared to the CJA. First is the explicit stipulation of a person having inside information as a result of his criminal activities as an insider. By explicitly stipulating a person who obtained inside

²⁵ s.57(2)(a)(i), Criminal Justice Act 1993

²⁶ s.57(2)(a)(ii), Criminal Justice Act 1993

²⁷ *Attorney General's Reference (No.1 of 1988)* [1989] 1 AC 971; Kern Alexander, UK insider dealing and market abuse law: strengthening regulatory law to combat market misconduct. in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 415; Iwona Seredyńska, *Insider Dealing and Criminal Law* (Springer 2012) 20

²⁸ s.57(2)(b)

²⁹ *Attorney General's Reference (No.1 of 1988)* [1989] 1 AC 971; Kern Alexander, UK insider dealing and market abuse law: strengthening regulatory law to combat market

misconduct. in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 416

³⁰ Kern Alexander, UK insider dealing and market abuse law: strengthening regulatory law to combat market misconduct. in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 416

³¹ *Dirks v Securities and Exchange Commission* [1983] 463 US 646

³² Paul Davies and Sarah Worthington, *Gower: Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) 1040 - 1041

³³ *ibid*, 1041

³⁴ Financial Services and Markets Act 2000

information through a criminal activity as an “insider”, the FSMA annihilated any uncertainties that may be casted in insider dealing cases where inside information was illegally obtained through hacking and/or cybercrime³⁵. Second notable addition is the provision that a person is an “insider” not only when he obtains inside information through other means which he knows is inside information, but also, he “could reasonably be expected to know, is inside information”. This is an extension of the *mens rea* element in the FSMA compared to the CJA. Thus, the FSMA encompasses a broader spectrum of persons within the definition of “insider” compared to the CJA.

³⁵ Sonal Sahel, 'Circumventing Insider Trading Laws by Cyberhacking: A Look into the Vulnerability of Cybersecurity Breaches in Regards to Insider Trading' [2016] 15(2) *Journal of International Business and Law* 239; Thomas O Gorman, 'SEC, Insider Trading and Cyber Security: An International Hacking—Insider Trading Ring' (*LexisNexis Legal Newsroom*, 8 December 2015) <<https://www.lexisnexis.com/legalnewsroom/securities/b/securities/archive/2015/08/12/sec-insider-trading-and-cyber-security-an-international-hacking-insider-trading-ring.aspx>> accessed 15 April 2018; Michelle Price, 'US SEC says hackers may have traded using stolen insider information' (*Reuters*, 21 September 2017) <[### Sri Lanka](https://uk.reuters.com/article/uk-sec-</p></div><div data-bbox=)

In Sri Lanka, Section 32 of the SEC Act³⁶ comprehensively defines the offence of insider dealing. Section 32(1) provides that, an individual connected with a company shall not trade in listed securities of that company if he has information which, (a) He holds by virtue of being connected with the Company; (b) It is reasonable to expect such a connected person by virtue of his position, not to disclose except for the proper execution of his official duties; and (c) He can reasonably be expected to know is unpublished price sensitive information in respect of those securities. Only when the above three criteria are satisfied, a person may be found guilty of the offence of “insider dealing”. Hence, it is evident

intrusion/u-s-sec-says-hackers-may-have-traded-using-stolen-insider-information-idUKKCN1BW0A4> accessed 15 April 2018; 'SEC fears insider trading after system hacked in 2016' (*Sky News*, 21 September 2017) <<https://news.sky.com/story/sec-fears-insider-trading-after-system-hacked-in-2016-11046012>> accessed 15 April 2018; Hannah Kuchler, 'Hackers target weakest links for insider trading gain' (*Financial Times*, 3 October 2017) <<https://www.ft.com/content/13a317ce-a561-11e7-9e4f-7f5e6a7c98a2>> accessed 15 April 2018.

³⁶ Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

that the key category of “insiders” under the original SEC Act³⁷ are solely defined by "connection" with a company.

This “connection” may be determined by either the person being a director of the company concerned or a related company, or the person being an officer other than a director, or an employee of the company or a related company, or having a professional relationship with the company or a related company, and in both cases where his position is expected to have given him access to inside information in relation to either company. Hence, under the SEC Act³⁸ definition, a mere shareholder will not be an “insider”, and this is a significant lacuna in the Sri Lankan law pertaining to “insider dealing”. Furthermore, this “connection” test shares similarity to the position in the UK prior to the CJA 1993. Under CJA, shareholders are encompassed into the definition, and the “connection” test was

replaced with the “access to information” test, thereby widening the coverage. However, by the 2003 amendment to the SEC Act³⁹ the “access to information” test is introduced in Sri Lanka, but it did not replace the “connection” test.

Sanctions

Sri Lanka, having only the criminal regime addressing “insider dealing”, the issue of sanctions is straightforward. Section 33A of the SEC Act⁴⁰ provides for the criminalisation and sanctions for any contravention of the provisions of Part V of the Act, thereby making “insider dealing” an offence which shall be tried in summary and punishable with “a fine not less than one million rupees, or imprisonment of either description for a term not less than two years and not exceeding five years, or to both such fine and imprisonment”⁴¹.

³⁷ Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

³⁸ Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

³⁹ Securities and Exchange Commission of Sri Lanka (Amendment) Act No 18 of 2003

⁴⁰ Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

⁴¹ Section 33A, Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

UK, having two parallel regimes governing “insider dealing” naturally raises the question of the very necessity of parallel regimes, and leads us to the main question whether the sanctions for insider dealing should be: criminal or civil or both. The CJA provides criminal penalties for “insider dealing”, while the FSMA (in light of MAR⁴²) stipulates civil regulatory sanctions. However, the criminal, and civil regulatory actions are mutually exclusive due to the *ne bis in idem* principle, which is stipulated in Article 4 of Protocol 7 of the ECHR. The ECtHR reiterated this principle in *Grande Stevens and Others v Italy*⁴³. Thus, in an action against “insider dealing”, the authority must make a choice in opting its path of action, as double jeopardy is barred. This narrows down the question to whether the sanctions for insider dealing should be: criminal or civil. To begin analysing this question, it is key to

reconnoitre the sanctions provided under each of these regimes.

The CJA stipulates a fine not exceeding the statutory maximum and/or imprisonment not exceeding six months in case of summary conviction⁴⁴, and a fine and/or imprisonment not exceeding seven years in case of conviction on indictment⁴⁵ for “insider dealing”. The FSMA, on the other hand, empowers the FCA to impose a financial penalty “of such an amount as it considers appropriate”⁴⁶ on a person committed market abuse⁴⁷ which includes insider dealing, or instead of financial penalty make a public statement that the person has engaged in market abuse⁴⁸. The FCA is also empowered to apply to court for an injunction to prevent market abuse⁴⁹, or for an injunction to remedy⁵⁰, or an injunction to freeze⁵¹ or for a restitution order⁵² in cases of market abuse. Further, the FCA may also require

⁴² Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1

⁴³ [2014] ECHR 230

⁴⁴ s.61(1)(a), Criminal Justice Act 1993

⁴⁵ s.61(1)(b), Criminal Justice Act 1993

⁴⁶ s.206(1), Financial Services and Markets Act 2000

⁴⁷ s.123(1), Financial Services and Markets Act 2000

⁴⁸ s.123(3), Financial Services and Markets Act 2000

⁴⁹ s.381(1), Financial Services and Markets Act 2000

⁵⁰ s.381(2), Financial Services and Markets Act 2000

⁵¹ s.381(4), Financial Services and Markets Act 2000

⁵² s.383, Financial Services and Markets Act 2000

the person concerned to pay appropriate compensation⁵³.

At least three cardinal differences between the criminal and civil sanctions can be identified: 1) Incarceration as a punitive sanction is available only under the criminal regime; 2) The criminal sanctions can be imposed only by the respective Court of Law, while an administrative authority (FCA) is statutorily empowered to investigate, and impose financial sanctions or public statements under the civil regime; and 3) The criminal sanctions can be imposed only if the offence is proven “beyond reasonable doubt”⁵⁴, while the civil sanctions require a much lesser standard of proof: “more probably than not”^{55 56}.

The paramount purpose of regulating “insider dealing” is to ensure “smooth functioning of securities markets and

public confidence in markets”⁵⁷. Analysing these differences in deference to its effect on curtailing “insider dealing” and promoting market confidence is crucial in answering the question whether the sanctions should be civil or criminal.

To lock them up; or not

In 2016, Martyn Dodgson, an investment banker who was found guilty by a jury for “insider dealing” was sentenced for four and a half years in prison. This is the longest prison sentence imposed thus far in the UK for “insider dealing”⁵⁸. In the US the longest prison sentence imposed for “insider trading” thus far is 12 years⁵⁹. Imprisonment is considered one of the serious forms of punishment, which, according to some scholars, impacts “physical”, “mental”, and “moral” deterioration on persons⁶⁰. The “utilitarian

⁵³ s.384, Financial Services and Markets Act 2000

⁵⁴ *Woolmington v DPP* [1935] 1 AC 462, in page 481; *Mancini v DPP* [1942] AC 1, in page 11; *R v Hepworth and Fearnley* [1955] 2 QB 600.

⁵⁵ *Miller v Minister of Pensions* [1947] 2 All ER 372; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, in para 55.

⁵⁶ i.e. balance of probabilities

⁵⁷ Preamble (2), Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1

⁵⁸ ‘Banker given record sentence for insider dealing’ (*BBC News*, 12 May

2016)<<http://www.bbc.co.uk/news/business-36277818>> accessed 20 April 2018

⁵⁹ Jonathan Stempel, ‘Lawyer’s record 12-year prison term for insider trading is upheld’ (*Reuters*, 9 July

2013)<<https://www.reuters.com/article/us-insidertrading-kluger/lawyers-record-12-year-prison-term-for-insider-trading-is-upheld-idUSBRE96814J20130709>> accessed 20 April 2018

⁶⁰ Joycelyn M Pollock, The Rationale for Imprisonment. in Joycelyn M Pollock (ed), *Prisons*

justification” for punishment demands that the punishment must have a “deterrent effect” on the individual and society, “incapacitate” the person from recommitting the crime, “reinforce community norms”, and “reform” the punished⁶¹. And the “retributive justification” for punishment demands that punishment be “proportional to the degree of wrongdoing”⁶². This leads to the question, whether imprisonment is an appropriate punishment for “insider dealing”.

In the strictest sense, “insider dealing” is a victimless crime. A person’s decision to sell or buy securities is absolutely independent from the fact the buyer or seller of those securities did it based on confidential inside information. Manne ardently argued that “no one is injured by insider trading”⁶³. In supporting Manne’s

position, Engelen and Van Liedekerke conclude that “there is very little harm caused by insider trading”⁶⁴ and distinguished “insider dealing” from market abuse. Nevertheless, the argument to the contrary seem to suggest that it is the market as a whole which is the victim⁶⁵. Despite the moral righteous tone in this argument, it is an inordinate exaggeration of victimhood. The arguments in favour of illegalising “insider dealing”, as presented in précis by Cole are: 1) “affects the efficiency of the market”; 2) “undermines investor confidence”; 3) “immoral”, and “inherently unfair”; 3) “contrary to ethics”; 4) “damages companies and shareholders”⁶⁶. While the efficiency and investor confidence arguments are

Today and Tomorrow (Jones & Bartlett Publishers 2009) 9

⁶¹ Kent

Greenawalt, 'Punishment' [1983] 74(2) *Journal of Criminal Law and Criminology* 350 - 352

⁶² *ibid*, in 348

⁶³ Henry G Manne, *Insider Trading and the Stock Market* (Free Press 1966)

⁶⁴ Peter-Jan Engelen and Luc Van Liedekerke, 'The Ethics of Insider Trading Revisited' [2007] 74(4) *Journal of Business Ethics* 497 – 507 in 502

⁶⁵ *United States of America v Raj Rajaratnam*

[2011] S1 09 Cr 1184; *R v Christopher McQuoid*

[2010] 1 Cr. App. R. (S.) 43; Norman S

Douglas, 'Insider Trading: The Case Against The 'Victimless Crime' Hypothesis' [1988] 23(2) *The Financial Review* 127 – 142; David

Kirk, 'Enforcement of criminal sanctions for market abuse: practicalities, problem solving and pitfalls'[2016] 17(3) *ERA Forum* 311 - 322 in 318

⁶⁶ Margaret Cole, 'Insider dealing in the City' [2007] 1(4) *Law and Financial Markets Review* 307 - 308

disputed by several scholars⁶⁷, we can observe that the foundation of the other arguments lie in “ethics, morality, and fairness” rather than “malice”. In most cases of insider dealing the information used is “typically legitimately acquired as a consequence of one's occupational position”⁶⁸. Nonetheless, studies⁶⁹ suggest that, “Insider Dealing” is a well calculated act, mostly committed knowing its wrong. Thus, entails the justification for punishment, and Öberg argues that imprisonment is the effective punishment⁷⁰.

On the other hand, it is not impossible to satisfy the “utilitarian justifications” and curtail “insider dealing” through civil regulatory sanctions. Even “retributive justice” to the ancient standard of “eye for

eye, tooth for tooth”⁷¹ would not warrant imprisonment over financial penalty for a financial crime. A punitive financial penalty, coupled with a public statement, and prohibition from trading and/or profession for a period of time would be a “proportional” punishment sufficiently effecting “deterrence”, “incapacitation”, and “reform”, and “reinforce community norms”. In support of this Bachner, a renowned defence attorney in several “insider dealing” cases in the US stated that “those involved in insider trading cases that result in civil charges rarely offend again”. Firey, striding further, claims that “it's wrong to lock someone in a cage for acting rationally” and argues that “there is nothing for society to gain

⁶⁷ Henry G Manne, *Insider Trading and the Stock Market* (Free Press 1966); Milton Friedman Quoted in Gilbert Geis, *White-Collar and Corporate Crime: A Documentary and Reference Guide* (ABC-CLIO 2011) 145; Donald J Boudreaux, 'Learning to Love Insider Trading' (The Wall Street Journal, 24th October) <<http://www.wsj.com/articles/SB10001424052748704224004574489324091790350>> accessed 15 April 2018; Peter-Jan Engelen and Luc Van Liedekerke, 'The Ethics of Insider Trading Revisited' [2007] 74(4) *Journal of Business Ethics* 497 – 507

⁶⁸ Elizabeth Szockyj and Gilbert Geis, 'Insider trading: Patterns and analysis' [2002] 30(2) *Journal of Criminal Justice* 273 - 286 in 283

⁶⁹ Elizabeth Szockyj and Gilbert Geis, 'Insider trading: Patterns and analysis' [2002] 30(2) *Journal of Criminal Justice* 273 – 286; Emily A Malone, 'Insider Trading: Why to Commit the Crime From a Legal and Psychological Perspective' [2003] 12(1) *Journal of Law and Policy* 327 - 368

⁷⁰ J Öberg, 'Is it 'essential' to imprison insider dealers to enforce insider dealing laws?' [2014] 14(1) *Journal of Corporate Law Studies* 111 - 138

⁷¹ *The Holy Bible, New International Version (Anglicised)*, NIVUK (Biblica 2011) <<https://www.bible.com/bible/113/EXO.21.NIVUK>> accessed April 30, 2018 Exodus 21:24

from sending [inside dealers] to prison”⁷². Even Öberg who grounds his argument in favour of imprisonment over civil penalties on the thesis that civil penalties don’t result in “sufficiently strong moral condemnation”⁷³, apart from a theoretical appraisal, doesn’t provide any empirical evidence to support his thesis. Hence, there seems no unequivocal reason, except for superficial and predominantly subjective “moral” considerations, to prefer imprisonment over civil sanctions.

Sanctions by Court or Administrative Authority

A criminal penalty under the CJA can only be imposed by a Court of Law after a fair trial, whereas the FSMA empowers the FCA to impose civil sanctions. In *Ridge v Baldwin*⁷⁴, the House of Lords held that principles of natural justice apply to administrative and quasi-judicial decision making as well. Accordingly, natural

justice principle of “*nemo iudex in causa sua*”⁷⁵ becomes a key consideration when FCA acts as the regulator, prosecutor, and the imposer of civil sanctions. Rix LJ in *R (Kaur) v ILEx*⁷⁶ held that, “participation in a prosecutorial capacity... will disqualify or else raise concern in the mind of the fair-minded observer about the appearance of impartial justice. Even an employee of a prosecuting agency may fall within this disqualification or concern, even though not employed in a prosecutorial capacity... However, that would not apply to every employee. Similarly, mere membership of a prosecuting association will not disqualify, where there is no involvement in the case in question, but a more senior role in governance may possibly do so”. Thus, it is not impossible for a regulatory authority to separate its inquiring and prosecuting arm from the decision making arm in order to comply with the principles of natural justice. In fact, the FCA has a “separate”

⁷² Thomas A Firey, 'Insider Trading Should Be Legal' (*Foundation for Economic Education*, 18 May 2017) <<https://fee.org/articles/insider-trading-should-be-legal/>> accessed 25 April 2018

⁷³ J Öberg, 'Is it 'essential' to imprison insider dealers to enforce insider dealing

laws?' [2014] 14(1) *Journal of Corporate Law Studies* 111 – 138 in 137 and 138

⁷⁴ [1964] AC 40

⁷⁵ *i.e.* no man shall be a judge in his own cause

⁷⁶ *R (Kaur) v Institute of Legal Executives Appeal Tribunal and another* [2011] EWCA Civ 1168 in para 35

Regulatory Decisions Committee⁷⁷, which is not only separate from FCA's "executive management structure"⁷⁸, but also has its "own legal advisers and support staff" who are "separate from the FCA staff involved in conducting investigations"⁷⁹. Further, it also provides for an appeal to an upper tribunal. Barnes, in his analysis of UK's enforcement track record, states that it is only after the introduction of the civil regime the enforcement was "pursued rigorously"⁸⁰. A reason would be that the civil regulatory approach relaxes the procedural rigour archetypal to the criminal regime, and provides diverse options of sanctions, thus enabling effective enforcement on a case-by-case basis. In addition, the FCA is also empowered to bring criminal prosecutions under the CJA⁸¹.

Standard of proof

While the criminal regime requires the offence to be proved "beyond reasonable doubt"⁸², the civil regime requires a lesser standard of "on the balance of probabilities"⁸³. However, Lord Hope in Clingham⁸⁴ held that, "there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made"⁸⁵, and referring to Lord Bingham⁸⁶ stated that, "if this is done the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard"⁸⁷. "Insider Dealing", despite the academic debates, is stipulated as a crime

⁷⁷ The nature and procedure of the RDC. in *The Decision Procedure and Penalties manual* (Financial Conduct Authority 2018) 3.1.1

⁷⁸ *ibid*, 3.1.2

⁷⁹ *ibid*, 3.1.3

⁸⁰ Paul Barnes, 'Insider dealing and market abuse: The UK's record on enforcement' [2011] 39(3) *International Journal of Law, Crime and Justice* 174 - 189

⁸¹ s.402(1)(a), Financial Services and Markets Act 2000

⁸² *Woolmington v DPP* [1935] 1 AC 462, in page 481; *Mancini v DPP* [1942] AC 1, in page 11; *R v Hepworth and Fearnley* [1955] 2 QB 600.

⁸³ *Miller v Minister of Pensions* [1947] 2 All ER 372; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, in para 55.

⁸⁴ *Clingham (formerly C (a minor) v Royal Borough of Kensington and Chelsea* [2002] UKHL 39

⁸⁵ *Clingham (formerly C (a minor) v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 in para 82

⁸⁶ in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 in 354, para 31

⁸⁷ *Clingham (formerly C (a minor) v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 in para 83

under the CJA, which *ipso facto* elevates its seriousness under the civil regulatory regime as well. Hence, the very existence of a parallel criminal regime for the same offence invites a higher standard of proof, if not the criminal standard, for the civil regime too. It seems that the Tribunal in *Davidson and Tatham*⁸⁸ has acknowledged this.

Conclusion

Imprisonment is the only sanction exclusive to the criminal regime. Ashworth contends that “custodial sentences should be used as sparingly as possible”⁸⁹. As observed above, when the very criminality of “insider dealing” lies predominantly on ethics and morality, it warrants the question whether imprisonment is the appropriate sanction for “insider dealing”. As stated by the South African judge Himestra J, imprisonment is “a harsh and

drastic punishment [which must] be reserved for callous and impenitent characters”⁹⁰. The civil regulatory regime is time and cost efficient⁹¹, empowered to impose diverse sanctions varying from public statement to fines, and if necessary, empowered to prosecute under the criminal regime. Thus, it is more sensible to utilise the civil regulatory apparatus as the norm, and reserve the criminal regime for the “callous and impenitent” exceptions.

In Sri Lanka, where “insider dealing” is solely governed by a criminal law regime, and there are calls for a stronger civil regulatory and enforcement regime constantly being presented from various quarters⁹². As emerged from the discussion above, it is pivotal that an efficient civil regulatory regime, in addition to the criminal regime, is introduced in Sri Lanka

⁸⁸ *Paul Davidson and Ashley Tatham v The Financial Services Authority* [2006] FIN/2003/0016 FIN/2003/0021 <<https://assets.publishing.service.gov.uk/media/57528e6140f0b64328000010/DavidsonAndTatham.pdf>> accessed 25 April 2018, in page 43

⁸⁹ Andrew Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicolson 1983) 318

⁹⁰ *S v Benetti* [1975] 3 SA 603 (T) in 605G

⁹¹ David Kirk, 'Enforcement of criminal sanctions for market abuse: practicalities, problem solving

and pitfalls'[2016] 17(3) ERA Forum 311 - 322 in 322

⁹² Securities and Exchange Commission of Sri Lanka, 'Proposal to amend the SEC Act to introduce a range of administrative and civil enforcement powers to deal with capital market offences' [2012] Consultation Paper No 10 <<http://www.sec.gov.lk/wp-content/uploads/cover-page-10-consultation-paper.pdf>> accessed 2 October 2019

without undue delay to efficiently deter
“insider dealing”.