

# CONSULTATION PAPER NO. 6 2003

CONSULTATION PAPER 2003-06

## MARKET MANIPULATION AND INSIDER DEALING

The introduction of revised legislative provisions concerning market manipulation and insider dealing.

# CONSULTATION PAPER

The Jersey Financial Services Commission invites comments on this consultation paper. Comments should reach the Commission by 30 January 2004.

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# CONSULTATION PAPER

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# 1 - EXECUTIVE SUMMARY

## OVERVIEW

- 1.1 The Jersey Financial Services Commission (“**the Commission**”) wishes to ensure that the Island has the most up to date provisions to counter insider dealing and market manipulation. This is in order to ensure that Jersey can co-operate to the fullest extent with overseas regulators and bring effective action against those in the Island who involve themselves in these activities.
- 1.2 Insider dealing is currently an offence and is investigated under the Company Securities (Insider Dealing) (Jersey) Law 1988 (“**CS (ID)**”). Market manipulation is an offence and is investigated under the Financial Services (Jersey) Law 1998 (“**FS (J) L**”).

## CONSULTATION

- 1.3 The Commission issues this consultation paper under Article 8(2) of the Financial Services Commission (Jersey) Law 1998, as amended, where the Commission “*may in connection with the carrying out of its functions consult and seek the advice of such persons or bodies whether inside or outside the Island as it considers appropriate*”.
- 1.4 The Commission invites written comments from all interested parties on this consultation paper and the specific questions posed by it.
- 1.5 Following a general period of consultation, the Commission proposes to instruct the Law Draftsman to prepare draft legislation in relation to the insider dealing and market manipulation provisions.
- 1.6 The Commission would like to be in a position to place recommendations and draft legislation concerning insider dealing and market manipulation before the Economic Development Committee by the middle of 2004.

## 2 - BACKGROUND

### THE COMMISSION

- 2.1 The Commission is a statutory body corporate established under the Financial Services Commission (Jersey) Law 1998, as amended, and is responsible for, among other things, investigating insider dealing under the CS (ID) and market manipulation under the FS (J) L.
- 2.2 The Commission's guiding principles require it to have regard to:
- the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial soundness of persons carrying on the business of financial services in or from within the Island;
  - the protection and enhancement of the reputation and integrity of the Island in commercial and financial matters;
  - the best economic interests of the Island; and, in pursuit of the above,
  - contributing to the fight against financial crime.

### WHAT IS INSIDER DEALING?

- 2.3 Insider information is non-public information of a precise nature relating to one or more issuers of financial instruments or to one or more financial instruments, which, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments. This is insider information as described in Directive 2003/6/EC of the European Parliament and of the Council the European Union on insider dealing and market manipulation (market abuse).  
([http://europa.eu.int/comm/internal\\_market/en/finances/mobil/market-abuse\\_en.htm](http://europa.eu.int/comm/internal_market/en/finances/mobil/market-abuse_en.htm)).
- 2.4 Insider dealing is the illegal use of insider information by an individual to secure a profit or reduce a loss resulting from dealing in investments. This illegality is extended to any person who knowingly uses insider information passed by this first person to secure a similar result.
- 2.5 An insider is any person in possession of insider information who, under Jersey's current law, is (knowingly) taking advantage of that information by acquiring or disposing of investments for him or a third party.
- 2.6 Any person is prohibited from (knowingly) disclosing insider information to any third party unless such disclosure is made in the normal course of the exercise of his employment, profession or duties.

## 2 - BACKGROUND - CONTINUED

### WHAT IS MARKET MANIPULATION?

2.7 Market manipulation involves transactions or orders to trade which

- give, or are likely to give, false or misleading signals as to the supply, demand or price of financial instruments;
- alter, by one or more persons acting in collaboration, the price of one or several financial instruments to an abnormal or artificial level; or
- employ fictitious devices or any other form of deception or contrivance.

2.8 Market manipulation includes the dissemination of information through the media, including the Internet, or by any other means, which give, or are likely to give, false or misleading signals as to the supply, demand or price of financial instruments, including the dissemination of rumours and false or misleading news.

**2.9 Should the EU definition of insider dealing and market manipulation be adopted as follows?**

2.10 “Inside information” shall mean information which has not been made public of a precise nature relating to one or more issuers of financial instruments or to one or more financial instruments, which, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative instruments.

- In Article 2 of Directive 2003/6/EC it states that Member States shall prohibit any natural or legal person who possesses inside information from taking advantage of that information by acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.
- The above subparagraph shall apply regardless of whether such person has obtained that information:
  - (a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or
  - (b) by virtue of his holding in the capital of the issuer; or
  - (c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or
  - (d) by virtue of his criminal activities.

## 2 - BACKGROUND - CONTINUED

2.11 “Market manipulation” shall mean:

- Transactions or orders to trade, which give, or are likely to give, false or misleading signals as to the supply, demand or price of financial instruments, or which secure, by one or more persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level, or which employ fictitious devices or any other form of deception or contrivance.
- Dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply, demand or price of financial instruments, including the dissemination of rumours and false or misleading news.

### **WHAT ARE THE EFFECTS OF INSIDER DEALING AND MARKET MANIPULATION?**

2.12 As a result of insider dealing or market manipulation, innocent investors may well buy or sell investments at a false price. Moreover, market abuse of this kind undermines confidence in markets.

### **WHY DOES JERSEY NEED TO HAVE LEGISLATION?**

2.13 Unauthorised business, market manipulation and insider dealing are the three criminal offences that are normally investigated by securities regulators, even where they are committed by people who are not themselves regulated financial services providers. In Jersey these offences carry the most severe criminal penalties contained in the regulatory laws.

2.14 The Commission may need to investigate offences carried out in Jersey, even though the Island has no secondary securities market. Market manipulation and insider dealing are offences normally associated with a stock exchange or other form of secondary market. The development of communications allows access to such markets remotely. It is perfectly possible for offences to be committed in Jersey regarding exchanges elsewhere. The Commission must be in a position to investigate such offences.

2.15 Therefore, the main purpose of Jersey insider dealing and market manipulation legislation is to enable the Commission to be able to respond to requests for assistance from other securities regulators that investigate these offences. The Commission must be able to respond to such requests to maintain international reputation and ensure that the business conducted in the Island does not facilitate the committing of these offences.

## 2 - BACKGROUND - CONTINUED

2.16 Jersey is vulnerable to abuse by those committing these offences because offenders may try to hide behind corporate vehicles and trusts or just bank the proceeds of the crime in the Island. Jersey does not want to harbour such offenders and must be able to assist overseas authorities to investigate offences committed under their legislation. Further, where the predicate offence is not committed in the Island, but this offence was aided or abetted from within Jersey, it is right that the Commission should be able to investigate those in Jersey who have aided and abetted the main offence.

### WHAT KIND OF ASSISTANCE CAN THE COMMISSION GIVE AT PRESENT?

2.17 Depending on the offence in question, the Commission can:

- provide information spontaneously if it comes across evidence in Jersey of a regulatory offence committed elsewhere;
- provide information on request that it has available in its files that is relevant to an overseas investigation and
- exercise its investigative powers on behalf of others where an offence is suspected in another jurisdiction that is equivalent to (in the case of market manipulation) or similar to (in the case of insider dealing) a Jersey offence.

2.18 International standards are clear. They are set out in the form of a multilateral Memorandum of Understanding on information exchange (please refer to the IOSCO web site <http://www.iosco.org/library>).

2.19 Information can only be requested by overseas authorities in respect of specific alleged offences. No requests for 'fishing expeditions' are entertained by the Commission.

2.20 The Commission will only investigate in response to a request for assistance where there are reasonable grounds for suspecting that evidence of a crime committed in another jurisdiction will be found in Jersey.

2.21 The Commission may only use statutory gateways to share information with an appropriate agency having the powers to investigate the relevant crimes.

2.22 International standards also require appropriate confidentiality for information exchanged.

## 2 - BACKGROUND - CONTINUED

2.23 Jersey conforms to these practices through its statutory gateways. At present Jersey can only assist overseas authorities in respect of market manipulation where it is satisfied that the assistance given will only be used for the purposes of supervisory functions and where the Commission may assess the requesting authority as being one that it recognises as a matter of practice under Article 33(4) of the FS (J) L as being one which;

- would give corresponding assistance;
- where the breach under foreign investigation has a close parallel in the Island;
- the seriousness of the case and its importance in the Island and whether the assistance could be obtained by other means; and
- whether it is otherwise in the public interest to give the assistance sought.

2.24 Article 33(6) of the FS (J) L also makes it clear that suspected market manipulation offences in other jurisdictions may only be investigated under Article 29(2) in Jersey if the foreign contravention would amount to a contravention under Jersey law if it arose in the Island.

2.25 For insider dealing, the current position in Article 15(1)(b) of the CS (ID) requires that the Commission suspects that there has been a breach of the laws of another jurisdiction relating to insider dealing and that a person in the Island has been concerned in any such contravention or may have information or documents which may be of assistance in the investigation of any such contravention. The Commission may then investigate the evidence through the appointment of an inspector and share the findings of the inspector's report with the foreign authority.

**2.26 Should the Commission have the ability to assist recognized overseas regulators in the investigation of any financial services crime, whether it passes a Jersey equivalence test or not (safeguards are contained in Article 33 of the FS (J) L including the consideration of a number of safeguards under 33(4) relating to the supervisory body requesting assistance)?**

### INADEQUACIES OF PRESENT LEGISLATION

2.27 The present definition of insider dealing reflects that in the UK dating from 1988. The UK law has changed twice since then, through a new primary law in 1993 and now new subordinate legislation has amended the definition of markets. The UK definition of insider dealing in 1988 reflected their need to preserve the structure of their markets at that time. The structure of the UK markets has changed considerably in 15 years but Jersey does not, in any event, have a secondary securities market. There is also a new definition in the EU Directive for market abuse referred to in 2.10 and 2.11 encompassing both insider dealing and market manipulation. It is therefore helpful to follow the definition in the Directive that is applicable in many of the countries from which requests for assistance are received.

## 2 - BACKGROUND - CONTINUED

- 2.28 Market manipulation and insider dealing are separate and distinct offences but have similar characteristics. It is therefore not sensible to have two offences of a similar nature in two separate laws, which differ considerably in structure and in the nature of the investigatory and assistance powers granted to the Commission. Any one set of facts could frequently involve either insider dealing or market manipulation or both. The Commission's investigation powers for the two are different due to the differing structures of the laws. For example, if we need to investigate an insider dealing offence, we have formally to appoint an inspector, rather than use the Commission's information gathering powers. We do not have to do this for market manipulation cases where the Commission may use ordinary regulatory law investigative powers. There is no justification for this difference.
- 2.29 Should the legislation regarding insider dealing and market manipulation be consolidated?**
- 2.30 If the legislation is consolidated, should all of the provisions regarding methods of investigation and gateways through which overseas requests for assistance are received and responded to, be consistent between the offences?**
- 2.31 Occasionally, we have had to refuse to assist a foreign regulator because the offence for which assistance is requested is, strictly speaking, a securities regulatory offence different from, even though broadly similar to, market manipulation. This could be damaging as it gives the impression that Jersey does not have adequate investigative powers or gateways to provide assistance.
- 2.32 Should the FS (J) L be brought into line with the CS (ID) so that overseas offences that are comparable to insider dealing and market manipulation may be investigated in Jersey rather than an equivalence test being applied?**
- 2.33 There is no formal provision in the CS (ID) that allows information to be shared. The Commission has always taken the view that the investigation is conducted for the purposes of investigating suspected breaches of foreign law, and that it is implicit in the Law that the results of the investigation be shared.
- 2.34 We must preserve what is good about the legislation we have at present. There are good investigative and information sharing powers for market manipulation. There is also a broad definition of what constitutes a comparable offence in respect of insider dealing in that Article 15(1)(b) of the CS (ID) allows the Commission to investigate any local person or information or documents held locally that may be of assistance in the foreign investigation without the need to meet an equivalence test.

## 2 - BACKGROUND - CONTINUED

2.35 However, other regulators have even broader powers. For example, the SEC, in the USA, can assist any foreign securities regulator with the investigation of any securities regulatory offence, even if the act under investigation, if committed in the USA, would not be an offence. Other jurisdictions can also act in this way. It is therefore important that the Commission's powers match those of important jurisdictions with which it has much dealing. However, the Commission will not assist in any 'fishing expeditions' and the safeguards contained in Article 33 of the FS (J) L will remain in place. These state in Article 33(3) that the Commission will not exercise powers to assist unless for an overseas authority's supervisory function. Article 33(4) states that the Commission may take into account:

- whether corresponding assistance would be given;
- whether there is a close parallel with legislation in the Island in respect of a recognized jurisdiction;
- the seriousness of the case;
- whether assistance could be obtained through other means;
- whether it is otherwise appropriate or in the public interest to give assistance.

The Commission would not assist an overseas supervisory authority unless it was collecting information for its own supervisory purposes.

**2.36 Should the Commission have powers to investigate evidence held in the Island of a regulatory offence committed overseas where that offence had no direct equivalent in the Island but where that overseas regulator was a recognized one under the above tests?**

**2.37 Would it be appropriate that additional safeguards be inserted in the FS (J) L that draw on similar provisions in other criminal investigatory laws under which local evidence of general crime committed overseas may be investigated?**

2.38 At present we cannot give assistance where the market manipulation offence is being investigated by an authority other than a supervisory authority (as defined in the FS (J) L). The FS (J) L will be amended to allow other authorities that are responsible for investigating insider dealing or market manipulation offences to make requests for assistance. At present the CS (ID) has no such restriction and historically non-regulatory bodies, such as the UK Department of Trade and Industry, had responsibility for insider dealing investigations and received assistance from the Commission in the form of investigations carried out under the CS (ID). The Commission would wish to continue providing the most relevant overseas authorities with assistance.

**2.39 Should the gateway in the FS (J) L be extended to match the ability to assist a wide range of relevant overseas authorities as in the CS (ID)?**

## 2 - BACKGROUND - CONTINUED

### OBJECTIVES OF THE CHANGE

- 2.40 The first objective is to harmonise investigative and co-operative powers across the two crimes, so as to maintain Jersey's reputation by ensuring that the Commission can co-operate by providing assistance in respect of any securities related regulatory offences.
- 2.41 The second objective is to allow the Commission to give assistance to any authority (whether a regulator or not) when the offence is comparable to insider dealing or market manipulation rather than precisely equivalent to it.
- 2.42 The third objective is to allow the Commission to give assistance to any securities regulator, regardless of the nature of the regulatory offence (provided the information is within the Commission or obtainable from a registered person) and relates to a financial services regulatory type offence.
- 2.43 In view of the proposed scope of the investigatory powers required for the third objective, it is considered that safeguards of a type previously used in the criminal investigatory laws should be utilised.

# 3 - PROPOSED CHANGES TO THE INSIDER DEALING LEGISLATION

- 3.1 The intention is that the provisions within the CS (ID) will be encompassed as a new Article 27A within the FS (J) L that defines the offence. Consequently the CS (ID) will thereafter be repealed. The definition of insider dealing in the amended FS (J) L will be the same as that used in the EU Directive as referred to in 2.10. Article 29(2) of the FS (J) L will be extended to investigations about insider dealing, market manipulation and like offences. This will enable the Commission to obtain information on behalf of other regulators in respect of insider dealing without having to appoint an inspector (unless the Commission wishes to) but by using the normal investigatory powers in Article 29(2) of the FS (J) L.
- 3.2 The amended FS (J) L will allow investigations and prosecutions to take place in Jersey in respect of insider dealing offences committed here, regardless of the market in which it is committed as the reference will be to “investments” rather than “markets”, as defined in the First Schedule to that law. In addition, the aiding and abetting of any insider dealing will become an offence in Jersey. This is not currently the case and is a deficiency in the Island’s laws.
- 3.3 As with the current CS (ID), the amended FS (J) L will allow assistance to be provided to overseas regulators and those with responsibility for investigating insider dealing:
- spontaneously if evidence of insider dealing is found by the Commission;
  - on request where we have the information in the Commission’s files;
  - on request where the information has to be obtained from any person in the Island. This is done using compulsory powers (with safeguards for self incrimination) where necessary, even if not directly equivalent to the Jersey definition of the offence;
  - in respect of any offence relating to insider dealing.

In addition, the Commission will be able to give assistance to anyone investigating insider dealing, even if they are not themselves a regulatory authority.

- 3.4 The amended FS (J) L will include safeguards in respect of information provided in relation to insider dealing cases which match those currently set out for market manipulation in the law. This will ensure that the confidentiality of information sent and received is protected. In addition, it will ensure that overseas authorities with which the Commission deals are limited to those that have been given responsibility to carry out insider dealing or market manipulation investigations even when these investigatory authorities are not purely financial services regulators. The definition of relevant supervisory authority in Article 33 of the FS (J) L will therefore be amended to incorporate this extension.

# 4 - PROPOSED CHANGES TO THE MARKET MANIPULATION LEGISLATION IN THE FS (J) L

- 4.1 Broadly speaking the definition of this offence is sufficient. However, the Commission must be able to help a foreign authority (e.g. a police or law enforcement agency) where the offence of market manipulation is comparable, but slightly different, to that in Jersey.
- 4.2 Moreover, the definition of “investments” in the FS (J) L may need to be amended to encompass all securities. Therefore the First Schedule of that Law will be extended to include money market instruments, forward interest rate agreements, commodity options, and interest rate, currency and equity swaps. Care would be taken to ensure that this did not result in the capture of currently unregulated business and that persons who are currently unregulated would not need to apply for licences because of these changes to the First Schedule.
- 4.3 It is also necessary to avoid the danger that assistance could not be provided if the offence technically fell outside the Jersey definition. The Commission therefore propose an additional power that allows it to give assistance spontaneously, or on request, in respect of information it has or can obtain from a registered person, using its powers for any offence investigated by a foreign supervisory authority (as defined in the wider interpretation of the FS (J) L as set out in 3.4) provided that the information is held by the Commission or a registered person (including customer information).

## 5 – SUMMARY OF QUESTIONS

REFERENCE	QUESTION
2.9	Should the EU definition of insider dealing and market manipulation be adopted?
2.26	Should the Commission have the ability to assist recognized overseas regulators in the investigation of any financial services crime, whether it passes a Jersey equivalence test or not (safeguards are contained in Article 33 of the FS (J) L including the consideration of a number of safeguards under 33(4) relating to the supervisory body requesting assistance)?
2.29	Should the legislation regarding insider dealing and market manipulation be consolidated?
2.30	If the legislation is consolidated, should all of the provisions regarding methods of investigation and gateways through which overseas requests for assistance are received and responded to, be consistent between the offences?
2.32	Should the FS (J) L be brought into line with the CS (ID) so that overseas offences that are comparable to insider dealing and market manipulation may be investigated in Jersey rather than an equivalence test being applied?
2.36	Should the Commission have powers to investigate evidence held in the Island of a regulatory offence committed overseas where that offence had no direct equivalent in the Island but where that overseas regulator was a recognized one under the above tests?
2.37	Would it be appropriate that additional safeguards be inserted in the FS (J) L that draw on similar provisions in other criminal investigatory laws under which local evidence of general crime committed overseas may be investigated?
2.39	Should the gateway in the FS (J) L be extended to match the ability to assist a wide range of relevant overseas authorities as in the CS (ID)?