



Insider Trading
Law in Ireland

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INSIDER TRADING LAW IN IRELAND

Legal Ground and Applicability

1.1 *Please identify the legal source of the insider trading rules applicable to investors in Ireland.*

The following provisions of Irish law apply to shareholders as well as officers of a company:

- i. Part V of the Companies Act, 1990¹. This applies to companies listed on the Alternative Securities Market and the Irish Enterprise Exchange of the Irish Stock Exchange, so should not be of wide application;
- ii. Market Abuse (Directive 2003/6/EC) Regulations 2005 SI No. 342 of 2005, (“the Regulations”);
- iii. Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005, (“the Act”);
- iv. Market Abuse Rules issued by the Financial Regulator (“the Rules”);
- v. Caselaw

Where an entity is considering making an offer for a company which is listed on a relevant market, it will need to comply with the following pieces of legislation in addition to those listed at points I to IV above.

- vi. The Irish Takeover Panel Act, 1997 (“Takeover Act”),
- vii. The Irish Takeover Panel Act 1997, Takeover Rules, 2007 (“Takeover Rules”);

¹ Article 6 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Commencement) Order 2005 (SI 323/2005), designating 6 July 2005 as the date of commencement of section 31, does so only for the purposes of regulated markets operated by a recognised stock exchange. This means that the Companies Act 1990, Part V continues in force insofar as it concerns securities of companies admitted to trading on the Irish Stock Exchange markets other than its main market for listed securities (often called the Official List). Part V will remain in place to cover dealings in respect of companies securities listed on unregulated markets operated by the Irish Stock Exchange such as (“IEX”)

- viii. The European Communities (Takeover Bids (Directive 2004/25/EC) Regulations 2006, (“Takeover Regulations”), and

Point IX applies to listed companies and requires them to comply with the obligations of the Regulations as if it were an issuer for the purposes of the Regulations.

- ix. Listings Rules (these apply to Companies listed on the main market of the Irish Stock Exchange).

Point X applies to persons discharging managerial responsibilities and would include directors of a company

- x. Model Code in the Irish Stock Exchange Listing Rules (Appendix 1 to Chapter 6) (the “Model Code”);

Point XI applies to directors of companies and those who act at the instigation of a director.

- xi. Section 30 of the Companies Act 1990;

1.2 *What is decisive for insider trading rules in Ireland to apply (e.g. seat of issues?, place of listing of relevant instruments?)?*

Regulation 4 of the Regulations applies to any financial instrument² which is (a) admitted to trading on a regulated market in at least one Member State, or (b) for which a request for admission to trading on a regulated market in at least one Member State has been made whether or not any transaction in or relating to the financial instrument takes place on that market. Regulation 4 is extended by Regulation 5 to a financial instrument which does not come within the definition contained in Regulation 4 but the value of which depends on a financial instrument which does fall within Regulation 4.

² “financial instrument” means (a) transferable securities as defined in Article 4 of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, (b) units in collective investment undertakings (c) money-market instruments, (d) financial futures contracts, including equivalent cash-settled instruments, (e) forward interest rate agreements, (f) interest-rate, currency and equity swaps, (g) derivatives on commodities, (h) any other instrument admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such a market has been made, and (i) options to acquire or dispose of any instrument falling into any of paragraphs (a) to (h) of this definition, including equivalent cash-settled instruments in particular options on currency and on interest rates;

The Regulations therefore apply to actions carried out in the State or abroad concerning financial instruments that are admitted to trading on a regulated market situated in or operating in the State, or for which a request for admission to trading on a regulated market situated in or operating in the State has been made and to actions carried out in the State concerning financial instruments that are admitted to trading on a regulated market in a Member State, or for which a request for admission to trading on a regulated market in a Member State has been made.

The Listings Rules and the Model Code apply to companies which are listed on the Official List of the Irish Stock Exchange.

The Companies Act, 1990 applies to quoted Irish companies admitted to one of the Irish Stock Exchange markets, other than companies with securities admitted to trading on the Official List (regulated market).

The Takeover Rules and the Takeover Act apply to companies with their registered office in Ireland whose transferable securities are admitted on a regulated market in Ireland or on a regulated market in another Member State.

The place of listing is therefore generally the determining factor in whether the Irish law on insider dealing applies.

2. *Which instruments are covered by insider trading regulations?*

2.1 *Please name examples of financial instruments covered by insider trading regulations, especially with regard to debt securities:*

Regulation 2 of the Regulations applies to:

- i. units in collective investment undertakings,
- ii. transferable securities as defined by Directive 2004/39 EC,
- iii. money market instruments,
- iv. financial futures contracts, including cash-settled instruments,
- v. forward rate interest agreements,

- vi. interest-rate, currency and equity swaps,
- vii. derivatives on commodities,
- viii. any other instrument admitted to trading on a regulated market in a Member State or for which a request for admission to trading in such a market has been made, and
- ix. options to acquire or dispose of any instrument referred to above in (i) to (vii), including equivalent cash settled instruments in particular options on currency and on interest rates.

Transferable securities are defined for the purpose of the Regulations as those classes of securities which are negotiable on the capital market and include the following:

- i. shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depository receipts in respect of shares,
- ii. bonds or other forms of securitised debt, including depository receipts in respect of such securities, and
- iii. any other securities giving the right to acquire or sell any such transferable securities.

Where Part V of the Companies Act, 1990 applies, securities are defined as:

- i. shares, debentures or other debt securities issued or proposed to be issued, whether in Ireland or otherwise, for which dealing facilities are, or are to be, provided by a recognised stock exchange (which for these purposes is the Irish Stock Exchange),
- ii. any right, option or obligation in respect of such shares, debentures or other debt securities referred to in paragraph (i),
- iii. any right, option or obligation in respect of any index relating to any such shares, debentures or other debt securities referred to in paragraph (i); and

- iv. such interests as may be prescribed.

The Listing Rules and the Model Code apply to Securities (being shares, certificates representing shares, units in a collective investment scheme, options to subscribe for or purchase securities, treasury shares, debt securities, warrants, certificates representing debt securities, and other instruments specified in Section C of Annex 1 of MiFID) admitted or seeking admission to one of the Irish Stock Exchange markets. The Irish Stock Exchange has three markets; the Main Market, the Alternative Securities Market and the Irish Enterprise Exchange.

The Takeover Rules apply to transferable securities which are admitted (depending on the registered office of the company) on a regulated market in either Ireland or another Member State.

- 2.2 *Where do insider securities have to be admitted to trading (e.g. organized market, regulated market, regulated unofficial market, etc.)? In which jurisdictions do insider securities have to be admitted to trading? Is the mere (i) application or (ii) announcement of such application sufficient? Are OTC/private deals included?*

Under the Regulations, the financial instruments have to (a) be admitted to trading on a regulated market in at least one Member State, or (b) requested admission to trading on a regulated market in at least one Member State whether or not any transaction in or relating to the financial instrument takes place on that market. As the Regulations apply whether or not a transaction takes place on the market, they would appear to cover private/OTC deals.

Part V of the Companies Act, 1990 applies in respect of dealings in companies securities which are listed on unregulated markets operated by the Irish Stock Exchange.

The Listings Rules (as they pertain to prohibiting the use of inside information) and the Model Code apply to dealings in the securities of listed companies (which are defined as Companies that have any class of their securities admitted to the official list of the Irish Stock Exchange). “Dealing in” includes:

- (i) any acquisition or disposal of, or agreement to acquire or dispose of any of the securities of the company,

- (ii) entering into a contract (including a contract for differences) the purpose of which is to secure a profit or avoid a loss where reference to fluctuation in the price of any of the securities of the company,
- (iii) to grant, acceptance, acquisition, disposal, exercise or discharge of any option to acquire or dispose of any of the securities of the company,
- (iv) entering into, or terminating, assigning or novating any stock lending agreement in respect of the securities of the company,
- (v) using a security, or otherwise granting a charge, lien or other encumbrance over the securities of the company,
- (vi) any transaction, including a transfer for nil consideration, or the exercise of any power or discretion effecting a change of ownership of a beneficial interest in the securities of the company, or
- (vii) any other right or obligation, present or future, conditional or unconditional, to acquire or dispose of any securities of the company.

The Takeover Act and the Takeover Rules apply to takeovers (not being takeover bids) and other relevant transactions in respect of Directive Companies (companies with their registered office in Ireland whose transferable securities are admitted to a regulated market in Ireland or a regulated market in one or more Member States (other than Ireland) or companies with their registered office in another Member State whose transferable securities are admitted to a regulated market in Ireland or companies with their registered office in another Member State whose transferable securities are admitted to a regulated market in Ireland or a regulated market in one or more Member States (excluding that Member State) but including Ireland) which are also relevant companies under the Takeover Act (Directive Relevant Companies) and to companies which fall within the definition of “relevant company” in Section 2 of the Takeover Act but which do not fall within the scope of the Takeover Regulations (“non-Directive Relevant Companies”).

A relevant company, as defined in Section 2 of the Takeover Act, means (i) any public limited company or other body corporate incorporated in the State, any of whose securities are authorised for trading (or have been so authorised within 5 years prior to the relevant proposal) on a market regulated by a recognised stock exchange (the Irish Stock Exchange has been prescribed as such) and (ii) a public

limited company incorporated in the State, any securities of which are authorised to be traded, or have been so authorised within 5 years prior to the relevant proposal on the London Stock Exchange, the New York Stock Exchange or Nasdaq.

Undertakings for Collective Investment in Transferable Securities and investment companies within the meaning of Part xiii of the Companies Act, 1990 are excluded under the Takeover Act from the definition of relevant companies. The Takeover Rules do not apply to takeover bids for securities issued by collective investment undertakings, other than the closed ended type, or for securities issued by a Central Bank of a Member State. The Takeover Rules will apply to a bid in respect of a closed-end investment company formed under Part XIII of the Companies Act, 1990 pursuant to certain amendments introduced by virtue of the Takeover Regulations. The applicability of the Takeover Act and the Takeover Rules are therefore not affected by the location of the companies head office or place of central management.

The Takeover Regulations, the Takeover Act, (subject to the Takeover Regulations), and the Takeover Rules apply to takeover bids for companies in respect of which the Takeover Panel has jurisdictions to supervise by virtue of Regulation 6 of the Takeover Regulations. Regulation 6 of the Takeover Regulations provides that the Takeover Panel shall have jurisdictions to supervise a bid in respect of a company which:

- (i) has its registered office in the State and whose transferable voting securities are admitted to trading on a regulated market in this State,
- (ii) has its registered office in the State and whose transferable voting securities are admitted to trading on regulated market in one or more Member States other than the State,
- (iii) has its registered office in another Member State and whose transferable voting securities are admitted to trading solely on a regulated market in the State, or
- (iv) has its registered office in another Member State and whose transferable voting securities are admitted to trading on regulated markets in more than one Member State, excluding that other Member State but including the State if:

- (i) the transferable voting securities were first admitted to trading on a regulated market in the State; or
- (ii) (subject to (iii)) the transferable voting securities have been simultaneously admitted to trading on regulated markets in more than one Member State, including the State, and the company determines in accordance with the Directive that the Irish Takeover Panel shall be the competent authority to supervise the takeover bid; or
- (iii) where the transferable voting securities were simultaneously admitted on regulated markets in more than one Member State, including the State by 20 May 2006 and the supervisory authorities of those Member States or, failing them, the company have determined in accordance with the Directive that the Irish Takeover Panel shall be the competent authority to supervise the bid.

2.3 *Is it sufficient that the price of financial instruments depends (directly or indirectly) on insider securities, even without such instruments themselves being admitted to trading?*

The insider dealing provisions of the Regulations apply to:

- (i) any “financial instrument” admitted to trading on a regulated market in the European Economic Area (EEA)³ (or for which a request for admission to trading has been made) irrespective of whether the transaction takes place on that market; and
- (ii) any “financial instrument” not admitted to trading on a regulated market in the EEA, but whose value depends on a “financial instrument” admitted to trading on a regulated market in the EEA or for which such admission to trading has been sought.

On that basis, the Regulations could apply to instruments which are themselves not listed.

³ EU Member States, Iceland, Liechtenstein and Norway. Liechtenstein has not yet implemented the MAD.

Part V of the Companies Act, 1990 prohibits the dealing in securities where a person connected with the Company in the preceding 6 months is in possession of information that is not generally available, but, if it were, would be likely to materially affect the price of those securities. The definition of securities is set out in 2.1 above and includes securities which are proposed to be listed.

Please refer to 2.2 for the application of the Model Code.

The Takeover Rules and Takeover Regulations apply to transferable voting securities which are admitted to trading on a regulated market in Europe. See 2.2 above.

3. What is insider information?

3.1 Are debt securities treated more/less strict than equity instruments?

Given the relatively recent introduction of much of the legislation in this area and the dearth of Irish case-law it is not possible to advise whether debt securities would be treated any differently to any other form of financial instruments such as equity instruments.

3.2 Can rumours or circumstances in the future be insider information?

“Inside information” is defined in Regulation 2 of the Regulations as meaning:

- i. information of a precise nature relating directly or indirectly to one or more issuers of financial instruments (see 2.1 above for a definition of financial instrument) or to one or more financial instruments which has not been made public and 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”,
- ii. in relation to derivatives on commodities and subject to *paragraph (2)*, information of a precise nature which has not been made public, and relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets, or
- iii. for persons charged with the execution of orders concerning financial

instruments, information conveyed by a client and relating to the client's pending orders, which is of a precise nature, which relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

The four major components of the definition of inside information are therefore:

- i. the information must be precise;
- ii. the information must not be available to the public. It would appear that reasonably extensive disclosure to the securities market is the test;
- iii. the information must relate to the issuer of the securities or to the securities themselves;
- iv. the information must be price sensitive, in that if disclosed generally, it is likely to have a significant effect on the price of the securities being traded.

“Information of a precise nature” is defined in Regulation 2 of the Regulations as information that indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to occur and is specific enough to enable a conclusion to be drawn as to the possible effect of that circumstance or event, as the case may be, on the price of financial instruments or related derivative financial instruments.

“Information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments” means information that a reasonable investor would be likely to use as part of the basis of the investor's investment decisions.

In determining the likely price significance of information, the Rules require that the issuer assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decision and would therefore be likely to have a significant impact on the price of the issuer's financial instruments or related derivative financial instruments (“the reasonable investor test”). In conducting the reasonable investor test, the Rules require that the issuer:

- (i) take into account that the significance of the information in question will vary widely from issuer to issuer depending on a number of factors such as the issuer's size, recent developments and the market sentiment about the issuer and the sector in which it operates; and
- (ii) assume that a reasonable investor will make investment decisions relating to the relevant financial instruments.

The information must therefore be of a precise nature as contrasted with rumours and general talk of questionable accuracy, however, the definition of "information of a precise nature" would appear to include circumstances or events in the future, provided that those circumstances or events may reasonably be expected to occur. Rule 5.10 of the Rules provides that where there is press speculation or market rumour regarding an issuer, the issuer is required to assess whether a disclosure obligation arises. The question as to whether or not a rumour or information concerning future events will constitute "inside information" will be determined on a case by case basis by the application of the principles set out above.

It is not possible therefore to state definitively that any information which is not "inside information" at the time it was obtained will not become inside information at a later date on the basis that circumstances may change and become such as to bring the information obtained within the definition of "inside information" for the purposes of the Regulations. According to the Rules (5.0.1) it is a matter for each issuer to make an initial assessment of whether a particular piece of information amounts to inside information.

The Committee of European Securities Regulators has published a document entitled "Level 3- second set of CESR guidance and information on the common operation of the Directive to the market"⁴ which includes a non-exhaustive and purely indicative list of events which might constitute inside information.

Regulation 6 of the Regulations provides that a person shall not engage in market manipulation. Market manipulation is defined as including the dissemination of information through the media, including the internet, which gives, or is likely to give, false or misleading signals as to financial instruments. Therefore, while rumour, unless sufficiently precise, may not be insider information, the dissemination of that information may constitute market manipulation which is also prohibited.

⁴ CESR/06-562b

Part V of the Companies Act, 1990 prohibits dealing in securities by a person who is connected or has been connected with the Company in the preceding 6 months and who is in possession of information that is not generally available, but, if it were, would be likely to materially affect the price of those securities. It seems that if rumour or information concerning future events consists of information which was not generally available and would be likely to materially affect the price of a company's securities that could constitute inside information for the purposes of the 1990 Act.

- 3.3 *In decision-making processes involving multiple layers of hierarchy (e.g. intention of a company to take over another company), can information regarding each layer (as opposed to the final decision) constitute insider information?*

The test which must be used under the Regulations is does the information regarding each layer constitute inside information as defined in 3.2 above. If it does and the person who possesses the inside information uses it to acquire or dispose of financial instruments to which that information relates this could constitute insider dealing for the purpose of the Regulations.

The prohibition on insider dealing applies to any person having acquired the inside information concerned by virtue of their membership of the administrative, management or supervisory bodies of the issuer of the financial instruments, by virtue of that persons holding in the capital of the issuer, by virtue of having access to the information through the exercise of that persons employment, profession or duties, or by virtue of that persons criminal activities.

A person who possesses inside information shall not, pursuant to Regulation 5 of the Regulations, disclose such inside information to any other person unless such disclosures are made in the normal course of the exercise of the first-mentioned persons employment, profession or duties, or recommend or induce other person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

- 3.4 *When is insider information deemed to be made public so that it ceases to be insider information?*

The Rules state that for an issuer whose financial instruments are admitted to trading on a regulated market in the State, an announcement may either be made

directly to a regulatory information service (“RIS”) or indirectly to an RIS through the CAO. Where notification is made through an RIS, the issuer must simultaneously notify the CAO.

Rule 5.7 provides that where an issuer has an internet site it is required to ensure that any information announced via an RIS is made available on its internet site by the close of business following the day of the RIS announcement. Rule 5.8 prohibits an issuer from disclosing inside information on its internet site as an alternative to or in advance of its disclosure via an RIS.

The commentaries on the subject indicate that the test of whether information is public information is whether the information has been reasonably extensively disclosed to the securities market. In considering the issue in *Fyffes plc v DCC plc* in the High Court Miss Justice Laffoy in delivering her judgment stated that regarding the issue of whether information is generally available (which was not relevant in this case or both parties agreed that the information was not generally available) the test is whether the information is accessible by investors.

3.4.1 Is it necessary that the information be published in the general media?

An issuer of financial instruments must publicly disclose, without delay, inside information which directly concerns the issuer, in a manner that enables fast access and complete, correct and timely assessment of the information by the public in accordance with Regulation 10(1). Please refer to 3.4 above regarding an issuer’s obligation to make inside information public.

3.4.2 Would a so-called “sectoral publicity” be sufficient? If yes, please explain such concept.

While disclosure in the form specified in 3.4 and 3.4.1 should meet the test regarding general availability, there has been no Irish caselaw which has considered the meaning of “general availability” in the context of the Regulations. As the *Fyffes* decision (which considered the issue in respect of the Companies Act, 1990) placed much reliance on US jurisprudence it is likely an Irish court would consider US caselaw as persuasive authority should the matter come before them in the future.

3.5 Is it sufficient that circumstances are only indirectly linked to (i) the insider securities or (ii) the issuer in order to constitute insider information? Please give examples of less obvious insider information, especially in the context of debt securities

The information must constitute inside information as defined in 3.2. The issue of whether information is directly or indirectly linked to securities or an issuer is irrelevant. Information is only inside information where it satisfies the tests in 3.2.

Appended at Appendix 1 is a list of examples contained in CESR paper reference CESR/06-562b. This CESR paper does provide that information regarding changes in the investment policies of the issuer or information on the withdrawal from or entry into new core business areas may constitute inside information. It would appear therefore that business plans may constitute inside information. Financial projections may also constitute inside information where they are precise, not available to the public and may have a significant price effect.

3.6 *Is it sufficient that insider information is only likely to have a significant effect on the exchange or market price of the securities, i.e. is a purely hypothetical effect enough?*

The information must be price sensitive, in that if disclosed it is likely to have a significant effect on the price of the securities being traded. Purely hypothetical effect is enough as per 3.2 above for the purpose of the Regulations as the Regulations apply a reasonable investor test. In the absence of direct evidence on the effect of the information, Courts would have to rely on expert evidence as to the effect of the information on a reasonable investor.

In the recent decision of the Supreme Court in *Fyffes plc v DCC plc*⁵ in a case concerning an action taken by Fyffes pursuant to Part V of the Companies Act, 1990 against DCC regarding the disposal of shares by DCC which it held in Fyffes, the Supreme Court gave consideration to how one would determine price sensitivity.

The facts of the case are that at the time of the disposal, Jim Flavin, the Chief Executive of DCC was a non-executive director of *Fyffes*. *Fyffes* alleged that DCC had access to price sensitive information at the time of disposal, being trading statements in November and December 1999 which were only circulated to directors of *Fyffes*, by virtue of Mr Flavin's position.

One of the tests adopted by the Supreme Court in determining whether the information would materially affect the share price was to firstly determine the generality or "total mix" of information available, then to determine the information which was not generally available but available to the dealer and then to determine

whether that information, if generally available and having regard to the total mix of information available, would materially affect the price of the share. The Court held that the evidence generally available to it was the evidence of experts and evidence of market movements on some or all of the evidence becoming available as did occur with the release of a March 2000 trading statement which contained information similar to those statements given to directors in November and December 1999. In the absence of any of the inside information becoming available, purely hypothetical effect would appear to be sufficient, based on the *Fyffes* decision and the Regulations.

3.6.1 If yes, from whose perspective and at which point in time is such hypothetical effect to be determined?

The Regulations have adopted a reasonable investor test in determining whether the information would have a significant effect on the price of financial instruments. According to the Supreme Court in *Fyffes* the court must for the purpose of Part V of the Companies Act, 1990 evaluate the state of the market at the relevant time and then, with such evidence as it has available to it, make a decision as to whether the share price would be materially affected if the information had been generally available.

3.6.2 If yes, does this perception change if it turns out that the information actually does not have a significant effect on the price of the securities?

The Supreme Court in the *Fyffes* case in determining whether the information was price sensitive stated that post market events could be of evidential value in certain circumstances. Mr Justice Fennelly in his decision overruled the decision of the High Court not to take account of a March 2000 trading statement which was similar to the November and December 1999 trading statements which were only circulated to the board. Mr Justice Fennelly took account of the fact that the March 2000 trading statement caused the share price in *Fyffes* to decrease significantly. He ruled that the November and December trading statements constituted price sensitive information as the March trading statement indicated what would have occurred if the information in the November and December trading statements had been released, given that the information in the March trading statement was similar, but less detailed than the information contained in the November and December trading statement.

Based on the *Fyffes* decision, a court must determine objectively whether the hypothetical test of the information having a significant effect on the price of the securities which is set out in Part V of the Companies Act, 1990 has been met. If the information which was alleged to have constituted inside information was later released to the market (or information similar to that information was later released) and was shown not to have a significant effect on the price of the securities, the information may not constitute inside information.

The test in the Regulations is whether a reasonable investor would use the information as part of the investor's investment decisions. If the information or similar information (as per the March 2000 trading statement in *Fyffes*), was released after the alleged instance of insider dealing and did not have a significant effect on the market price of the financial instruments, this would, as per the *Fyffes* decision, be something a court would be likely take into account.

3.6.3 *Would information regarding company personnel constitute insider information?*

Please see paragraph 3.2 which sets out the definition of inside information. If the information relating to personnel was of a precise nature and was information which if it was made public would have a significant effect on the price of the securities being traded, then the information regarding company personnel could constitute insider information.

3.7 *Can anybody be an insider, or only certain groups of people?*

For the purposes of the insider dealing regime, insiders may be divided between primary and secondary insiders. The former are those who, on account of their position vis a vis the company or the market, have ready access to the information. The latter are "tipees" and others who obtain the information from the former.

Primary insiders are those who have obtained the information by virtue of their position as (i) members of the administrative, management or supervisory bodies of the issuer, (ii) shareholders of the company, (iii) persons having access to the information through their employment, profession or duties (e.g. the company's auditors, lawyers and stock brokers) or (iv) those who obtained the information by virtue of their criminal activities, such as by corrupting the company's management or employees, or otherwise stealing the information. In the case of a legal person, the prohibition on insider dealing applies to any natural persons who take part in the

decisions to carry out for the account of the legal person any transaction in financial instruments.

The secondary category of insider is defined as those that know or ought to know that the information is inside information regardless of how they obtained it.

4. *Please explain the prohibitions of insider trading*

Regulations

Regulation 5 of the Regulations provides that a person who possesses inside information (as defined in 3.1 above) shall not use that information by acquiring or disposing of, or by trying to acquire or dispose of, for the persons own account or for the account of a third party, directly or indirectly, financial instruments (as defined in 2.1 above) to which that information relates. The person who possesses the inside information shall not, pursuant to Regulation 5(2), disclose that inside information to any other person unless such disclosure is made in the normal course of the exercise of the first mentioned persons employment, profession or duties. That person shall also not recommend or induce another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

Regulation 5(3) specifies the persons to whom the prohibition on insider dealing applies. Please see 3.7 above. Pursuant to Regulation 5(5), the prohibition on the use of inside information does not apply to any transaction conducted in the discharge of an obligation to acquire or dispose of any financial instrument which has become due and which results from an agreement concluded before the person concerned possessed the inside information.

If the obligation is conditional on the person not learning of major obstacles to the transaction during due diligence, arguably the obligation to acquire the financial instruments has not become due prior to the receipt of the insider information. There is, however, no guidance on the issue in Ireland.

If the pre-existing contractual obligation only enters into force from a certain point in time and can be revoked prior to its entry into force based on a decision made by the relevant party on foot of inside information which it has received, arguably the obligation to acquire the financial instruments has not become due prior to the

receipt of the insider information. There is however no guidance on the issue in Ireland.

The prohibition on insider dealing is subject to an exception for actions carried in compliance with the Takeover Rules. See 4.2.2. below.

Listing Rules

Rule 6.2.4 of the Listings Rules provides that a listed company, whose securities are admitted on regulated market in Ireland, should consider its obligations under the Regulations and the Rules in relation to, inter alia, the disclosure of inside information, the maintenance of insider lists and the recording of manager transactions. Rule 6.2.5 of the Listings Rules provides that a listed company, that is not already required to comply with the Regulations, must comply with the Regulations as if it were an issuer for the purposes of the Regulations.

Rule 6.2.6 of the Listing Rules provides that no dealings in any securities may be effected by or on behalf of a listed company or any member in its group at a time when, under the provisions of the Model Code, a director of the company would be prohibited.

Rule 6.2.7 of the Listings Rules provides that a listed company must require every person discharging managerial responsibilities, including directors, to comply with the Model Code and must take all proper and reasonable steps to ensure their compliance.

Where clearance is given to a person to deal in exceptional circumstances (pursuant to paragraph 9 of the Model Code) in a close period, the notification to a RIS, required by listing rule 6.11 and/or Regulation 12 of the Regulations, must include a statement of the exceptional circumstances.

Model Code

The Model Code provides that a restricted person must not deal in any securities of the company without obtaining clearance to deal in advance. "Restricted person" is defined, for the purposes of the Model Code, as a person discharging managerial responsibilities who in turn are defined as members of the administrative, management or supervisory bodies of an issuer or a senior executive who is not a member of such bodies but who has regular access to inside information relating

directly or indirectly to the issuer and has the power to make managerial decisions affecting the future developments of business prospects of the issuer.

In order to deal, a director (other than the chairman or chief executive) or company secretary must notify the chairman and receive clearance to deal from him. The chairman must not deal in any securities of the company without first notifying the chief executive (or director designated by the board for this purpose) and receiving clearance to deal from him. Where the chief executive is not present, the chairman must not deal without first notifying the senior independent director or a committee of the board or other officer of the company nominated for that purpose by the chief executive and receiving clearance to deal from that director, committee or officer. The chief executive must not deal in any securities of the company without first notifying the chairman (or director designated by the board for this purpose) and receiving clearance to deal from him or, if the chairman is not present, as above, first notifying the senior independent director.

A restricted person can not be given clearance to deal in any securities of the company during a prohibited period or on considerations of a short term nature. An investment with a maturity of one year or less will always be considered to be of a short term nature pursuant to the Model Code.

Prohibited period means for the purposes of the Model Code any close period, or, any period where there exists any matter which constitutes inside information in relation to the company.

“Close Period” is defined as a period of 60 days immediately preceding a preliminary announcement of the listed company’s annual results or, if shorter, the period from the end of the relevant financial year up to and including the time of the announcement, or, if a preliminary announcement of annual results is not published, the period of 60 days immediately preceding the publication of its annual financial report or if shorter the period from the end of the relevant financial year up to and including the time of such publication. If the company reports on a half yearly basis, the close period means the period from the end of the relevant financial period up to and including the time of such publication and, if the company reports on a quarterly basis, the close period means the period of 30 days immediately preceding the announcement of the quarterly results or, if shorter, the period from the end of the relevant financial period up to and including the time of the announcement.

A person discharging managerial responsibilities must, pursuant to the Model Code, take reasonable steps to prevent any dealing in the securities of the company during a close period by:

- (a) or on behalf of any connected person of his; or
- (b) an investment manager on his behalf or on behalf of any person connected with him where either he or the connected person has funds under management with that investment fund manager, whether or not discretionary.

A person discharging managerial responsibilities must advise all of his connected persons and investment managers acting on his behalf of the name of the listed company in which he is a person discharging managerial responsibilities and of the close periods during which they cannot deal in securities of the company. They in turn must advise him immediately after they have dealt in the securities of the company. There are a number of exceptions to this prohibition on dealing which are dealt with in paragraph 2 of the Model Code.

Takeover Rules

The Takeover Rules provide that no person, other than the offerer, who is privy to confidential price – sensitive information concerning an offer or contemplated offer, shall deal in relevant securities of the offeree during the period from the time at which such person first has reason to suppose that an offer, or an approach to the view to an offer being made, is contemplated to the time of the announcement of the offer or approach or the termination of discussions, whichever is the earlier.

The Takeover Rules further provide that no person who is privy to such information shall make any recommendations during the relevant period to any other person as to the dealings of any kind in relevant securities of the offeree. The notes on the Takeover Rules state that notwithstanding the provisions of Rule 4, a person may be precluded from dealing or communicating price-sensitive information to others by virtue of the restrictions in the Companies Act, 1990 or by virtue of the Regulations and state that if the Takeover Panel become aware of incidences to which such restrictions may be relevant, it may inform the Stock Exchange and/or other authorities.

Companies Acts

Part V of the Companies Act, 1990 provides that a person who is, or at any time in the previous 6 months has been, connected with a company is prohibited from dealing in any securities of that company if, because of his position, he has information that is not generally available – but, if it were, would be likely to materially affect the price of those securities.

Furthermore, where a person connected with one particular company obtains inside information about another company, particularly where some business relationship or transaction is involved or contemplated between the two, it is unlawful for a person in the first company to deal in securities of the other company if the information is inside information, and relates to any transaction (whether actual, contemplated, or no longer proposed) involving both companies.

A person who receives inside information (a “tippee”) is prohibited from dealing. This subsection complements the previous subsections which are concerned with the dealing activities of actual insiders. The prohibition applies to persons who are aware, or ought reasonably to have been aware, that the person who passed the information to him was already prohibited from dealing with the securities in question.

Any person who is prohibited under the preceding subsections from dealing in securities is also prohibited from getting another person to deal in those securities. Section 108(5) prohibits tipping if the tipper knows, or ought to know, that the person getting the information will himself either actually deal in the securities, or “cause or procure yet another party to do the dealing, while Section 108(6) extends the prohibition to a company where at anytime any of its officers are already prohibited from dealing by virtue of any earlier prohibitions mentioned. There are a number of exemptions for banks and stock brokers.

Section 30 of the Companies Act, 1990 makes it an offence for a director to buy options in listed shares or debentures of a company of which he is a director or of related companies. Specifically, a director who buys a right to call for delivery, or a right to make delivery or, at his election, a right to either call for or make delivery, at a specified price within a specified time with a specified number of listed shares or debentures of his company commits an offence.

Caselaw

While the only recent Irish decision in respect of insider trading is the *Fyffes* decision, the High Court in that case did make reference to US caselaw in considering whether the information was material by reference to the “reasonable investor” test which appears to be the relevant US test. While the “reasonable investor” test was not held to be the appropriate test in the context of the Companies Act, 1990, the use of, in particular, US caselaw in considering the “reasonable investor” test may be of relevance as the Regulations import the “reasonable investor” test into the definition of “*information which, if it were made public, would be likely to have a significant effect on a price of financial instruments or related derivative financial instruments*”.

In order to determine the question of whether information was material or not, the High Court referred to the decisions in *S.E.C. v Texas Gulf Supher Company* 401 F.2d 833 [1968], *T.S.C. Industries Inc v Northway Inc* 426 US 438, *S.E.C. v Lund* 570 F. Supp. 1397[1983], *Elkind v Ligett and Myers Inc.* 65 F 2 d 156 [1980], *S.E.C. v Falbo* 14 F Supp. 2 d 508 [1998], and *Securities and Exchange Commission v Bausch & Lomb Inc.* 565 F.2 d 8 [1977].

- 4.1 *Is it required that the insider buys or sells insider securities for his own account, or is it sufficient that he buys or sells it on behalf or for the account of a third party?*

Regulation 5(1) of the Regulations provides that certain persons possessing “inside information” shall not “use that inside information to acquire or try to acquire, dispose or try to dispose for that person’s own account or for a **third party**, directly or indirectly, financial instruments to which that information relates.”

Please see 4 above regarding the prohibition on tipping and the prohibition on dealings by connected persons.

- 4.2 *Is insider trading committed if the insider has already decided on his action before obtaining the insider information?*

Regulation 5(5) of the Regulations provides that the prohibition contained in Regulation 5(1) of the Regulations does not apply to any transaction conducted in the discharge of an obligation to acquire or dispose of any financial instrument which has become due and results from an agreement concluded before the person concerned possessed the inside information.

Please also see 4 above for an overview of the law on insider dealing.

Generally an offence is committed where a person acts or causes others to act (whether they are connected or otherwise) on the basis of inside information (as defined in 3 above). As a matter of fact it may be difficult to establish that a person had decided to act prior to receiving the inside information in the absence of an instruction to acquire/dispose of the relevant securities having been given prior to receipt of the inside information. Careful consideration would need to be given to any trading carried out on foot of a decision made before the receipt of inside information, but not executed until after the receipt of the information.

If the obligation is conditional on the person not learning of major obstacles to the transaction during due diligence, arguably the obligation to acquire the financial instruments has not become due prior to the receipt of the insider information. There is however no guidance on the issue in Ireland.

If the pre-existing contractual obligation only enters into force from a certain point in time and can be revoked prior to its entry into force based on a decision made by the relevant party on foot of inside information which it has received, arguably the obligation to acquire the financial instruments has not become due prior to the receipt of the insider information. There is however no guidance on the issue in Ireland.

The prohibition on insider dealing is subject to an exception for actions carried in compliance with the Takeover Rules. See 4.2.1 below.

4.2.1 If the investor obtains insider information in the course of due diligence but purchases shares in the amount already decided upon before obtaining such information, does this constitute insider trading? Would it be any different if upon obtaining insider information the investor decides to purchase more shares than originally planned? What if the investor decides to acquire less shares than originally planned?

Having access to and using information in the context of a public takeover offer for the purpose of gaining control of that company or proposing a merger with that company in conformity with the Takeover Rules does not in itself constitute a contravention of the insider dealing provisions.

In addition, a company is not precluded from dealing in the financial instruments of another company at any time by reason **only** of information in the possession of an officer of the first mentioned company where that information was received in the course of the carrying out of the officers duties and consists **only** of the fact that the first mentioned company proposes to acquire or attempt to acquire financial instruments of the second mentioned company.

The exception contained in the preceding paragraph is of a limited nature as the exception only permits a company to acquire securities of another company where the only information which an officer has is that the company is acquiring or attempting to acquire financial instruments of the second mentioned company.

Actions taken in compliance with the Takeover Rules will not of themselves constitute market abuse provided that the general principles of the Takeover Act are complied with.

4.2.2 Does insider trading take place if a participant enters into a commitment to sell a defined quantity of shares to another party, at a defined date and price, without holding such shares, and only later obtains inside information before buying the shares?

Regulation 5(5) of the Regulations provides that the prohibition contained in Regulation 5(1) of the Regulations does not apply to any transaction conducted in the discharge of an obligation to acquire or dispose of any financial instrument which has become due and results from an agreement concluded before the person concerned possessed the inside information concerned.

The commitment to sell in the absence of the inside information may therefore not constitute insider dealing. Where the person, after coming into receipt of the inside information, acquires or disposes of the relevant financial instruments otherwise than in the discharge of an obligation to acquire or dispose of any financial instrument which has become due from an agreement concluded before the person concerned possessed the inside information, they may be in breach of the prohibition on insider dealing.

4.2.3 Do insider trading prohibitions apply to employee share ownership programs if such shares and/or options are credited to an employee's security account 'automatically' at the end of the program term and the employee had no insider information when declaring his participation in the program?

The definition of “financial instrument” includes options to acquire transferable securities and would therefore include the granting of options under a share ownership programme.

Section 110 of the Companies Act, 1990 provides an exemption from the insider dealing provisions of that act where the dealing relates to the acquisition of shares in the company concerned by its employees, or their trustees, under a pension fund or superannuation scheme.

Paragraph 2 of the Model Code provides that the following dealings are not subject to the provisions of the code:

- (i) transfers of shares arising out of the operation of an employees share scheme into a savings scheme investing in securities of the company following:
 - (a) exercise of an option under a savings related share options scheme, or;
 - (b) release of shares from a profit sharing scheme,
- (ii) with the exception of a disposal of securities of the company received by a restricted person as a participant, dealings in connection with the Revenue Commissioners approved employees’ share scheme, or any other employees’ share scheme under which participation is extended, on similar terms to those contained in a Revenue Commissioners approved employees’ share scheme, to all or most of the employees of the participating companies in that scheme,
- (iii) the cancellation or surrender of an option under an employees’ share scheme,
- (iv) transfers of the securities of the company by an independent trustee of an employee share scheme to a beneficiary who is not a restricted person,
- (v) transfers of securities of the company already held by means of a matched sale and purchase into a saving scheme or a pension scheme in which the restricted person is a participant or beneficiary,

- (vi) an investment by a restricted person in a scheme or arrangement where the assets of the scheme (other than a scheme investing only in the securities of the company) or arrangement are invested at the discretion of a third party.

4.3 *What should be done in order to demonstrate that the potential insider had already decided his actions prior to obtaining insider information?*

While it is not possible to definitively state what should be done in order to demonstrate that a particular decision was taken prior to obtaining the inside information, one would assume that a written note of a meeting or a written record of an instruction given to a third party to deal in the financial instruments dated prior to the date on which the inside information was received would assist in demonstrating that the actions were decided prior to obtaining the inside information.

4.4 *Do insider trading provisions also apply to insider trading securities that are traded in OTC or private deals? If yes, is insider trading committed if both parties of such private deal have the same information?*

The Regulations apply to financial instruments which are admitted to trading on a regulated market in at least one Member State or which have requested admission to trading on a regulated market in at least one Member State whether or not any transaction in or relating to the financial instrument takes place on that market.

As set out in paragraph 2.1, securities are defined for the purposes of Part V of the Companies Act, 1990 as shares, debentures or other debt securities issued or proposed to be issued, whether in Ireland or otherwise, for which dealing facilities are, or are to be, provided by a recognised stock exchange.

It would appear therefore that the insider trading provision contained in the Regulations and the Companies Act, 1990 could apply to OTC or private deals.

If both parties to the transaction possess information of a precise nature which has not been made public, and which, if it were made public would be likely to have a significant effect on the price of those financial instruments or related derivative financial instruments then both parties could be guilty of insider dealing as the rules apply to primary insider and tippers who know, or ought to have known, that the information is inside information.

4.5 *Please explain if, and under which circumstances, the insider trading prohibitions extend to share buy-back programs and stabilisation measures.*

The prohibition on insider dealing in the Regulations does not apply to trading in own shares in buy-back programs, trading to secure the stabilisation of a financial instrument, provided that such trading is carried out in accordance with the Market Abuse Regulation or to the purchase of own shares carried out in accordance with Part XI of the Companies Act, 1990.

In order to benefit from the exemption provided for in Article 8 of Directive 2003/6/EC, a buy-back program must comply with Articles 4, 5 and 6 of Commission Regulation (EC) No2273/2003. The sole purpose of the buy-back program must be to reduce the capital of an issuer (in value or in number of shares) or to meet obligations arising from debt financial instruments exchangeable into equity instruments, employee share option programs or other allocation of shares to employees of the issuer or of an associate company.

The buy-back program must furthermore comply with the conditions laid down in Article 19(1) of Directive 77/91/EEC. In addition, prior to the start of trading, full details of the program approved in accordance with Article 19(1) of Directive 77/91/EEC must be adequately disclosed to the public in Member States in which the issuer has requested admission of its shares to trading on a regulated market. All transactions must be publicly disclosed no later than the end of the seventh daily market session following the execution of any buy-back transaction.

When executing trades under a buy-back program, the purchase price must not be at a price higher than the price of the last independent trade and the highest current independent bid on the trading venues where the purchases are carried out. So far as volume is concerned, the issuer must not purchase more than 25% of the average daily volume of the shares in any one day on the regulated market in which the purchase is carried out. The average daily volume figure must be based on the average daily volume traded in the month preceding the month of public disclosure of that program and fixed on that basis for the authorised period of the program. The 25% limit may be breached in cases of extremely low liquidity where certain conditions are met.

The issuer shall not, during its participation in a buy-back program, engage in the selling of own shares during the life of the program, trade during a period which, under the law of the Member State in which trading takes place, is during a closed

period or trade where the issuer has decided to delay the public disclosure of inside information in accordance with Article 6(2) of Directive 2003/6/EC (being regulation 10(7) of the Regulations).

In order to benefit from the exemption regarding stabilisation of a financial instrument, the stabilisation must be carried out only for a limited period and can only be undertaken where the fact that:

- (i) stabilisation may be undertaken,
- (ii) that there is no assurance that it will be undertaken,
- (iii) that it may be stopped at any time,
- (iv) that stabilisation transactions are aimed to support the market price of the relevant securities,
- (v) the beginning and end of the period during which stabilisation may occur,
- (vi) the identity of the stabilisation manager and the existence and maximum size of any over allotment facility or exercise of the greenshoe option must be adequately publicly disclosed by issuers, offerers or entities undertaking the stabilisation.

There are further requirements contained in the regulation regarding the making available of information post the stabilisation period. In the case of an offer of shares or other securities equivalent to shares, stabilisation of the relevant securities shall not in any circumstances be executed above the offering price. In the case of an offer of securitised debt convertible or exchangeable into shares, stabilisation of those instruments shall not in any circumstance be executed above the market price of those instruments at the time of the public disclosure of the final terms of the new offer.

4.6 *It is prohibited to merely disclose, or make available, insider information to third parties without authority to do so? If yes, when is such disclosure unauthorised?*

Regulation 5(2) of the Regulations provides that persons possessing inside information shall not disclose that information to any other person unless such disclosure is made in the normal course of the exercise of the first mentioned

persons employment, profession or duties. Other than that exception and the requirement of issuers to disclose inside information pursuant to regulation 10 of the Regulations, it is prohibited to disclose inside information. The granting of authority, or lack thereof, is not a relevant consideration.

4.7 *Is it prohibited to merely induce a third party to buy or sell insider securities, even if such third party does not receive the insider information itself?*

Regulation 5(2) of the Regulations provides that persons possessing inside information shall not recommend or induce another person, on the basis of that inside information, to acquire or dispose of financial instruments to which that information relates.

The mere inducement of a third party is therefore prohibited.

4.8 *Is intention required in order to commit insider trading? To which circumstances must the insider's knowledge extend? Is a precise estimate of the effect of the insider information on the price of the securities required?*

There has been one prosecution under the insider dealing provisions of the Companies Act, 1990 – *DPP v Byrne*, Circuit Court, unreported January 2002. In that case the DPP accepted that mens rea of a kind was required under the relevant section of the 1990 Companies Act. The DPP accepted that the defendant must know that he was dealing in shares. The judge held that the DPP would have to prove that the defendant not only knew he was dealing but also that he intended to make improper profit from the dealing. The legal basis for this is based on precedent that Irish courts in imposing light penalties do not take account of whether mens rea is present. Where the penalty is severe, as in this case, where the penalty is 10 years in jail and a fine of €253,947.61, it is likely that the courts will require the presence of mens rea. Given that the Regulations have not been considered by the Irish courts it is not possible to say what approach the courts would adopt, although the decisions in *Byrne* and *Fyffes* would be relevant.

Given that section 32 of the Act provides penalties of a fine not exceeding €10,000,000 or imprisonment for a term not exceeding 10 years or both and that the Regulations provide that a person who contravenes the insider dealing provisions shall be guilty of an offence and liable on summary convictions to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both, it appears likely that a court would require an element of mens rea.

5. **Are release mechanisms available?**

5.1 *What can be done in order to still be able to buy and sell insider securities even when in possession of insider information (e.g. OTC/private deals, big boy letters, public cleansing statements)?*

Save for actions taken in conformity with the rules made under section 8 of the Takeover Act which of themselves do not constitute market abuse and are not in contravention of regulation 5 of the Regulation and actions which are within the exemptions granted for buy-back programmes or stabilisation measures, there would appear to be no provision to enable a person to buy and sell insider securities when in possession of insider information without being in breach of the law.

5.2 *Does it make a difference whether the contracting party has the same information (i.e. can insider securities be sold by simply sharing the information with the potential buyer/seller)?*

The definition of inside information is set out at 3.2 above. One of the components of the definition of inside information is that the information must not be available to the public. The commentaries on the matter indicate that the test of whether information is available to the public or not would appear to be whether reasonably extensive disclosure to the securities market has been made. In that context, simply disclosing the inside information to the purchaser would appear to be insufficient.

The same considerations would apply in OTC and private deals. If the information constitutes inside information, simply disclosing it to the Purchaser in an OTC or private deal will not affect the status of the information as inside information as it is difficult to see how the information could be considered to have been reasonably widely disclosed.

6. ***What are the legal consequences of insider trading?***

Apart from the statutory prohibition on insider dealing, a director or other fiduciary may not, except with the consent of the company in general meeting, use confidential information obtained by virtue of his position as a director in order to make a personal profit. Thus, he may be accountable for profits he makes from dealings in securities issued by his company or any other company where he has price sensitive information about that company which is not available to investors

generally, and which information has come to him by reason of his fiduciary position. In normal circumstances, such an action could only be maintained against the director or other fiduciary by the company itself and not by individual shareholders who had suffered losses as a result of the insider dealing. In some exceptional circumstances an individual shareholder could maintain such a claim himself where the director had been appointed as his agent or where there was a pre-existing relationship of trust and confidence between the director and the shareholder.

Under the Regulations, insider trading is an offence which may be prosecuted summarily by the Central Bank with a maximum penalty of €5,000 and/or 12 months imprisonment. In a prosecution on indictment, the maximum penalty is €10,000,000 and/or 10 years imprisonment.

The Regulations also provide that the unsuccessful defendant must also compensate any other party to the impugned transaction who did not possess the same information. The measure of this liability is the difference between the price at which the securities changed hands and the price at which they were likely to change hands if the information in question had been generally available.

It would appear that an intention to deceive or defraud is not a prerequisite of civil liability. It would appear in other words that liability is strict. In *Fyffes* the High Court concluded that liability was strict in that sense and, further, assuming the information involved was price sensitive, that it was not necessary to show the defendant or his agent was aware of that fact.

Under the Companies Act, 1990 where it is still relevant, a person who engages in insider dealing is liable to both criminal and civil sanctions. Under that Act a person who suffers a loss as a result of another party to the transaction engaging in insider dealing, can seek to recover the loss suffered by taking a civil action against the offender. The offender may also be liable to account to the company that issued securities for any profit he made on the transaction. The question of determining the profit made from the transaction is a question which has been left to the courts to decide.

There are certain automatic consequences where a person is convicted of a criminal offence under the Companies Act, 1990 which include a prohibition from further dealing for a period of 12 months from the date of conviction and where, in spite of such prohibition, a person does deal, and is convicted of an offence under this new

section for doing so, he is automatically prohibited from dealing for a further 12 months from the date of the second conviction.

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