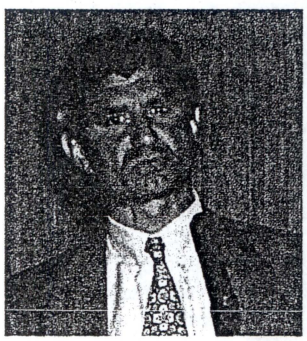
# Insider DEALING



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*by David Fabri, LL.D.,*
*Director at the MFSC*

The Insider Dealing Act was passed by Parliament in 1994. At that stage, insider dealing had already been contemplated in our legislation through a number of provisions introduced way back in the 1990 law which set up the Malta Stock Exchange. These provisions, which have now been largely superseded by the new Act, had the merit of being clear and uncomplicated. In my view, it was a great pity that our law departed from its original source, and opted instead in 1994 to copy from an obtuse English model, the Company Securities (Insider Dealing) Act of 1985, which was about to be scrapped, and which was indeed eventually replaced by the Criminal Justice Act of 1993 which has now greatly simplified the law in the United Kingdom.

Under our law, insider dealing is primarily a criminal offence, and it can be committed in a number of ways. Like money laundering, it is a relatively recent offence and also a very particular one. It is a type of

offence that may only be committed by certain categories of persons acting in particular circumstances. In brief non-legal terms, insider dealing may only be committed by persons, who enjoy some form of special or privileged position with a listed company and who use information obtained from such office or position to deal, engage or encourage others to deal in listed shares and other securities of that company (or a related company), either to make a gain or to avoid a loss.

Insider dealing is prohibited because it gives an unfair opportunity for persons occupying such posts as directors and officers of listed companies to make a financial gain in securities trading at the expense of others who do not enjoy the same level of updated information. In this manner the confidence of the investors in the securities exchange system is preserved. Without this confidence, the system would collapse. This type of legislation coupled with other legislation dealing with the Borsa and its bye-laws seek to ensure that investors dealing on the Borsa have an equal opportunity to evaluate their positions, in other words to preserve the proverbial level playing field or equal race objective. But even here, however, one must be able to distinguish a scenario involving say a financial analyst, who is constantly monitoring and studying the markets with a sharpness and know-how which the ordinary small investor would lack. It would be legitimate for such a person to gain an advantage and steal a march over other investors through his/her better analytical expertise, background preparation, resources and experience, provided he/she builds expertise and skills on the basis of publicly accessible corporate information. It would not be legitimate to acquire the advantage by accessing and exploiting sensitive confidential information obtained on the strength of one's own or of another's status and position of trust with the company in question.

For a long time, insider dealing was not considered as illegal, but merely as bad form bordering on the slightly immoral. Indeed some go so far as to justify insider dealing as a perk which comes with the job and as a mechanism which actually helps to establish the real market price of the security involved in the transaction. Professor Barry Rider addressing a conference in Malta a few years ago remarked that in his view insider dealing investigations and prosecutions are invariably a waste of time and money, rarely successful and always expensive. Whatever the case, during these past twenty years the approach to insider dealing has hardened and most countries now have laws regulating it. There is also a European Community directive as well as a Council of Europe Convention on the subject both adopted in 1989. These documents provide the basis for harmonisation in this field and for establishing a common standard.

Not all the countries of the world have dealt with the matter uniformly. Some countries have considered the matter as something purely criminal, while others have stressed the civil law consequences of insider dealing and have sought to provide compensation and other remedies to the victims.

To my knowledge, no formal reports on actual cases or suspicions of insider trading have ever been submitted. In fact the Malta Stock Exchange Tribunal, envisaged under the Malta Stock Exchange Act with a primarily anti-insider dealing function, has never been set up because there have not been any alleged cases of insider dealing on the Exchange for it to investigate. Nor are there any recorded prosecutions for insider dealing. Should the time come for applying the law to actual concrete circumstances, we may then have to start addressing a number of questions possibly not yet fully addressed ►

► so far: is the activity a one-off event; is there a pattern of undetected insider trading being carried out in local practice; how has it been facilitated and what circumstances have made it possible; what are the financial consequences; how would the actual investigation be initiated; how would it be handled, what should be done and by whom, and at what cost.

In Malta, insider dealing legislation has so far attracted little public attention, and practically nothing has been published locally on the subject. Possibly, it has largely only engaged the interest of the regulatory authorities, licensed financial institutions and their officials and professional advisers, including the steadily growing community of stockbrokers and investment advisers, whose jobs require a reasonable awareness of this potential problem, as well as students of law, finance and accountancy. The regulatory authorities principally concerned in this area are the Malta Stock Exchange and the Malta Financial Services Centre, both of whom supervise areas connected with dealing in shares or other securities. Additionally, the Central Bank of Malta would also appear to be interested because of the number of local banks whose shares are listed on the Borsa, and in view of the general statutory supervisory role played by the Central Bank in respect of the activities of the Malta Stock Exchange. Hopefully, the subject should also interest the Police authorities, whose job is to prevent, investigate and prosecute criminal behaviour, in all its forms.

Undoubtedly, a case of insider dealing would ignite public excitement and drama where some well-known personality or politician is caught doing it. But in the meantime, most people would not know what it means and many undoubtedly do not care to know. One can easily go through a normal life without having to bother with insider dealing. However, it should be of interest to the thousands of individual Maltese investors who have invested their savings in shares and other instruments listed on the local Stock Exchange. On the other hand, the Insider Dealing Act, 1994 may turn out to be one of its own worst enemies simply because its provisions and structure are so difficult to follow. Its underlying principles and fundamental intentions are inelegantly concealed in a complicated web of definitions and unduly elaborate drafting ■

*Dr. Fabri is a Director at the Malta Financial Services Centre with overall charge of legal matters. He lectures on financial services and consumer legislation at the University of Malta. The views expressed in this article are his own, and do not reflect any official position. The second part of this article shall be featured in the next issue of The Malta Bankers Journal. It shall seek to uncover some instances of insider dealing and similar activity in some well known works in literature.*