

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 4280 of 21 July, 2016

LEGAL NOTICE NO. 159 OF 2016.

MARKET ABUSE ACT 2005

INTERPRETATION AND GENERAL CLAUSES ACT

**MARKET ABUSE ACT 2005 (AMENDMENT No. 2) REGULATIONS
2016**

In exercise of the powers conferred upon the Minister by section 42 of the Market Abuse Act 2005, as read with section 23(g)(i) of the Interpretation and General Clauses Act and upon the Government by sections 23(g)(ii) of that Act and of all other enabling powers, and in order to implement Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, to transpose Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation, and for connected purposes, the Minister and the Government have made the following Regulations—

Title and commencement.

1.(1) These Regulations may be cited as the Market Abuse Act 2005 (Amendment No. 2) Regulations 2016.

(2) These Regulations come into operation on the day of publication in the Gazette.

Amendment of Act.

2.(1) The Market Abuse Act 2005 is amended as follows.

(2) For the long title substitute—

“**AN ACT** to restate the law on market abuse, to implement Regulation (EU) No 596/2014 of the European Parliament and

of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC and to transpose Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation; and for connected purposes.”.

- (3) In the title to Part I, for “I” substitute “1”.
- (4) In section 1 for “2005” substitute “2016”.
- (5) For section 2 substitute—

“Interpretation.

2.(1) In this Act—

“the EU Market Abuse Regulation” means Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, as amended from time to time;

“the FSC” means the Financial Services Commission established under section 3 of the Financial Services Commission Act 2007;

“infringement” means an infringement of the EU Market Abuse Regulation;

“inside information” has the same meaning as in Article 7 of the EU Market Abuse Regulation;

“the Minister” means the Minister with responsibility for financial services;

“relevant infringement” has the meaning given in section 21(2); and

“relevant offence” has the meaning given in section 9(1).

- (2) The following expressions have the same meaning in this Act as they have in Article 3 of the EU Market Abuse Regulation–

“accepted market practice”;

“benchmark”;

“buy-back programme”;

“emission allowance”;

“financial instrument”;

“issuer”;

“MTF” (multilateral trading facility);

“OTF” (organised trading facility);

“regulated market”;

“spot commodity contract”;

“stabilisation”; and

“trading venue”.

- (3) Other expressions used in this Act that are also used in the EU Market Abuse Regulation have the same meaning in this Act as they have in that Regulation.”.

- (6) For Part II substitute–

**“PART 2
RELEVANT FINANCIAL INSTRUMENTS**

Relevant financial instruments.

- 3.(1) This Act applies to the following financial instruments–

- (a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
 - (b) financial instruments admitted to trading or traded on an MTF or for which a request for admission to trading on an MTF has been made;
 - (c) financial instruments traded on an OTF;
 - (d) financial instruments not within paragraphs (a) to (c) (including credit default swaps and contracts for difference) but the price or value of which depends or has an effect on the price or value of a financial instrument referred to in any of those paragraphs.
- (2) This Act also applies to behaviour or transactions, including bids, relating to the auctioning on an auction platform authorised as a regulated market of emission allowances or other auctioned products (including when auctioned products are not financial instruments) under Commission Regulation (EU) No 1031/2010 and, without limiting any specific provision to the contrary, any provision in this Act relating to orders to trade applies to bids submitted in the context of an auction.
- (3) For the purpose of section 8, this Act also applies to—
- (a) spot commodity contracts where the transaction, order or behaviour has an effect on the price or value of a financial instrument in subsection (1);
 - (b) financial instruments (including derivative contracts and derivative instruments for the transfer of credit risk) where the transaction, order, bid or behaviour has an effect on the price or value of a spot commodity contract, the price or value of which depends on the price or value of those financial instruments; and
 - (c) behaviour in relation to benchmarks.
- (4) In subsection (3), a reference to a spot commodity contract does not include a spot commodity contract which is a

wholesale energy product as defined in point (4) of Article 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council.

- (5) This Act applies to a transaction, order or behaviour concerning any financial instrument referred to in this section, irrespective of whether or not the transaction, order or behaviour takes place on a trading venue.

Exceptions.

4. This Act does not apply to–

- (a) trading in own shares in buy-back programmes, which is carried out in accordance with Articles 5(1), (2) and (3) of the EU Market Abuse Regulation;
- (b) trading in securities or associated instruments as referred to in points (a) and (b) of Article 3(2) of the EU Market Abuse Regulation for the stabilisation of securities, which is carried out in accordance with Articles 5(4) and (5) of that Regulation;
- (c) activities carried out in pursuit of–
 - (i) monetary, exchange rate or public debt management policy in accordance with Articles 6(1) or (2) of the EU Market Abuse Regulation;
 - (ii) the European Union’s climate policy in accordance with Article 6(3) of that Regulation; or
 - (iii) the European Union’s Common Agricultural Policy or Common Fisheries Policy in accordance with Article 6(4) of that Regulation.”.

(7) For Part III substitute–

**“PART 3
MARKET ABUSE**

Insiders.

5.(1) A person is an “insider” if the person possesses inside information as a result of–

- (a) being a member of the administrative, management or supervisory body of–
 - (i) an issuer; or
 - (ii) an emission allowance market participant;
- (b) having a holding in the capital of–
 - (i) an issuer; or
 - (ii) an emission allowance market participant;
- (c) having access to the information through the exercise of any employment, profession or duties; or
- (d) being involved in criminal activities.

(2) A person is also an “insider” if the person–

- (a) possesses inside information which was obtained in circumstances other than those in subsection (1); and
- (b) knows that it is inside information.

Insider dealing.

6.(1) A person who engages in insider dealing commits an offence.

(2) A person (P) engages in insider dealing if P possesses inside information which P obtained as an insider; and P–

- (a) uses that information, whether directly or indirectly and whether for P’s own account or for the account of another person, in–
 - (i) acquiring or disposing of a financial instrument to which the information relates;

- (ii) amending or cancelling an order concerning a financial instrument to which the information relates, where the order was placed before P possessed the inside information;
 - (iii) submitting, modifying or withdrawing a bid in relation to an auction of emission allowances or other auctioned products to which Regulation (EU) No 1031/2010 applies; or
- (b) recommends or induces another person, on the basis of that information–
 - (i) to acquire or dispose of a financial instrument to which the information relates; or
 - (ii) to cancel or amend an order concerning a financial instrument to which the information relates.
- (3) A person also engages in insider dealing if the person–
 - (a) acts upon a recommendation or inducement of the kind referred to in subsection (2)(b); and
 - (b) knows that the recommendation or inducement is based upon inside information.
- (4) A person is not to be regarded as having engaged in insider dealing merely because the person–
 - (a) is or has been in possession of inside information; and
 - (b) has used that information to acquire or dispose of a financial instrument;

if the person's behaviour constitutes legitimate behaviour within the meaning of Article 9 of the EU Market Abuse Regulation.

Disclosing inside information.

- 7.(1) A person who unlawfully discloses inside information commits an offence.

- (2) A person (P) unlawfully discloses inside information if P–
- (a) possesses inside information which P obtained as an insider and–
 - (i) P discloses it to another person; and
 - (ii) the disclosure is made other than in the normal course of P’s employment, profession or duties; or
 - (b) received a recommendation or inducement of the kind referred to in section 6(2)(b); and P–
 - (i) discloses that recommendation or inducement to another person; and
 - (ii) knows that the recommendation or inducement was based on inside information.
- (3) For the purposes of subsection (2)(a)(ii), a disclosure will be within the normal course of a person’s employment, profession or duties if it qualifies as a market sounding made in compliance with Article 11(1) to (8) of the EU Market Abuse Regulation.
- (4) Where a person is charged with an offence under this section, it is a defence to prove that the disclosure was made for the purpose of journalism or some other form of media expression and that–
- (a) the disclosure was not made with the intention of misleading the market as to the supply of, demand for, or price of any financial instrument; and
 - (b) the person or any person closely associated with that person did not derive, directly or indirectly, any advantage or profit from the disclosure.

Market manipulation.

- 8.(1) A person who engages in market manipulation commits an offence.

- (2) A person (P) engages in market manipulation if P–
- (a) enters into a transaction, places an order to trade or engages in any other behaviour which–
 - (i) gives false or misleading signals as to the supply or price of, or demand for, a financial instrument or related spot commodity contract; or
 - (ii) secures the price of a financial instrument or related spot commodity contract at an abnormal or artificial level;
 - (b) enters into a transaction, places an order to trade or engages in any other behaviour which uses a fictitious device or any other form of deception or contrivance which affects or is likely to affect the price of a financial instrument or related spot commodity contract;
 - (c) disseminates information through the media, including the internet, or by any other means, which–
 - (i) gives false or misleading signals as to the supply or price of, or demand for, a financial instrument or related spot commodity contract; or
 - (ii) secures the price of a financial instrument or related spot commodity contract at an abnormal or artificial level;and from which P derives an advantage or profit (whether for P or another person); or
 - (d) transmits false or misleading information, provides false or misleading inputs or engages in any other behaviour that manipulates the calculation of a benchmark.
- (3) Subsection (2)(a) does not apply to a transaction, order or other behaviour which is shown to have been entered into for a legitimate purpose and to conform with accepted market practices on the trading venue concerned.”.

- (8) Omit Parts IV to VI.

(9) For Part VII substitute—

**“PART 4
INVESTIGATIONS**

Investigations.

- 9.(1) Where the FSC has reasonable grounds for suspecting that an offence under sections 6, 7 or 8 (a “relevant offence”) or an infringement is being or has been committed, the FSC—
- (a) may take any steps that it considers appropriate to establish whether or not a relevant offence or infringement is being or has been committed; and—
 - (b) where it concludes—
 - (i) that a relevant offence is being or has been committed, must report the results of its investigation to the Attorney General; and
 - (ii) that an infringement is being or has been committed, may take any applicable action that it considers appropriate under Part 6 or the EU Market Abuse Regulation.
- (2) A person who is or may be able to give information to the FSC in respect of an investigation under subsection (1) must—
- (a) produce to the FSC any document in the person’s possession or control which appears to be relevant to the FSC’s investigation;
 - (b) produce to the FSC, at a time and place it may specify, any document it may specify which appears to the FSC to be relevant to its investigation; and
 - (c) give the FSC all assistance in connection with the investigation which that person is reasonably able to give.
- (3) In this section, “document” includes information recorded in any form and, where information is not recorded in legible

form, the power to require its production includes the requirement to produce a copy of it in legible form.

- (4) The FSC may take copies of or extracts from any document produced under this section.
- (5) A statement made by a person in compliance with a requirement imposed under this section may only be used in evidence in criminal proceedings against that person if—
 - (a) the person has introduced the statement in evidence; or
 - (b) the proceedings concern the prosecution of the person for—
 - (i) failing or refusing to produce documents or give assistance in accordance with subsection (2);
 - (ii) omitting to disclose information which should have been disclosed; or
 - (iii) providing an untruthful statement.
- (6) A person is not required to produce a document or disclose information under this section if the person—
 - (a) would be entitled to refuse to produce or disclose it on grounds of legal professional privilege in proceedings in the Supreme Court; or
 - (b) owes an obligation of confidence in respect of that document or information by virtue of carrying on the business of banking, except where—
 - (i) the person to whom the obligation of confidence is owed consents in writing to the production or disclosure; or
 - (ii) the making of the requirement was authorised by the Minister.
- (7) A person (P) commits an offence if P—

- (a) without reasonable excuse–
 - (i) fails or refuses to comply with a requirement imposed under subsection (2); or
 - (ii) omits to disclose material which P should have disclosed in accordance with this section;
 - (b) in purported compliance with a requirement imposed under subsection (2)–
 - (i) gives information which P knows to be false or misleading; or
 - (ii) recklessly gives information which is false or misleading.
- (8) This section and section 10 apply without limiting the FSC's powers under section 20.

Entry of premises under warrant.

- 10.(1) A justice of the peace may issue a warrant authorising a person to enter and search premises if the justice of the peace is satisfied, on information on oath, that there are reasonable grounds for suspecting that–
- (a) a relevant offence is being, has been or is about to be committed on the premises; or
 - (b) evidence is to be found on the premises of the commission of–
 - (i) a relevant offence; or
 - (ii) an infringement of Article 14 or 15 of the EU Market Abuse Regulation.
- (2) An application for a warrant under this section–
- (a) may be made by a person acting under the authority of the FSC or a constable; and

- (b) must specify the premises to which it relates.
- (3) A warrant issued under this section–
 - (a) continues in force for one month beginning with the date on which it was issued;
 - (b) authorises a person acting under the authority of the FSC or a constable to–
 - (i) enter the premises specified in the warrant, using such force as may be reasonably necessary;
 - (ii) search the premises and inspect any relevant information found on the premises;
 - (iii) take copies of or seize and remove any relevant information found on the premises or take any other steps which may appear to be necessary for preserving or preventing interference with any relevant information;
 - (iv) require any person on the premises to provide an explanation of any relevant information or to state where it may be found.
- (4) Any relevant information of which possession is taken under this section may be retained–
 - (a) for up to three months; or
 - (b) if within that time relevant proceedings are commenced, until the conclusion of those proceedings.

- (5) In this section–

“relevant information” means any document or information which a person acting under a warrant issued under this section reasonably believes may be required as evidence for the purposes of relevant proceedings; and

“relevant proceedings” means–

- (a) proceedings against a person for a relevant offence; or
 - (b) the exercise by the FSC of any supervisory or regulatory powers which may lead to the imposition of an administrative sanction upon a person in respect of an infringement of Article 14 or 15 of the EU Market Abuse Regulation.
- (6) A person who wilfully obstructs another person in the exercise of any power under this section commits an offence.

**PART 5
PROCEEDINGS AND PENALTIES**

Consent to prosecution.

11. Proceedings for an offence under this Act may only be instituted by or with the consent of the Attorney General.

Offences by bodies corporate, etc.

12.(1) Where an offence under sections 6 to 8–

- (a) is committed by or for the benefit of–
 - (i) a body corporate;
 - (ii) a partnership; or
 - (iii) an unincorporated body (other than a partnership);
and
- (b) is proved–
 - (i) to have been committed with the consent or connivance of an officer; or
 - (ii) to be attributable to any neglect on the part of an officer;

the officer, as well as the body corporate; partnership, or unincorporated body (as the case may be), commits the offence and is liable to be proceeded against and punished accordingly.

- (2) In subsection (1) “officer” means—
- (a) in respect of a body corporate—
 - (i) a director, manager, secretary or other officer; or
 - (ii) where the affairs of the body are managed by its members, a member;
 - (b) in respect of a partnership, a partner; or
 - (c) in respect of an unincorporated body—
 - (i) an officer of that body; or
 - (ii) a member of its governing body; or
 - (d) any person purporting to act in a capacity within any of paragraphs (a) to (c).

Mode of trial and penalties.

- 13.(1) An individual who commits an offence—
- (a) under section 6(1), 7(1), 8(1) or 9(7)(b) is liable—
 - (i) on summary conviction, to imprisonment for six months, or the statutory maximum fine, or both; or
 - (ii) on conviction on indictment, to imprisonment for seven years, or a fine, or both;
 - (b) under section 9(7)(a) is liable on summary conviction, to imprisonment for six months, or the statutory maximum fine, or both;
 - (c) under section 10(6) is liable—

- (i) on summary conviction, to the statutory maximum fine; or
 - (ii) on conviction on indictment, to a fine.
- (2) A body corporate, partnership or unincorporated body that commits an offence under this Act is liable—
 - (a) on summary conviction, to the statutory maximum fine; or
 - (b) on conviction on indictment, to a fine.
- (3) A person who is convicted of an offence in proceedings instituted as a result of an investigation under section 9 may, at the discretion of the court, in the same proceedings be ordered to pay all or part of the expenses incurred by the FSC in conducting the investigation.

Proceedings against unincorporated bodies.

- 14.(1) Proceedings against an unincorporated body for an offence under this Act must be brought in the name of the unincorporated body and in any proceedings—
 - (a) the following provisions of the Criminal Procedure and Evidence Act 2011 apply as if an unincorporated body was a corporation—
 - (i) section 178 (representatives of corporations);
 - (ii) section 179 (sending for trial of a corporation);
 - (iii) section 217(5) (which concerns the committal for sentence of a corporation convicted of an offence triable either way); and
 - (iv) section 296 (pleas by corporations); and
 - (b) any rules of court related to the service of documents apply as if an unincorporated body was a corporation.

(2) A fine imposed on an unincorporated body is to be paid out of the funds of that unincorporated body.

Territorial application.

15. An offence is committed under this Act if any act or omission which forms part of an offence takes place in Gibraltar.

Civil proceedings for loss.

16.(1) A breach of section 6(1), 7(1) or 8(1) is actionable at the suit of a person who suffers loss as a result of that breach, subject to the defences and other incidents applying to actions for breach of statutory duty.

(2) In any proceedings under this section, a certificate issued by or on behalf of a court of competent jurisdiction certifying that a person has been convicted of an offence under this Act is admissible as conclusive evidence of the matters certified.

**PART 6
EU MARKET ABUSE REGULATION**

Application of EU Regulation.

17. The EU Market Abuse Regulation has effect in Gibraltar subject to this Part.

Designation of competent authority.

18. The FSC is designated as the competent authority for the purposes of the EU Market Abuse Regulation.

Public disclosure of inside information.

19. An issuer or emission allowance market participant that has delayed the public disclosure of inside information in accordance with Article 17(4) of the EU Market Abuse Regulation, must provide to the FSC, at its request, a written explanation of how the conditions set out in that Article were met in respect of the delay.

FSC's powers.

- 20.(1) For the purpose of supervising or investigating compliance with the EU Market Abuse Regulation, the FSC may–
- (a) exercise any power that the FSC has under any law that confers supervisory responsibilities on the FSC;
 - (b) act directly or in collaboration with market undertakings or other statutory or competent authorities;
 - (c) delegate tasks under its responsibility; or
 - (d) institute legal proceedings.
- (2) The FSC may–
- (a) require the provision of documents and data in any form and retain copies;
 - (b) require information from any person and, if necessary, summon and question a person with a view to obtaining information;
 - (c) in relation to commodity derivatives–
 - (i) request information in standardised formats from market participants on related spot markets;
 - (ii) require reports on transactions; and
 - (iii) require direct access to traders' systems;
 - (d) carry out on-site inspections and investigations other than at premises used wholly or mainly as a dwelling;
 - (e) require–
 - (i) existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions; or

- (ii) where permitted by the laws of Gibraltar, existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement of Article 14(a), 14(b) or 15 of the EU Market Abuse Regulation and where those records may be relevant to the investigation of that infringement;
 - (f) suspend the trading of a financial instrument;
 - (g) impose a temporary prohibition of professional activity;
 - (h) require the temporary cessation of any practice that the FSC considers to be contrary to the EU Market Abuse Regulation;
 - (i) request the freezing or sequestration of assets;
 - (j) refer a matter for criminal prosecution; and
 - (k) take all necessary measures to ensure that the public is correctly informed, including by–
 - (i) correcting false or misleading disclosed information; or
 - (ii) requiring an issuer or other person who has published or disseminated false or misleading information to publish a corrective statement.
- (3) A person who provides information to the FSC in accordance with the EU Market Abuse Regulation does not–
- (a) infringe any restriction on the disclosure of information, whether imposed by contract or any legislative, regulatory or administrative provision; or
 - (b) incur any liability of any kind in respect of that disclosure.

- (4) This section applies without limiting the FSC's powers under Part 4 or any law which confers supervisory functions upon the FSC.
- (5) The Minister may, by Regulations, make further provision in respect of the FSC's powers under this section.

Sanctions for relevant infringements.

- 21.(1) The FSC may take any of the actions specified in sections 22 to 27 if it is satisfied that a relevant infringement has occurred.
- (2) In this Act a "relevant infringement" means—
 - (a) infringement of a provision of the EU Market Abuse Regulation specified in Article 30(1)(a) of that Regulation; or
 - (b) failure to cooperate or comply with an investigation, inspection or request made in the exercise of a power—
 - (i) under section 20(2); or
 - (ii) under section 9 or 10, in respect of the investigation of an infringement.
- (3) This section and sections 22 to 27 apply without limiting the FSC's powers under—
 - (a) Part 4 or section 20;
 - (b) the EU Market Abuse Regulation; or
 - (c) any law which confers supervisory functions upon the FSC.

Public statement.

- 22.(1) The FSC may publish a statement specifying—
 - (a) the nature of a relevant infringement; and

- (b) the identity of the person who has committed it.
- (2) Publication under this section may take any form, or combination of forms, that the FSC thinks appropriate.

Cease and desist order.

- 23. The FSC may order a person–
 - (a) to cease any conduct which constitutes a relevant infringement; and
 - (b) to desist from any repetition of that conduct.

Prohibition order.

- 24.(1) The FSC may by order (“a prohibition order”) prohibit a specified individual–
 - (a) from discharging managerial responsibilities within a specified investment firm;
 - (b) from exercising management functions in investment firms; or
 - (c) from dealing in financial instruments on the person’s own account.
- (2) A prohibition order–
 - (a) must specify a period during which it has effect; and
 - (b) in the case of an order made under subsection (1)(a) or (b), may specify an indefinite period in respect of repeated infringements of Article 14 or 15 of the EU Market Abuse Regulation.

Suspension or revocation of authorisation.

- 25.(1) The FSC may by order suspend or revoke an authorisation it has granted to an investment firm.

- (2) A suspension under subsection (1) must specify a period during which it has effect.

Disgorgement.

26. Where it is practicable to do so, the FSC may by order require the person responsible for a relevant infringement–

- (a) to account for the profits gained or losses avoided by the infringement, and
- (b) to make restitution payments to those who have suffered loss as a result of the infringement.

Civil penalties.

27.(1) The FSC may by order impose a penalty for a relevant infringement of an amount not exceeding whichever is the higher of the following–

- (a) where the profits gained or losses avoided by the infringement can be determined, three times the amount of those profits or avoided losses;
- (b) in the case of a legal person, for an infringement of–
 - (i) Article 14 or 15 of the EU Market Abuse Regulation, EUR 15,000,000 or 15% of the total annual turnover according to the last available annual accounts approved by its management body;
 - (ii) Article 16 or 17 of that Regulation, EUR 2,500,000 or 2% of the total annual turnover according to the last available annual accounts approved by its management body; or
 - (iii) Article 18, 19 or 20 of that Regulation, EUR 1,000,000; or
- (c) in the case of an individual, for an infringement of–
 - (i) Article 14 or 15 of the EU Market Abuse Regulation, EUR 5,000,000;

- (ii) Article 16 or 17 of that Regulation, EUR 1,000,000; or
 - (iii) Article 18, 19 or 20 of that Regulation, EUR 500,000.
- (2) A penalty under subsection (1)(b) or (c) may be imposed as an equivalent amount expressed in Sterling, based upon the exchange rate as at 2 July 2014.
 - (3) Where a legal person is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts pursuant to Directive 2013/34/EU, the relevant total turnover for the purpose of subsection (1)(b)(i) or (ii) is the total annual turnover, or the corresponding type of income in accordance with the relevant accounting directives (Council Directive 86/635/EEC for banks and Council Directive 91/674/EEC for insurance companies), according to the last available consolidated annual accounts approved by the management body of the ultimate parent undertaking.
 - (4) A penalty imposed under this section may be enforced as if it was a civil debt owed to the FSC.

Exercise of powers.

- 28. The FSC must ensure that, in determining the type and level of sanction imposed for an infringement, all relevant circumstances are taken into account, including where appropriate—
 - (a) the gravity and duration of the infringement;
 - (b) the degree of responsibility of the person responsible;
 - (c) the financial strength of the person responsible, for example, as indicated by a legal person's total turnover or an individual's annual income;
 - (d) in so far as they can be determined, the importance of the profits gained or losses avoided by the person responsible;

- (e) the level of cooperation with the FSC of the person responsible (but without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person);
- (f) previous infringements by the person responsible; and
- (g) measures taken by the person responsible to prevent its repetition.

Reporting of infringements.

- 29.(1) The FSC must establish appropriate arrangements for the reporting of infringements and potential infringements to it by any person.
- (2) The arrangements established under subsection (1) must include—
- (a) secure communication channels for the reporting of infringements;
 - (b) specific procedures for the receipt and investigation of reported infringements; and
 - (c) arrangements which accord with the Data Protection Act 2004 for the protection of the personal data of an individual who reports an infringement and any individual who is allegedly responsible for an infringement.
- (3) The FSC must treat information about the identity of a person who reports an infringement as confidential, except where its disclosure is necessary for the purpose of any further investigations or subsequent judicial proceedings.
- (4) Employers who conduct regulated financial services activities (“financial services firms”) must establish appropriate internal procedures for their employees to report infringements.

- (5) An employee of a financial services firm who reports an infringement in accordance with arrangements established under subsection (1) or (4)–
- (a) is not to be considered to be in breach of any restriction on disclosure of information imposed by contract or by any law and any provision in an agreement is void in so far as it purports to preclude an employee from reporting an infringement; and
 - (b) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that the employee has reported an infringement.
- (6) An employee who has been subjected to a detriment contrary to subsection (5)(b) may present a complaint to the Industrial Tribunal as if the reporting of an infringement was a protected disclosure within the meaning of Part IVA of the Employment Act.
- (7) The Schedule, which transposes Commission Implementing Directive (EU) 2015/2392, makes further provision in respect of the reporting of infringements and related matters.

Warning notices.

- 30.(1) Before taking action under sections 22 to 27 in respect of an infringement, the FSC must give the person concerned a warning notice, stating the action proposed and the reasons for it.
- (2) Subsection (1) does not apply if the FSC is satisfied that a warning notice–
- (a) cannot be given because of urgency;
 - (b) should not be given because of the risk that steps would be taken to undermine the effectiveness of the action to be taken; or
 - (c) is superfluous having regard to the need to give notice of legal proceedings or for some other reason.

- (3) A warning notice—
 - (a) must give the recipient not less than 14 days to make representations; and
 - (b) must specify a period within which the recipient may decide whether to make oral representations.
- (4) The period for making representations may be extended by the FSC.

Decision notices.

- 31.(1) This section applies where the FSC has—
 - (a) issued a warning notice; or
 - (b) dispensed with the requirement to do so under section 30(2).
- (2) After considering any representations made in accordance with section 30, the FSC must issue—
 - (a) a decision notice stating that the FSC will take the action specified in the warning notice;
 - (b) a discontinuance notice stating that the FSC does not propose to take that action; or
 - (c) a combined notice consisting of a decision notice stating that the FSC will take certain action specified in the warning notice and a discontinuance notice in respect of the remaining action.
- (3) A decision notice takes effect, and the specified action may be taken—
 - (a) at the end of the period for bringing an appeal if no appeal is brought; or
 - (b) when any appeal is finally determined or withdrawn.

Interim orders.

32. The FSC may apply to the Supreme Court for permission to take action under this Part where a decision notice has been given and has not yet taken effect (whether or not a warning notice has been given).

Appeals.

- 33.(1) The person on whom a decision notice is served may appeal to the Supreme Court.
- (2) An appeal must be brought within the period of 28 days beginning with the date of the decision notice.

Publication of enforcement action.

- 34.(1) This section applies where the FSC has taken action under sections 22 to 27 in respect of an infringement (other than measures of an investigatory nature).
- (2) The FSC must publish on its official website details of any action taken in respect of a person under those sections without undue delay after that person is informed of that action.
- (3) The information published under subsection (2) must include at least—
- (a) the type and nature of the infringement; and
 - (b) the identity of the individual or legal person responsible for it.
- (4) The FSC must take one of the steps in subsection (5) where—
- (a) following an obligatory prior assessment, it considers that it would be disproportionate to publish in accordance with subsection (2)—
 - (i) the identity of the legal person involved; or
 - (ii) the personal data of the individual involved; or

- (b) it considers that publication in accordance with that subsection would jeopardise the stability of financial markets or an ongoing investigation.
- (5) Those steps are–
 - (a) to defer publication until the reasons for non-publication cease to exist;
 - (b) to publish the decision on an anonymous basis if doing so ensures effective protection of the personal data concerned; or
 - (c) not to publish the decision if the steps in paragraphs (a) and (b) are considered to be insufficient to ensure–
 - (i) that the stability of the financial markets would not be put in jeopardy; or
 - (ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.
- (6) In the case of a decision to publish on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is envisaged that within that period the reasons for anonymous publication shall cease to exist.
- (7) Where a decision to which this section applies is subject to an appeal, the FSC must publish information to that effect on its website and, without undue delay, revise that information to reflect the status and outcome of any appeal.
- (8) The FSC must ensure that any publication in accordance with this section is of proportionate duration and remains on its website for a minimum of five years, but that personal data is only retained on the website for so long as is necessary, in accordance with the Data Protection Act 2004.

**PART 7
MISCELLANEOUS**

Regulations.

35. The Minister may make regulations in respect of any matter and for any purpose relating to the subject matter of this Act.

Revocations.

36. The Market Abuse (Competent Authority Appointment) Regulations 2005, the Market Abuse Regulations 2012 and the Market Abuse Act 2005 (Amendment) Regulations 2016 are revoked.”.

- (10) For Schedule 1, substitute the following Schedule–

“SCHEDULE

REPORTING OF INFRINGEMENTS

Interpretation.

1. In this Schedule–

“infringement report” means a report submitted by a reporting person to the FSC about an infringement or potential infringement;

“reported person” means a person who is alleged to have committed or intend to commit an infringement; and

“reporting person” means a person reporting an infringement or potential infringement to the FSC.

Dedicated staff.

- 2.(1) The FSC must have dedicated members of staff who are appropriately trained to handle infringement reports (“dedicated staff members”).

- (2) Dedicated staff members are to exercise the following functions–
- (a) providing information to interested persons on the procedures for reporting infringements;
 - (b) receiving and following-up infringement reports;
 - (c) maintaining contact with a reporting person (if that person's identity has been made known by that person to the FSC).

Information about reporting infringements.

3. The FSC must publish on a separate, easily identifiable and accessible section of its website–
- (a) the communication channels it has established in accordance with paragraph 5(1) for contacting dedicated staff members and receiving and following-up infringement reports, including–
 - (i) telephone numbers, indicating whether or not calls are recorded when using those numbers; and
 - (ii) dedicated electronic and postal addresses which are secure and ensure confidentiality;
 - (b) the infringement reporting procedures set out in paragraph 4;
 - (c) the confidentiality regime which applies to infringement reports submitted in accordance with those procedures;
 - (d) the procedures for the protection of employed persons who report infringements; and
 - (e) a statement clearly explaining that a person, in providing information to the FSC in accordance with the EU Market Abuse Regulation, does not–

- (i) infringe any restriction on the disclosure of information, whether imposed by contract or any legislative, regulatory or administrative provision; or
- (ii) incur any liability of any kind in respect of that disclosure.

Infringement reporting procedures.

- 4.(1) The procedures referred to in paragraph 3(b) must clearly indicate–
- (a) that infringement reports may be submitted anonymously;
 - (b) how the FSC may require the reporting person to clarify the information reported or to provide additional information that is available to the reporting person;
 - (c) the information that the reporting person can expect to receive from the FSC in respect of the outcome of an infringement report, including the time in which that information is likely to be provided; and
 - (d) the confidentiality regime that applies to infringement reports, including the circumstances under which the confidential data of a reporting person may be disclosed in accordance with Articles 27, 28 and 29 of the EU Market Abuse Regulation.
- (2) The information provided under sub-paragraph (1)(d) must ensure that a reporting person is aware of the exceptional cases in which confidentiality of data may not be ensured, including where its disclosure is a necessary and proportionate obligation required by European Union or domestic law in the context of investigations or subsequent judicial proceedings or to safeguard the freedoms of others including the right of defence of the reported person, and in each case subject to appropriate safeguards under such law.

Dedicated communication channels.

- 5.(1) The FSC must establish communication channels which are independent, autonomous, secure and ensure confidentiality, for receiving and following-up infringement reports (“dedicated communication channels”).
- (2) A dedicated communication channel is independent and autonomous if it meets all of the following criteria—
 - (a) it is separate from the FSC’s general communication channels, including those through which the FSC communicates internally and with third parties in the ordinary course of business;
 - (b) it is designed, set up and operated in a manner that—
 - (i) ensures the completeness, integrity and confidentiality of information; and
 - (ii) prevents access by non-authorised FSC staff members;
 - (c) it enables the storage of durable information in accordance with paragraph 6 to allow for further investigations.
- (3) Dedicated communication channels must allow infringement reports to be made by any of the following methods—
 - (a) in writing (whether in electronic or paper form);
 - (b) orally by telephone;
 - (c) in a meeting with a dedicated staff member.
- (4) The FSC must provide the information referred to in paragraph 3 to the reporting person either before or at the moment when it receives an infringement report.
- (5) Where an infringement report is received by the FSC other than by means of a dedicated communication channel, the

report must be forwarded promptly and without modification to a dedicated staff member by means of a dedicated communication channel.

Record keeping.

- 6.(1) The FSC must keep a record of every infringement report it receives.
- (2) The FSC must promptly acknowledge the receipt of a written infringement report, to the postal or electronic address provided by the reporting person, except where—
 - (a) the reporting person requests otherwise; or
 - (b) the FSC reasonably believes that acknowledging receipt would jeopardise the protection of the reporting person's identity.
- (3) Where a recorded telephone line is used for receiving infringement reports, the FSC may record those reports by means of—
 - (a) an audio recording of the conversation in a durable and retrievable form; or
 - (b) a complete and accurate transcript of the conversation prepared by a dedicated staff member.
- (4) Where an unrecorded telephone line is used for reporting of infringements, the FSC may record those reports in the form of accurate minutes of the conversation prepared by a dedicated staff member.
- (5) Where a person requests a meeting with a dedicated staff member in order to report an infringement in accordance with paragraph 5(3)(c), the FSC must ensure that a complete and accurate record of the meeting is kept in a durable and retrievable form which may be either—
 - (a) an audio recording of the conversation in a durable and retrievable form; or

- (b) accurate minutes of the meeting prepared by a dedicated staff member.
- (6) In any case where the reporting person has disclosed his or her identity, the FSC must offer that person an opportunity to check, rectify and agree (by signing them)–
- (a) the transcript or minutes of a call; or
 - (b) the minutes of a meeting.

Personal data.

7. The FSC must store the records referred to in paragraph 6 in a confidential and secure system that is subject to access restrictions which ensure those records are only available to FSC staff members for whom access to that data is necessary to perform their professional duties.

Data transmission.

- 8.(1) The FSC must have adequate arrangements for transmitting, both within and outside of the FSC, the personal data of reporting persons and reported persons.
- (2) The FSC must ensure that the transmission of data related to an infringement report does not–
- (a) disclose the identity of the reporting person or reported person, whether directly or indirectly; or
 - (b) refer to circumstances that would allow the identity of the reporting person or reported person to be deduced.
- (3) Sub-paragraph (2) does not apply to a transmission made in accordance with the confidentiality regime referred to in paragraph 4(1)(d).

Protection of employed persons.

- 9.(1) The FSC must establish arrangements for the effective exchange of information and cooperation in respect of whistleblower protection between the FSC and–

- (a) other competent authorities; and
 - (b) any other relevant authority involved in whistle-blower protection.
- (2) In this paragraph “whistle-blower protection” means the protection of persons working under a contract of employment who—
- (a) report infringements to the FSC; or
 - (b) are accused of infringements;
- against retaliation, discrimination or any other form of unfair treatment arising from or in connection with the reporting of an infringement.
- (3) The arrangements established under this paragraph must ensure that a reporting person has access to—
- (a) comprehensive information and advice on the legal procedures and remedies available to protect the person against unfair treatment, including on the procedures for claiming compensation; and
 - (b) effective assistance from the FSC before any relevant authority involved in the person’s protection against unfair treatment, including certification by the FSC in any employment dispute of the reporting person’s status as a whistle-blower.

Protection of the reported persons.

- 10.(1) Where the identity of a reported person is not known to the public, the FSC must ensure that the person’s identity is protected in the same manner as a person who is the subject of an investigation by the FSC.
- (2) The requirements of paragraph 7 also apply to records which contain the identity of a reported person.

Review of procedures.

- 11.(1) The FSC must review its procedures for receiving and following up infringements reports.
- (2) Reviews under sub-paragraph (1) must be conducted regularly and, in any event, not less than once every two years.
- (3) In conducting a review under sub-paragraph (1), the FSC must–
 - (a) have regard to its experience, and that of other competent authorities, in receiving and following up infringement reports; and
 - (b) take account of that experience and market and technological developments in adapting its procedures.

Dated 21st July, 2016.

A J ISOLA,
Minister with responsibility for financial services,
and for the Government.

EXPLANATORY MEMORANDUM

These Regulations implement the Market Abuse Regulation (EU) No 596/2014 and transpose and Commission Implementing Directive (EU) 2015/2392. By amending the Market Abuse Act 2005, these Regulations replace the legislation that transposed the earlier Directives and which are repealed by the Market Abuse Regulation.

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