
Introduction
A book that contains a fascinating history of the development of the prohibition of insider dealing in the USA and Europe; a meticulous comparison of different regulatory and criminal laws that prohibit insider dealing; an analysis of the argument for and against the prohibition of insider dealing and a presentation of alternatives to criminalisation.

Insider dealing, we all know what that is! Or do we? It turns out that the legal definition is as slippery as an eel. Precisely what behaviour constitutes insider dealing varies between continents, between different countries in the European Union and between different types of proceedings: regulatory proceedings on the one hand and criminal proceedings on the other. So we have a basket of slippery eels and which one you try and grasp depends on what country you are in and which kind of proceeding are in contemplation.

Iwona Seredynska has compared the regulations that prohibit insider dealing in United States and in some countries in the European Union. She has demonstrated that there are some significant disparities between the definition of concepts such as “inside information”, the moment when information is deemed “public” and different types of insiders and prohibited conduct. Within those jurisdictions definitions will also vary between regulatory and criminal sanctions. There are also discrepancies in penalties. For example, in France the maximum prison sentence for insider dealing is usually one or two years imprisonment whereas in the United Kingdom the maximum sentence is seven years’ imprisonment.

Why is insider dealing wrong? Again the answer differs depending on who you ask and where you happen to be. Is conviction and imprisonment ever a just and proportionate response to insider dealing? Or is the criminal code in many jurisdictions being stretched to punish activity more appropriately addressed in an employment law context or in regulatory or civil proceedings?

These are the questions that Iwona Seredynska has addressed in her book setting out, theme by theme, her commendably meticulous research. Her book covers the genesis and evolution of the regulatory and criminal laws that apply to insider dealing in the United States and the European Union. She dissects ethical and economic justifications for the prohibition on insider dealing. She also questions whether insider dealing can properly be characterised as so harmful it should attract criminal penalties.

I was interested in the differences in the definition of insider dealing that have grown up between different jurisdictions. However, what I found most fascinating was the argument for why insider dealing might not, after all, be all that bad. Indeed, there are some people who have argued that insider dealing is positively beneficial. Perhaps this book will inspire further research into the subject by market participants, economists and academics as it seems there has been little contemporary analysis of the true impact of insider dealing.

Iwona Seredynska explains that the main arguments used to justify the prohibition on insider dealing are the need to promote fairness in the market, and the need for those with fiduciary duties not to benefit from knowledge obtained through their work. However, for many arguments expressed in support of the prohibition there is a counter argument. Iwona Seredynska argues that if there is no general consensus about the extent to which insider dealing is wrong or harmful why should there be criminal penalties at all?

Is insider dealing unfair? There are various strands to the argument that it is. Some say it is unfair for an investor to deal when better informed than others, others say that it is unfair to the employer of the “insider.” However, taking an opposite point of view does fairness require that all parties to a transaction have access to the same knowledge? Some would argue that it is also unfair that a job is not openly advertised and given to a relative but that is not a criminal offence. Desirable though fairness may be it is not a concept that can drive a decision as to what is criminal and what is not. The problem with justifying criminalisation of any behaviour on the basis that it is unfair is that what is considered to be unfair depends on whose shoes one is standing in. An employee may say it is unfair that they should be restricted from dealing in investments solely because they know something others do not because of their work.

Another reason given for why insider dealing is wrong is that an insider may get rich quickly. However there is no rule that financial gain must always be linked to a certain amount of hard work. If that were the case many people working in the most demanding of jobs might be expected to be the richest in the land, but often they are not.
If the notion of unfairness won’t do as a justification for the prohibition on insider dealing then another approach is to look at the harm it may cause. Iwona Seredynska questions whether “the market”, an object as opposed to an individual, is properly eligible for protection by the criminal law. But even if it is, some have argued that insider dealing does not harm the market as it does not seem to deter people from investing. She cites research conducted in the 1980’s in the United States at a time when there were many public reports of insider dealing. This research appeared to show that appetite for investing did not diminish. She wonders whether investors are pragmatic and accept that some are better informed than others for a variety of reasons but participate notwithstanding this.

An economic argument against insider dealing is that investors may be discouraged, resulting in a reduction in market liquidity and volatile prices. However, opponents of the prohibition argue that transactions of insiders can make prices of financial instruments more reflective of their true value. Iwona Seredynska cites Henry G. Manne who has criticised insider dealing laws. He has argued that insiders create market trends by influencing the price of a financial instrument. Thanks to those trends the price tends to reflect the true value of the financial instrument being traded and investors can draw conclusions from those trends. Iwona Seredynska believes that most supporters of the prohibition accept this but cling to the ethical argument that it is unfair to make a profit from information unavailable to other market participants. In other words, insider dealing is the price that other market participants pay for more information about probable changes in value of a financial instrument. Thus the argument becomes circular as the ethical justifications are less tangible and stand up less well to scrutiny.

Whatever the arguments for and against the prohibition of insider dealing it seems that it is here to stay in all its regulatory and criminal manifestations. Indeed, in the European Union the scope of the prohibition has recently been expanded by the Market Abuse Regulation and Directive on Criminal Sanctions for Market Abuse which came into force last year. Arguments for decriminalisation face this prevailing wind and for the foreseeable future are likely to remain matters of academic debate only.

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