Investigation into Market Abuse in the UAE Financial Markets: 
A Comparative Legal Study

Submitted by

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..........................................................
ABSTRACT

Market abuse practices have clearly harmed the integrity of financial markets and damaged investors’ confidence. Market abuse takes two forms: insider dealing and market manipulation. These cover a variety of illegal practices, such as misusing inside information, pursuing courses of conduct which lead to artificial transactions, giving false or misleading information, and distorting the market in other ways. This thesis aims to examine the two forms of market abuse (insider dealing and market manipulation) under the UAE legal system. Particular attention is given to Federal Law No. 4 of 2000, known as the Emirates Securities & Commodities Authority Law (ESCA Law 2000). Other regulations which affect the market place are also covered. The core question addressed in this thesis is to what extent ESCA Law 2000, and other regulations promulgated pursuant thereto, are efficient in combating market abuse practices and how they have been applied to protect market integrity and the market participants. The thesis investigates the deficiencies of the existing law through a legal comparative study of the jurisdictions of the UK and the Dubai International Financial Centre. This is followed by an applied study which consists of a questionnaire and interviews. The applied study, conducted in the UAE, aims to investigate the perspectives of legal experts, other specialists and investors towards the regulation of the securities markets in the UAE. Applied study and comparison eventually provide the basis for recommendations for the improvement of the UAE legal system, with respect to market abuse practices.
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DEDICATION

I dedicate this thesis in gratitude to His Highness General Sheikh Mohammed Ben Zayed Ben Sultan Al Nahyan, Crown Prince of Abu Dhabi and Deputy Supreme Commander of the UAE Armed Forces.
# ABBREVIATIONS

<table>
<thead>
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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ADX</td>
<td>Abu Dhabi Securities Exchange</td>
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<td>ADSM</td>
<td>Abu Dhabi Stock Market</td>
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<tr>
<td>AIM</td>
<td>Alternative Investment Market</td>
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<td>CBU</td>
<td>Central Bank of the UAE</td>
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<td>CJA 1993</td>
<td>Criminal Justice Act 1993 (UK)</td>
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<tr>
<td>DFM</td>
<td>Dubai Financial Market</td>
</tr>
<tr>
<td>DFSA</td>
<td>Dubai Financial Services Authority</td>
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<td>DGCE</td>
<td>Dubai Gold and Commodities Exchange</td>
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<tr>
<td>DIB</td>
<td>Dubai Islamic Bank</td>
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<tr>
<td>DIFC</td>
<td>Dubai International Financial Centre</td>
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<tr>
<td>DIFX</td>
<td>Dubai International Financial Exchange</td>
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<tr>
<td>DJA</td>
<td>DIFC Judicial Authority</td>
</tr>
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<td>ESCA law 2000</td>
<td>Federal Law No. 4 of 2000 concerning the Emirates Securities &amp; Commodities Authority</td>
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<td>FC law 1984</td>
<td>Federal Company Law No. 8 of 1984 (UAE)</td>
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<td>FSA</td>
<td>Financial Services Authority of the United Kingdom</td>
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<td>FSMA 2000</td>
<td>Financial Services and Markets Act 2000 (UK)</td>
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<tr>
<td>GCC</td>
<td>Gulf Cooperation Council</td>
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<tr>
<td>IFI</td>
<td>International Finance Institution</td>
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<td>IFSB</td>
<td>Islamic Financial Services Board</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IOSCO</td>
<td>International Organisation of Securities Commissions</td>
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<tr>
<td>IPO</td>
<td>Initial Public Offering</td>
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<tr>
<td>MAR</td>
<td>Market conduct sourcebook (UK FSA)</td>
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<td>MOE</td>
<td>Ministry of Economy of the UAE</td>
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<tr>
<td>OTC</td>
<td>Over-the-counter market</td>
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<td>SCA</td>
<td>Securities and Commodities Authority of the UAE</td>
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<tr>
<td>SIB</td>
<td>Securities and Investment Board of the United Kingdom</td>
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<tr>
<td>TTP</td>
<td>TTP Communications Plc</td>
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<td>UAE</td>
<td>United Arab Emirates</td>
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INTRODUCTION

Market abuse has been one of the main issues of concern in financial markets throughout the world. Market abuse badly harms market integrity, stability and efficiency as well as public confidence. Accordingly, the topic of market abuse is the main problem examined in this thesis. The UAE government realised that it is important to create a legislative environment defining rules of law regarding the securities markets. On these grounds, Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority (ESCA Law 2000) was enacted in the year 2000 for the regulation of securities markets. Even though it came into law quite late, it was at a convenient time and is of importance. The UAE needed to pay great attention to this field because of its rapidly developing economy. The fundamental tendency in regulating the marketplace has been increasingly in the direction of codification at the Federal level\(^1\) rather than by each state of the Emirates.

Importance of the study

There are dimensions of importance to this study. The first is the fact that the UAE is an emerging market that was only 10 years old when it enacted the first law (ESCA Law 2000) concerning the securities markets. Any law must be carefully drafted in order to secure investors from any misleading action and maintain their confidence by creating a suitable legislative environment in the securities markets. Market abuse practices that occur in securities markets raise legal problems which are worthy to study in order to find appropriate solutions and complete the lack of legislation by issuing recommendations. While the ESCA law 2000 drafted provisions against practices of

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\(^1\) The United Arab Emirates as a federation was formally established in December 1971, and is comprised of seven States (emirates): Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Qaiwain, Ras al-Khaimah and Fujairah.
market abuse, it has not yet found its way into enough practice in cases of law. There are countless cases which illustrate its shortcomings and its weaknesses. Therefore, it is important that the ESCA law 2000 be examined.

Second, this topic (specifically with regard to the UAE) has not been dealt with analytically in either Arabic or Western Literature. Hence there is a gap in the academic law library in this regard and this research aims at filling that gap. Even though there was a study focused just on insider dealing regulation related to the UAE it did not cover market abuse practices overall. This study concentrates on market abuse; both insider dealing and market manipulation as a whole.

Third, recent experience of the securities market of the UAE and the dramatic involvement of the locals in the securities market calls particular attention to the need to study the current regime and see whether this is efficient for combating practices of market abuse in the UAE financial markets.

Research purpose

The purpose of the research is to investigate the legal provisions of market abuse practices under the ESCA Law 2000. It looks at how the UAE jurisdictions combat deceptive trading. The study critically analyses the experience of the UAE proper (i.e. at federal level and as observed in the cases of the Abu Dhabi and Dubai stock markets) through a comparison with the jurisdictions of the UK and DIFC laws in how they deal with such practices of market abuse: insider dealing and market manipulation. These two practices will be analysed and their definitions in legal and economics perspectives will be looked at, as will the arguments for their reform. The DIFC, in other words, is

seen here as an ‘external’ case, even though physically located within the emirate of Dubai, from which lessons can be drawn, just as they can from the case of the UK.

The current legal framework of the UAE needs to be examined with the following questions: To what extent is the ESCA law 2000 efficient for combating market abuse? How has it been used to protect market integrity and market participants in the market place? The thesis provides reasonable recommendations for enhancing the UAE regulatory regime through reforming the market abuse regime and remedying its deficiencies in order to protect investors and maintain market integrity.

There are various aspects of market abuse regulation which are of major interest and are significant for this thesis. The objectives of this thesis are related to them and are as follows:

- Exploring the historical legislation development of the securities markets in the UAE.
- Identifying the reasons for the summer crisis in 1998.
- Analysing the UAE legal issues referring to market abuse: insider dealing and market manipulation behaviours.
- Defining who can be caught by the market abuse laws and to whom they can be liable.
- Identifying the forms of market abuse that ESCA law 2000 has stated by comparing them with the UK and DIFC jurisdictions in order to judge the adequacy of criminal provisions and highlight the deficiencies
- Examining the legal protection of investors in the UAE financial markets.
- Investigating the operational problems in the UAE financial markets.
• Improving the UAE the judicial system and investors’ legal protection by suggesting:
  - To establish a specialist court and criminal reconciliation in the UAE financial markets.
  - To criticise criminal punishments under ESCA law 2000 in order to be deter more market abuse.
• Highlighting recommendations in order to reform the current legal framework.

Research methodology

This thesis relies on the comparative analytical method and applied social study. The comparative law study will be approached by studying the UK and DIFC legislations. The key purpose of this is to look at the problems and shortcomings of market abuse regulations under ESCA Law 2000 and how both laws (the UK and DIFC) in question deal with such illegal practices. This has required an analysis of the law in question to show how it has developed in regard to judicial reasoning and legislative enactment. This will be followed by gathering data from articles and textbooks which have been written on the same subject.

The applied social study, using qualitative and quantitative methods, will be employed in this thesis. In fact, this is unusual in the legal field. Legal study often focuses on comparative law methodology alongside the reading of legislation digests, legal cases, journal articles, textbooks and other commentaries. However, this study will combine social study with legal methodology. This will assist the researcher to identify legal problems in regulation of the financial markets, and to build an integrated study.
The structure of the study

This research begins with an introduction to the UAE securities markets, looking at the background of the securities legal development. It also will cover the legislative and administrative regulation of the capital markets: the Abu Dhabi Securities Exchange (ADX) and the Dubai Financial Market (DFM) as well as the Dubai International Financial Centre (DIFC). This will be in the first chapter because it is important to understand their regimes and the legal framework of the UAE. It is followed by Chapter Two which will discuss the regulation of market abuse in the UAE by making a comparison between the UK and DIFC laws. This chapter will define market abuse under UAE, UK and DIFC laws, so it should be read in conjunction with Chapters Three and Four. Chapters Three and Four will discuss insider dealing and market manipulation regulation in the UK and UAE. These two forms will be identified and examined with UAE, UK and DIFC jurisdictions. Chapter Five will use a social study to investigate operational problems and legal protection in the market place by means of investors’ attitude and legal experts’ perspectives towards law and regulation applied in the markets. The last chapter will consist of a conclusion of the thesis and recommendations for reforms needed to enhance the markets regulations. Thus, the remainder of this thesis will be organised as follows:

- **Chapter two**: regulation of market abuse: overview
- **Chapter three**: the regulation of insider dealing.
- **Chapter four**: regulation of market manipulation.
- **Chapter five**: applied study: market abuse from the perspectives of legal experts, other specialists and investors towards legal regulation of securities markets in the UAE.
- **Chapter six**: conclusion and recommendation.
CHAPTER ONE
INTRODUCTION TO THE UAE SECURITIES MARKETS

1.1 Introduction

The focus of this thesis is the United Arab Emirates (UAE) financial market. This initial chapter has two aims. The first is to provide a brief, historical outline of establishment of the securities markets in the UAE by tracking its development since its foundation on December 2, 1971 until 2000. There are two primary dimensions to the securities market’s background in the UAE. The first dimension concerns historical elements of the financial market and the informal and unregulated securities market, which functioned in the absence of a regulated market. The second dimension concerns attempts to launch a formal securities market. Thus, this chapter explores how trading is achieved through an informal and unregulated over-the-counter (OTC) market as well as the UAE government’s response to the financial problems faced in that regime until the new law established a formal securities market authority in 2000.

The secondary aim of this chapter is to provide information on the legislative and administrative regulation of the capital market, including the Dubai International Financial Centre (DIFC).

The chapter is divided into four main topics. The first two sections cover the historical establishment of the securities market and the launch of the Securities and Commodities Authority (SCA). The last two sections present the structure of the DIFC and discuss the stock market dealers as well as the types of securities that traded in the country’s stock market.
1.2 Historical Establishment of the UAE’s Securities Markets

The UAE securities markets have a complicated history, having undergone significant changes. Since its inception on December 2, 1971, the UAE’s national economies witnessed unprecedented growth, manifest in a significant transformation from an economy based on traditional resources to one based on oil. The oil sector now dominates the economy, accounting for most export revenue and providing significant opportunities for investment, thus underscoring a remarkable emergence of the UAE on the global economic stage. However, the government’s dependency on oil to provide public revenue makes the national treasury both vulnerable and subject to typical oil market disturbances and fluctuations, which lead to the necessity of adopting an economic diversification strategy.

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3 The United Arab Emirates (UAE) is a federal country that comprises seven Emirates, namely: Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Qaywayn, Ras al-Khaimah and al-Fujayrah. Each UAE state is ruled by a hereditary sovereign with authority over local issues in his emirate. In terms of geography, the UAE is on the eastern side of the Arabian Peninsula on the Arabian Gulf. The country is a total of about 32,000 square miles. The largest of its states is Abu Dhabi, which boasts an area of 28,000 square miles, followed by Dubai, its second largest state, with 1,500 square miles, followed by Sharjah 1000 square miles, Ras's al-Khaimah at 650 square miles, al-Fujayrah at 450 square miles, Umm al-Qaywayn at 300 square miles and Ajman at 150 square miles. The country’s neighbors include Saudi Arabia to the west and south, Qatar to the northwest, and Oman to the southeast and northeast. For more details, see: http://gulf-law.com/uae_profile.html, accessed on 23/09/2010


5 The oil sector represents 66.8% of the UAE’s GDP in 1975, the surplus reaches 6287 million dirham, rising annually by about 20.8%, i.e., reaching 16211 million dirham by 1980. The chief reason behind the nation’s increasing dependence on oil is a dramatic increase in oil prices and revenues, which affords the government solid ground for various promising investment projects. See Yusuf Khalifa Al-Yusuf, ‘Economic Development in UAE from 1975 to 1990’, (September 1992, UAE University press) 8 Economic and Administrative Sciences, pp. 25-37.

The 1971 to 1975 period comprises key years that see significant development of the Emirates into a united and amalgamated political organization. The United Arab Emirates was founded on December 2, 1971. In order for the new country to develop and grow, new institutional structures, both economic and social, were required. The necessity of developing a new infrastructure was in particular due to the UAE’s increased wealth that resulted from oil industry revenue. The creation of a modern infrastructure led to success and growth in all areas of life in the country.

In fact, the economic policies adopted by the government, alongside radical changes that affect the country’s economic structure, combined with considerable economic achievements, led to a capital surplus. However, this surplus required the appropriate investment channels. As a result, there were numerous calls for financial markets transformation so that the national economy could absorb a large portion of the country’s oil revenues and facilitate investment in the local markets.

The UAE financial markets began with various forms of investments. However, institutional investments (some with government participation) were soon greater than those by private individual investors. Both types, though, including joint-stock companies and public companies, contributed to the development of the national economy.

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From 1975 to 1982, great awareness occurred over the importance of investment, which led to the creation of public, joint-stock companies to deal with the surplus capital. This ushered in a significant move toward subscription of the new releases of companies, which developed dramatically. At this time, several banks were established by local governments, individuals and families. However, securities were limited and there was no financial brokerage activity. The majority of company shares were closed, meaning they were not made available for public subscription, but only for private purchase among the company’s owners.\textsuperscript{10} This occurred prior to establishment of the Federal Company Law No. 8 of 1984 (FC law 1984).\textsuperscript{11} Thus, one of the negative phenomena that accompanied this period was a deficiency in the distinction between legal forms of commercial companies, which led to non-discrimination between the duties of each company according to its legal form.

Moreover, it is worth noting that the government did not deal in other securities, such as treasury bills or bonds, which are generally issued by governments, because these bills were not yet available at the time. However, from the mid-1970s to the early 1980s, share-dealing transactions witnessed a dramatic increase in the number of credit facilities offered by banks and other financial institutions. In this sense, it is interesting to note that the overwhelming majority of investor savings made their way to the secondary markets. These dealings also include companies that were only recently founded, but which had not yet engaged in any real activity.\textsuperscript{12}


\textsuperscript{11} The Federal Company Law No. 8 of 1984 was issued in the UAE Official Gazette on April, 1, 1984 and comes into force three months starting from the date of its publication. See the Federal Company Law No. 8 of 1984 Article 329.

\textsuperscript{12} Aljali, *A study on the Possibility for Establishing Securities Market in the United Arab Emirates*,p.42.
1.2.1 The Absence of a Formal and Regulated Securities Market

Markets regulation in the UAE was supposed to be shared by the federal and Emirate levels. Nevertheless, federal legislative authority regarding market behavior was not exercised until 1979. Prior to 1979, market regulation was achieved separately and rather liberally by each ruler of the seven Emirates and their administrations. Most of these rules and regulations were not based on codified law and thus are informal and optional. As a result, many drawbacks came to the fore and some companies found it easy to exploit shareholder money through manipulation. One might justifiably conclude that, of all the drawbacks and deficiencies that taint this period, the lack of distinction between companies’ various obligations and the lack of effective laws are the most noticeable.

In addition to the above-mentioned problems in the establishment of financial markets, there were various other obstacles, such as lack of organization, unregulated markets and informal trading as well as the overall absence of public company integrity. Moreover, lack of transparency concerning periodic economic and financial reports undoubtedly underscored this negativity. Only with the establishment of certain regulations and laws could the nation’s capital market develop and prosper.

Since 1979, the legal situation in the UAE has undergone a process of regulation. Federal and Emirate law has moved toward facilitating the entry of foreign businesses.

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14 Aljali, A Study on the possibility for Establishing Securities Market in the United Arab Emirates, p.42.

15 Asisi, Arab and International Securities and Establishment of the UAE Stock Market, p74

into the market, which significantly affects business sector in the UAE. The fundamental tendency in market regulation has increasingly been moving toward codification, extra regulation at the federal level, rather than solely by each Emirate.\textsuperscript{17}

Though there was no official, organized market for securities negotiation in the United Arab Emirates,\textsuperscript{18} the Central Bank held an important position in licensing and regulating securities and commodities brokers and dealers. In addition, the issue and transactions involved in the securities of publicly-held companies, to some extent, have been regulated by the Federal Company Law No. 8 of 1984 (FC law 1984).\textsuperscript{19}

In March 1984, the FC law 1984 was established, with a view to being put into effect on July 1, 1984. However, this July date was delayed by six months. The FC law 1984 gave companies a one-year period to meet its requirements. By 1985, the Federal Ministry of Economy and Commerce, was in charge of overseeing that the original intent of the law would be carried out. The Ministry issued many executive regulations regarding the application and re-examination methods for new companies, the processes of registration for older companies and the need of public companies to have standard corporate documentation. After the Council of Ministers promulgated a decree to suspend the law for one year, it finally became effective on 1 January 1987.\textsuperscript{20}

In retrospect, the delay establishing a proper financial market may seem surprising, but in fact there was a good reason for it. Establishing a financial market was a goal of the

\textsuperscript{17} Angell, Regulation of Business Under the Developing Legal System of the United Arab Emirates, p125.
\textsuperscript{18} Imad Salah Sallam , Handling the Crises in the Financial and International Securities, the Ongoing Development, 1\textsuperscript{st} ed (Abu Dhabi :2002), p.218. (Hereinafter Sallam, Handling the Crises in the Financial and International Securities)
\textsuperscript{19} Angell, Regulation of Business under the Developing Legal System of the United Arab Emirates, p. 126.
Government in order to encourage local and foreign investors, but efforts to establish it in the early 1980s were destroyed by the Kuwait financial market Al-Manakh crisis. The financial market in Kuwait had a strong influence on the UAE economy, as there has been investment from the UAE in Kuwait, which had opened the first financial market in the Gulf region. Additionally, Kuwait and the UAE as countries share similar socio-economic backgrounds, features and characteristics.

In the early 1990s, the plan to establish a financial market was revived, providing for the country's flourishing economy at that time. However, uncertainty and hesitation meant more delays. Following that, the Second Gulf War took place, which negatively affected the plan. In the late 1990s, the Asian economic crisis provided another excuse for the delay in taking the decision.

By the end of 1998, the UAE stock market became one of the major markets in the region, compared to the rest of the Arab world. In terms of total market value, it was ranked second after the Saudi Arabian stock market and considered one of the largest markets in proportion to the size of the state economy, as the percentage of market value reached 56% of the general national income. This prosperity encouraged the government to attempt to establish a formal securities market. However, this attempt was stopped as can be seen in the subsection below.

1.2.2 Attempts at Launching a Formal Securities Market

Officials in the United Arab Emirates realised the necessity of establishing a securities market. Therefore, in 1982, the Chamber of Commerce and Industry attempted to

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21 Sallam, *Handling the Crises in the Financial and International Securities*, p.218
22 Asisi, *Arab and International Securities and Establishment of the UAE Stock Market*, p. 73.
found such an exchange.\textsuperscript{23} The International Finance Institution (IFI) was also commissioned by the UAE Central Bank to undertake a study on the possibility of instituting a stock market and hiring experts in the field of securities in the Emirates.\textsuperscript{24} In light of this step, a group of experts visited the United Arab Emirates in 1982, met with a number of officials in various fields and then prepared a report on the prospect of establishing a securities market in the United Arab Emirates.\textsuperscript{25} The IFI then discussed the report with experts from the International Monetary Fund, who agreed. The recommendations of international experts were interesting as they suggested that conditions were ripe for the establishment of a formal securities exchange in the country. The Council of Ministers forwarded the report to the Supreme Committee (1983). Following discussion of the report, the Supreme Committee recommended taking appropriate action for the establishment of a stock exchange. Consequently, the Supreme Committee adopted a draft bill for establishment of a stock market. However, the Council of Ministers did not take any action at that time.\textsuperscript{26}

These attempts were challenged for various reasons, the most important of which is the crisis (Al-Manakh) of the neighboring Kuwait financial market. This collapse affected companies and investors in the UAE. Moreover, the oil boom had ended and the UAE experienced economic deflation. Despite the introduction of the Federal Company Law No 8 of 1984, it took another three years for the law to become effective. Owing to

\begin{itemize}
\item[\textsuperscript{23}] Yet, these attempts are stopped because they coincide with an investment environment crisis in Kuwait alongside the ensuing negative impact on investors in the United Arab Emirates. Further, the soaring rise of oil and the national recession that continues until 1988 usher in total deferral of the market’s development and promotion. See Sallam, \textit{Handling the Crises in the Financial and International Securities}, p 216. See also regarding crisis of Kuwait; R.M. Salameh, \textit{The Stock Market and Economic Stability in a Developing Surplus Economy, Case Study: Kuwait}, (Dissertation presented to University of Denver, March 1986), p.96.
\item[\textsuperscript{24}] Sallam, \textit{Handling the Crises in the Financial and International Securities}, p.216.
\item[\textsuperscript{25}] Asisi, \textit{Arab and International Securities and Establishment of the UAE Stock Market}, p.73.
\item[\textsuperscript{26}] Aljali, \textit{A Study on the Possibility for Establishing Securities Market in the United Arab Emirates}, pp.61-26.
\end{itemize}
shareholders needs for liquidity and economic deflation. In the same era, three financial brokerages were founded, one in Sharjah and two in Abu Dhabi.27

1.2.3 The Importance of an Open Securities Market

Securities markets undeniably play an important role in driving a country’s economy.28 This has resulted in the growing importance of securities markets around the world, which in turn has led to more research on the relationship between financial development and economic growth. This research has made it possible to identify securities market growth predictors, which explain at least part of the difference in increased rates across countries.29 The interest in the foundation and development of securities markets has increased in many Arab States as part of the implementation of privatization programs and has become an important factor in promoting and directing savings towards various investment channels.30 The UAE has played a large role as a financial and banking center of the Gulf Region, which emphasised the importance inaugurating a formally regulated securities market.

Securities markets afford individuals and institutions a way to construct wealth or reduce the risk of financial failure.31 Some of the most important benefits of founding securities markets32 are as follows:

1. Securities markets contribute to the development of financial services and enable the establishment of more limited companies.
2. Such markets gather a portion of the funds invested abroad and re-inject them into the national economy.

32 Asisi, Arab and International Securities and Establishment of the UAE Stock Market, p. 80.
3. Securities markets can advise the financial community about options for dealing in publicly-traded shares as well as creating confidence among dealers.
4. Securities markets capitalize on higher prices and diversity of investment portfolios for analysts and investors.\(^{33}\)
5. Securities markets reassure investors about the safety of their investments as well as their ability to reacquire the value of their shares from public companies easily and quickly, if necessary.
6. Such markets improve the quality of investments and increases investment awareness, demanding better performance from companies and likewise improving available economic management for both individuals and institutions.

It is assumed that stock markets facilitate the kind of price equilibrium on which economic theories are centred. They similarly perform two basic functions: providing large-scale financing directly to productive units within the economy while simultaneously creating a market for company shares. Thus, they assist shareholders in achieving liquidity, while allowing them to acquire shares without great risk. These two functions are interrelated.\(^{34}\)

1.3 The Evolution of the Securities Market Establishment in the UAE

In the sphere of consolidation, the distinguished role of the United Arab Emirates as a major banking and financial center in the Arab Gulf region and the evolution of a systematic securities market of company shares became increasingly important, as one of the basic fundamentals and focal points of the economic policies and plans for the region.\(^{35}\) In any country, the importance of commencing a formal and regulated market is shown in the presence of company shares being evaluated at more than their real market value without financial or economic justification.

\(^{33}\) The term “investor” is planned to comprise customers or other consumers of financial services.
\(^{34}\) Tony Naughton, ‘The Role of Stock Markets in the Asian-Pacific Region’, (1999) 13 Asian-Pacific Economic Literature 1, p. 22. xxx
In its Financial System Stability Assessment report in 2003, the International Monetary Fund (IMF) indicated that the ‘absence of effective regulation and reliable and accurate market information, combined with the closely held nature of many of the publicly held companies, [has] created a perception that the market was susceptible to abuse by insiders as well as other forms of market malpractice.’ The report adds, ‘during 1997 and 1998, the UAE securities markets are characterized by extreme price volatility. It is believed that market manipulation and insider dealing contributed to this condition.’ This report based its findings on a crisis in the summer of 1998, which was an unforeseen event and a reflection of the frenzied activities in unregulated securities markets.

1.3.1 Summer of 1998 Crisis

The summer of 1998 saw a destructive crisis in the market. This crisis created unreliable and unpredictable stock market activity in which stocks fluctuated greatly as prices rose to incredible heights. Investors and trading companies lost assurance in the market. In addition, after the crisis, there was a quiet period and then one of extended decline. All of these problems caused the stock market to seem lackluster and had a dramatic effect on investor confidence, who began to worry that a similar crisis would recur. Lack of attraction to the market, as it was not considered profitable meant local investment ceased to be drawn to it, thus making it difficult to create the requisite financial liquidity.

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36International Monetary Fund, United Arab Emirates: Financial System Stability Assessment, including reports on the Observation of Standards and Codes on the following topics: Monetary and Financial Policy Transparency, Banking Supervision and Payment Systems. (Washington, D.C.: International Monetary Fund, 2003).
One important factor in the 1998 crisis, exacerbating the effect of the oil price slump on confidence in banks, was the absence of a formally regulated securities market. Major investors exploited the situation, perpetuating it by becoming involved in market abuse, such as through the spreading of false rumors.\(^{39}\) It is clearly shown that the delay in establishing a regulated market was the reason for the crisis. Capital markets could never exist or develop unless legislation for their organization would be established.\(^{40}\) Consequently, the government issued regulatory laws to govern market activities and also rules governing the issuance and process of securities in conformity with international standards in order to avoid negativity and potential operational obstacles of an unorganised market.

Officials considered the crisis to be the result of a stock market that lacked a central authority and legal regulation, considering it necessary to create such an authority and rule of law as quickly as possible in order to solve the market’s problems. Authorities in Dubai and Abu Dhabi moved rapidly to bring about changes and establish committees to learn what was necessary in order to establish a functioning market in the country. Later, the UAE Cabinet approved a draft law on the creation of an official stock market and authority.\(^{42}\) It was this crisis of the summer of 1998 which finally caused the government to reconsider the organization of the financial market and


\(^{40}\) Nabulsi, p.264.

\(^{41}\) The most important legislation relevant to the securities market before its formal foundation is the Law of Companies, which is issued under Federal Law No. 8 of 1984, concerning commercial companies; this is amended under Federal Law No. 13 of 1988 and the Federal Law No. 25 of 2001, which determine the conditions for founding various types of companies, including the shareholding companies that represent the backbone of the market. In the UAE, the Law of Companies plays an essential role in the protection of shareholders other than civil and federal laws regarding organized accounting and auditing standards. For more details, see Uday Qasior, *Protection of the Rights of Individual Shareholders in the Securities Markets of Abu Dhabi*, 1st edition (The Emirates Centre for Strategic Studies and Research Press, Series No. 108, 2005) p. 38.

pushed them to decide to establish an effective regulatory regime that would improve market mechanisms and protect the markets integrity.\textsuperscript{43}

\textit{1.3.2 Launching the Securities and Commodities Authority (SCA)}

On January 29, 2000, Federal Law No. 4 of 2000 was issued concerning the Emirates Securities and Commodities Authority and Market (ESCA law 2000). Under the terms of this law, a public body was created called the ‘Securities and Commodities Authority’ (SCA) in Abu Dhabi. This was given a juristic, financial and administrative profile, with the independence and the supervisory and executive powers required for practicing and achieving its tasks. The latter were to serve the objectives of the general economic policy of the country and to support economic stability. In addition, the body had the right to establish other branches or offices to carry out its supervisory and control functions over the markets. The law prohibited the body from trading, having a particular benefit in any project, or from possessing or issuing any securities.\textsuperscript{44}

The Government identified three goals\textsuperscript{45} that it saw as essential to achieving the national economic interest; first it must provide an opportunity for investment funds and savings in securities and commodities. This means the Regulating Authority must ensure the safety and accuracy of transactions and ensure the interaction of supply and demand factors for determining prices while protecting investors by consolidating the foundation of proper handling between various investors. Second, it exists to develop investment awareness through studies as well as to present recommendations. Its last directive is to work to ensure the country’s financial and economic stability.

\textsuperscript{43}International Monetary Fund, United Arab Emirates: Financial System Stability Assessment, including reports on the Observation of Standards and Codes on the following topics: Monetary and Financial Policy Transparency, Banking Supervision and Payment Systems. (Washington, D.C.: International Monetary Fund, 2003).

\textsuperscript{44}Article 2 of the ESCA law 2000.

\textsuperscript{45}Article 3 of the ESCA law 2000.
The Regulating Authority engages in a legislative and supervisory role in the securities and commodities markets of the country, where it is authorized to regulate the protection of investor rights, such as instituting an effective disclosure and transparency system as well as a system for the arbitration of disputes that arise from the securities market. Further, it has the right to propose regulations related to the stock market issued by a decision of the Ministers’ Council. It can put into place certain regulations immediately after consultation and in coordination with the licensed markets of the country, while also overseeing the execution of laws and regulations by all parties, such as financial markets, intermediaries, listed companies and investors.46

The ESCA Law 2000 was approved, producing two markets, namely, the Abu Dhabi Securities Exchange (ADX) and the Dubai Financial Market (DFM). These markets are connected electronically, allowing them to be viewed as one combined market, to some extent as Emirates Securities.47

1.3.3 The Abu Dhabi Securities Exchange

The Abu Dhabi Securities Exchange market was founded under Law No. 3 of 2000 issued by the Executive Council of Abu Dhabi on May 13, 2000. The market was officially opened on November 15, 2000 when the shares of twelve shareholding companies were listed; the market value of shares was approximately 13 billion dirhams. The number of listed companies increased from 12 to 5948 companies by the end of September 2006 and the market value of those company shares reached

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46 Article 4 of the ESCA law 2000.
48 Sallam,p. 220.
approximately 345,188.1 million dirhams ($93,979 million). Under Law No. 3, the market was defined as a government institution and so enjoyed individuality, financial and administrative independence and the powers of control and implementation necessary to execute its tasks. The market was also afforded the right to establish other branches outside the borders of Abu Dhabi.

Financial experts and economists were agreed that the establishment of the Abu Dhabi securities market caused radical changes in the existing method of dealing with shares, giving them greater depth through correlation with other Gulf markets. Also, it actively contributed to the development of financial services and the establishment of more shareholding companies, which offered a positive reflection on the economic growth prospects of the country.

1.3.4 The Dubai Financial Markets

On March 26, 2000 the Dubai Securities Market was founded pursuant to Decree No. 14 of 2000 issued by the ruler of Dubai on May 29, 2000, which stated that the Dubai Securities Market was an independent public institution, enjoying individuality as a secondary market to the securities exchange. These securities are issued by deeds and bonds of the federal government, shareholding companies, local governments, public authorities, investment funds and all other financial mechanisms, both international and domestic, which are acceptable to the market. Mohammed Al Abar highlights the view that ‘[t]he goal for the foundation of the market [has been] to play a vital role in

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52 Mohammed Ali Rashid Al Abbar. Al Abbar served as the Director-General of Dubai’s Department of Economic Development, and Chairman of Emaar, one of the world’s largest real estate companies. Al Abbar is also a member of the Dubai Executive Council. Available at http://en.wikipedia.org/wiki/Mohammed_bin_Ali_Al_Abbar Accessed (23/09/2010).
utilizing local savings through the creation of equal opportunities, for individuals and institutions to invest in local shares and to eliminate the overstepping and passiveness that dominated the unofficial stock market in the past years.’ He adds that the ‘Dubai market is a part of a project of the UAE market for securities and commodities. The market mechanism will be governed by the provisions of the Federal Law No. 4 of 2000’.53

The number of listed companies in the Dubai market at the end of September 2006 reached 40 companies; the market value of its shares reached 352,358.8 million dirhams ($95,932 million) with 47,839.3 million dirhams trading ($13,024 million).54

On December 27, 2005, a significant development for the Dubai Financial Market (DFM) followed from a decision of the Executive Council Decree. The DFM became a public joint stock Company with 8 billion dirham capital paid for 8 billion shares - 1 dirham for each share. Twenty percent of the shares were offered to public shareholders. This offering was the first of its kind in the UAE. These shares were overly subscribed and over 201 billion dirham is gained. On March 7, 2007 trading of DFM shares finally began.55

1.4 Legislative and Administrative Regulation of the Capital Market

To ensure effectiveness and efficiency of a capital market and to guarantee its mandated role in the country’s economy, legislation is adopted governing its operation and configuration in terms of both substantive and administrative control. Legislation varies from one country to another as to the degree with which the law involves itself in the

54 The Arab Monetary Fund, a database of Arab Securities Markets, third quarter 2006 of term period, p. 66.
The UAE capital markets are regulated by both the Federal Commercial Company Law No. 8 of 1984 and the Federal Law No. 4 of 2000 concerning the Emirates Securities and Commodities Market (ESCA Law 2000). The former applies to and regulates a group of legal processes for all commercial companies that either are established in the UAE or that have the foundation of their branch agencies in foreign countries. The latter regulates secondary market and securities trading conduct. These legal frameworks regulate both foreign and domestic commercial and investment activity.

Three resolutions were issued by the UAE Federal Cabinet in order to implement Federal Law No. 4 of 2000 with regard to the securities and commodities markets. The policy for licensing and supervising securities markets is determined by these three cabinet resolutions. This policy regulates securities listing on the markets as well as the actions of the Securities and Commodities Authority. With the approval of the legislation, the two stock exchanges come into being: the Abu Dhabi Securities Exchange (ADX) and the Dubai Financial Market (DFM). These markets are considered one entity, as Emirates Securities, since they are connected electronically.

On the other hand, the Dubai International Financial Centre (DIFC) was created by the enactment of Federal Law No. 8 of 2004 concerning the Financial Free Zones in the United Arab Emirates and of Federal Law No. 9 of 2004 with regard to the DIFC. This is the process by which a new law and financial regime are formed in the region of

Dubai. The Federal Law alters the Constitution to give the DIFC extensive legislative, judicial and executive powers as a financial "free zone" within Dubai.\(^{59}\)

The DIFC cannot rise to become an integral part of Dubai’s future unless it is able to attract worldwide investors; therefore, it offers a dollar-denominated environment in which 100% overseas possession is permitted with no tax on returns or profits and no limits on foreign exchange or capital/profit repatriation.\(^{60}\)

Based on this, the legislative regulation and managerial restructuring of the capital market and superintendence are presented and the rules and legislative laws clarified to the extent necessary, such that they are within the bounds of the DIFC’s influence.

\(1.4.1\) Management Structure of the Market

In the United Arab Emirates, the supervisory and regulatory role is played by the Securities and Commodities Authority (SCA).\(^{61}\) This Authority consists of a Board of Directors responsible for running its affairs, setting up general policy that is consistent with the regulations issued\(^ {62}\) and acting in the interests of the national economy. It is not confined to that role, but also issues the necessary decisions to protect investors through consolidating proper handling bases that ensure the interaction of supply and demand and the development of investment awareness as well as financial and economic stability.\(^ {63}\)

\(^{61}\) Article 2 of the Federal Law No. 4, 2000, concerning the Emirates Securities and Commodities Authority and Market.
The Board of Directors comprises the Minister of Economy and Commerce as the Chairman, five experienced and competent members nominated by the minister, and a Chief Executive Officer of the Board, all appointed by decision of the Ministers’ Council.64 A board term is for four years, with renewal for only one term, with the exception of the Chief Executive Officer.65 The Chairman or his deputy is the head of the board and its representative in the judiciary as well as to third parties.66

Board resolutions are decided by majority vote and in the case of equal votes the chairman’s vote carries greater weight. Council meetings are considered valid when the majority of members are present so long as this includes the attendance of the chairman or his deputy.67

To achieve transparency and prevent insider dealing, the legislation obliges Board Members to declare, in writing, to the Authority their own securities and any owned by their wives or minor children; also, Board Members are required to declare, in writing, any changes that occur within a week of the member becoming aware of that change.68 Moreover, the Board is considered the controlling authority for the conduct of its affairs in accordance with its regulations.69

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64 Article 6 of the ESCA Law 2000.
65 Article 8 of ESCA law 2000.
68 Article 9 of the Federal Law No. 4, 2000. This obligation includes similar duties as required in Article 21 in the same law, the Federal Law, which requires the Boards of Director in the markets to make disclosure. As Article 21 states, ‘The Market's director general, his deputy, and each member of the Market, shall, forthwith upon assuming his duties, make a declaration in writing as to the securities owned by himself, his spouse and his minor children, as well as the holdings of himself and the holdings of his spouse and his minor children with any Broker. He shall also make a declaration in writing as to any change occurring therein within one week at most from the date he becomes aware of the change’.
1.4.2 Speciality missions of the Securities and Commodities Authority (SCA)

The UAE legislation charges the SCA with several missions, the most important of which are to:

- Propose laws and regulations to practice its missions and roles and to issue authorization for securities markets and its trading and circulation system\(^ {70} \) where practice of any of the actions related to the capital market law is not permitted until authorization from the SCA is obtained.\(^ {71} \)

- Conduct the necessary investigations, inspection and follow-up checks\(^ {72} \) to ensure application of the law, regulations and the availability of transparency and disclosure.\(^ {73} \) Inspection teams have the right to enter the market and intermediaries’ offices during working hours and to examine records and documents. They also have the right to request they any document or information they deem necessary for executing their tasks.\(^ {74} \) Through the process of investigation and inspection, the inspection team can order anyone under investigation not to take any action related to his own securities and can prevent him from withdrawing any funds or securities deposited with another party.\(^ {75} \) The paperwork that results from these investigations and inspections are considered confidential documents that should not be published for the general public.\(^ {76} \) It is worth noting that the law does not grant inspection teams the judicial authority to prove that crimes have happened in contravention of the provisions of the Securities Market Law and its pursuance decisions.

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\(^ {70} \) Article 4 of the ESCA law 2000.
\(^ {71} \) Article 2 of the Ministers’ Council Decree No. 12, 2000 on regulations as to the listing of securities and commodities. And see: Article 2 of the Resolution of the Authority's Board of Directors No. 3, 2001, on the regulations as to market functioning.
\(^ {72} \) Article 10 of the Ministers’ Council Decree No. 11, 2000, on the regulations as to market licensing and supervision and its amendments.
\(^ {73} \) Article 8 of the Resolution of the Authority's Board of Directors No. 3, 2000, on regulations as to disclosure and transparency.
\(^ {74} \) Article 12, ibid.
\(^ {75} \) Article 13 of the of the Ministers’ Council Decree No. 11, 2000.
\(^ {76} \) Article 14, ibid.
Consider complaints submitted with possible sanctions including a warning and a financial penalty that does not exceed 100,000 dirham issued by the Board of Directors. ⁷⁷

1.4.3 Mission of the SCA’s Board of Directors

In addition to administering the Authority’s affairs, the Board is charged with many specific tasks, such as to:

- Oblige any person, whether natural or legal ⁷⁸ connected to securities, to disclose any information related to his activities in public or in private. For this, the Board has the right to ask that an investigation be conducted according to the provisions of the law, or to request that executive decisions be made thereon. ⁷⁹

- Receive reports and complaints related to market activity or their intermediaries and make appropriate decisions. ⁸⁰

- Temporarily stop transactions in the securities market or in the shares of any company, or dealing in any securities in the case of exceptional circumstances or due to any threat to the market system and its workflow functioning. ⁸¹

- Freeze, suspend, or enforce any regulation, or any system of the market or its operations. ⁸²

- Conduct periodic inspections of market members, or make a significant request for an investigation regarding compliance with execution of the law, and compliance with the law as well as with regulations. ⁸³

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⁷⁸ Artificial person: ‘an entity, such as a corporation, created by law any giving certain legal rights and duties of a human being ; a being , real or imaginary , who for the purpose of legal reasoning is treated more or less as a human being’. See Bryan A. Garner, Black’s Law Dictionary 8th edition (USA: Westgroup, 2004), p. 1178.
⁷⁹ Article 33 of the ESCA law 2000.
⁸² Article 19, ibid.
1.4.4 Legislative Regulation of the Securities Market

The economic situation of any country is the basis on which legislative policy is formed regarding the organization of capital markets, as the law emerges from the needs of society. Legislators plan general principles for incrimination and penalties applicable when offenses are committed and leave identifying the elements of acting to the competent authority entrusted by law to manage its regulations, such as the Emirates securities market. In economic penal law, especially, it can be hard to identify elements of criminality and identify the acts of each crime. Therefore, is often more appropriate for legislators to determine the general rules of criminality and the sanctions to be applied when committing the offense, leaving the job of identifying the elements of a crime to the executive authority.

Accordingly, the legislative policy of the financial markets grants the administrative agencies concerned with the implementation of the law the authority to issue the appropriate regulations as well as to propose the solutions necessary to address any shortfall. These agencies display a high level of technical expertise through their practical experience and are able to identify the gaps resulting from practical experience. Some market behavior demonstrates a high degree of innovation means and techniques, requiring extensive expertise to understand their nature.

The Emirati Legislature adopted several policies that govern capital markets legislation. The first is a policy of determining which crimes happen exclusively in securities, such

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83 Article 9 of the Resolution of the Authority's Board of Directors No. 3, 2000
84 Farghali, p.66.
as in Articles No. 40, 41 and 42. Further, it grants legislative authorization, as in Article 4 of ESCA Law 2000, which decides that the SCA has the right to suggest regulations and set the requisite legislations to achieve its goals. Also, SCA Regulations are set out in Article 43 of the aforementioned law, which states that:

> Without prejudice to the penalties prescribed in this Law or in any other law, any person who contravenes any other provision of this Law and the regulations issued pursuant thereto shall be liable to imprisonment and a fine or to either of these penalties.\(^{90}\)

The SCA Board made a decision on article 16, which states:

> The Board may compel any person having a connection with activities in securities, whether a natural or a juristic person, to make public or private disclosure and to submit any information related to its activity.\(^{91}\)

Administrative penalties are a kind of legislative permission given so that the SCA is empowered to issue the appropriate regulations to deter crimes. According to this authorization, the SCA is concerned with setting up strict penalties, in order to deter violators of the capital market resolutions and regulations. Fines may not exceed 100,000 dirhams.

### 1.5 The Dubai International Financial Centre (DIFC)

The DIFC is a Federal Financial Free Zone\(^{92}\) located in Dubai\(^{93}\) with three central bodies based on international principles: the DIFC Authority, the Dubai Financial Services Authority and the DIFC Judicial Authority.\(^{94}\) The DIFC has financial and administrative independence and is attached to the Dubai government by Dubai Law No 9 of 2004,\(^{95}\) which entitles the President to create other bodies as he deems necessary.

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\(^{90}\) Article 43 of ESCA Law 2000.
\(^{91}\) Article 16 of the Resolution of the Authority's Board of Directors No. 3, 2000.
\(^{92}\) The Federal Law No. 8 of 2004 declares that the creation of a free zone should be by Federal decree; Article (2/1) states that ‘A Financial Free Zone shall be established pursuant to a Federal decree. It shall have a juristic personality and the chairman of its board of directors shall be its lawful representative’. Following this, the President of the UAE makes a Federal Decree to establish a financial free zone in Dubai, Number 35 for the year 2004.
\(^{93}\) The United Arab Emirates is a federation of seven separate Emirates, of which Dubai is one.
\(^{94}\) Article 3/3 of the Law No. 9 of 2004 In respect to the Dubai International Financial Centre.
\(^{95}\) Article 2, *ibid.*
The current President of DIFC is His Highness Sheik Mohammed bin Rashid Al Maktoum, the Vice President and Prime Minister of the UAE and the Ruler of Dubai.\textsuperscript{96}

The DIFC concentrates on several sectors of financial activity that may occur in the DIFC, as follows: ‘Banking Services (Investment Banking, Corporate Banking & Private Banking); Capital Markets (Equity, Debt Instruments, Derivatives and Commodity Trading); Asset Management and Fund Registration; Insurance and Reinsurance; Islamic Finance; Business Processing Operations and Ancillary Services’.\textsuperscript{97} Article 14 of Dubai Law No. 9 of 2004, states that financial institutions in the DIFC are entitled to a zero tax rate on income and profit for 50 years from the date of the law’s enactment.

\begin{footnotesize}
\textsuperscript{96} Doing Business in the DIFC, p.13
\textsuperscript{97} http://www.difc.ae/09/06/2007
\end{footnotesize}
Based on DIFC law No. 12 of 2004, the bodies in the chart above may not deal in UAE Dirhams and may not receive deposits from the UAE markets. The following summarizes key DIFC organisations.

1.5.1 DIFC Authority

Dubai Law No. 9 of 2004 recognizes the DIFC Authority as a legitimate body connected with the Dubai Government. The important function given to the DIFC Authority by this law is the development of overall policy, providing both direction and

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99 Article 3 (a) of the Law No 9 of 2004.
operating management to the center as the executive body of the DIFC.\textsuperscript{100} Further, the DIFC is not limited to those roles, but is also in charge of the development of laws and regulations to cover all aspects of non-financial services, such as employment law, contract law, company law and real estate law that are not regulated by the Dubai Financial Services Authority (DFSA). In addition, the DIFC Authority was authorised to encourage licensees to operate within the Centre (DIFC), in effort to incorporate and register companies.\textsuperscript{101}

Regarding certain business and commercial sector considerations, such as the license application process, acquiring visas and resident permits for the applicant’s employees, assistance was to be provided to prospective license applicants at all stages of the procedure by the DIFC Authority.\textsuperscript{102}

In fact, to provide opportunities for international investors in the region’s emerging markets, the Dubai International Financial Exchange (DIFX) is held completely as a subsidiary to the DIFC Authority. Further, financial services are regulated to international standards by the Dubai Financial Services Authority.\textsuperscript{103} These will be discussed in the following sections.

\textbf{1.5.2 Dubai Financial Services Authority (DFSA)}

Formed by Law No. 9 of 2004, the DFSA is the autonomous regulator of financial and subsidiary activities conducted in or from the DIFC.\textsuperscript{104} Entirely independent of the DIFC Authority and the DIFC Judicial Authority, the DFSA is responsible for

\textsuperscript{100} Article 6 (6) of the Law No. 9 of 2004. See also: Term Definition, Schedule 1 Interpretation within DIFC Law No. 1 of 2004.

\textsuperscript{101} \textit{Doing business in the DIFC}, p.15

\textsuperscript{102} Ibid.


\textsuperscript{104} Ibid.
administrating and developing regulations and rules\textsuperscript{105} in addition to developing policy related to market activity and implementing the legislation that it controls.\textsuperscript{106} Significantly, the DFSA may issue any rules and regulations required to achieve its aims.\textsuperscript{107}

The DFSA’s robust regulatory and legal structure is drawn from internationally recognized regulatory entities and primary financial institutions\textsuperscript{108} in order to inspire investor confidence.\textsuperscript{109} This robust and flexible regulatory framework remains in compliance with the DFSA’s guiding standards: integrity, transparency and efficiency.\textsuperscript{110}

To achieve its aims, the DFSA forms alliances, through Memoranda of Understanding, with global organisations as well as other regulatory agencies within Dubai. It also has membership in the International Organisation of Securities Commissions (IOSCO)\textsuperscript{111} and the Islamic Financial Services Board (IFSB)\textsuperscript{112}. This facilitates data exchange and the exercise of investigative and enforcement powers in the pursuit of individual and common objectives.\textsuperscript{113}

\textsuperscript{105} Mark Watterson and Tim Coak, ‘Middle East; Rules of Attraction’, (May 28, 2007) The Lawyer, p.1
\textsuperscript{106} Doing business in the DIFC p.15.
\textsuperscript{108} Doing Business in the DIFC, p.15.
\textsuperscript{109} Watterson and Coak., p.3.
\textsuperscript{110} Al Tamimi, p.15.
\textsuperscript{111} The world’s leading body of international securities regulation.
\textsuperscript{112} This is the leading industry associations for Islamic finance.
\textsuperscript{113} Doing Business in the DIFC, p.15.
1.5.3 DIFC Judicial Authority

In accordance with Dubai Law No. 9 of 2004 and the Judicial Authority Law, the DIFC Judicial Authority (DJA) was made independent and responsible for directing and implementing the civil and commercial laws of the DIFC. It has unlimited court jurisdiction to deal with all disputes arising from or within the DIFC, such as commercial transactions or all matters resulting from any contract, even personal injury actions or a number of smaller civil matters, so long as they occur in the DIFC area. However, criminal issues are referred to a suitable outside authority.

The DJA rules are based on global principles of legal procedure and designed according to the Commercial Court Guide and the English Civil Procedure Rules; however they contain some major changes to provide the court with a more global outlook. The method of drafting the Rules of Court involves wide consultation with accepted court users from many different legal cultures.

The DIFC courts comprise a court of first instance and a court of appeal. The court is presided over by a Chief Justice—presently Sir Anthony Evans—and a Deputy Chief Justice—currently Mr. Michael Hwang SC—both of whom have international

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114 Article 8 (1) Law No. 9 of 2004.
115 Article 3(1) Law No. 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Center.
116 Article 5, Law No. 12 of 2004, ibid.
118 http://www.dfsa.ae/dfsائف/the_difc/dc_court/
119 Doing business in the DIFC, p.16.
120 Michael Black QC and Tom Montagu-Smith.
121 Article 2 and 3 (3) Law No. 12 of 2004.
122 “He was a High Court Judge in England and Wales from 1984 until 1992 and a Lord Justice of Appeal (a member of the Court of Appeal) from 1992 until his retirement in 2000. Before being appointed as judge, Sir Anthony practiced as a barrister, specializing in commercial cases. He became Queen’s Counsel in 1971 and a Recorder of the Crown Court in 1972. As a High Court Judge, he sat regularly in the Commercial Court, and from 1990 until 1992 he was judge in charge of the Commercial list.” See: http://www.difccourts.ae/press_centre/news/11.html. See also: Michael Black QC and Tom Montagu-Smith.
123 ‘He has previously worked as a Judicial Commissioner and as one of the first twelve Senior Counsel of the Supreme Court of Singapore. Between 2000 and 2003, he also served as a Commissioner of the
reputations and are former leaders in the DIFC Courts. The official language in the DIFC Courts is English\textsuperscript{124}; therefore, any advocate who has sufficient fluency in English can appear before the court.

It is important to note that Article 3 Law No. 12 of 2004 provides the right of parties to submit to the jurisdiction of any other court in order to have their issues heard provided they deal with civil or commercial matters.\textsuperscript{125} This flexibility reflects the different circumstances and needs of companies and institutions and ensures that a dispute is heard within the legal structure that is most appropriate to their requirements.\textsuperscript{126}

\textit{1.5.4 Dubai International Financial Exchange (DIFX)}

On September 26, 2005, the Dubai Stock Exchange opened at the Global Financial Dubai Centre and was expected to play a key role in the growth of local capital markets by attracting major regional companies to list their shares and other securities on the exchange. This, in turn, was expected to draw worldwide investors and attract other inflows to the region, thus facilitating the region’s integration with world markets.\textsuperscript{127}

The Dubai International Financial Exchange DIFX was established as part of DIFC\textsuperscript{128} and its financial activities are controlled by international principles. DIFX is subject to the legislation of the Dubai Financial Services Authority.\textsuperscript{129} The DFSA holds responsibility for listing procedures, including powers of permission for securities and

\textsuperscript{124} Doing business in the DIFC p.16.
\textsuperscript{125} The Judicial Authority at the Dubai International Financial Centre (DIFC).
\textsuperscript{126} Doing business in the DIFC, p.16.
\textsuperscript{127} Ibid., p.10.
\textsuperscript{129}http://www.difx.ae/Public/about-difx/about-difx.htm?__eo_obj_states=ASEBDw5TbGkZU1lbnUxOjBELA== (6/28/2007)
policies concerning securities being admitted to an official list of securities. In setting up listing rules, the DIFX seeks to reduce duplication between the obligations imposed on issuers by the DIFX and those imposed on issuers under the Offered Securities Rules. Therefore, the DIFX works effectively with the DFSA.

Al Shaali-Nasir, the present executive director for operations of the Dubai Global Stock Exchange has said, ‘The Stock Exchange came to close the gap between East Asia, Europe, and America as the Middle East has more than two billion people who do not have an international centre for advanced financial services’. He added, ‘The stock exchange deals with several items such as ordinary shares and deeds where it has the largest debt tools in the world.

Most listings on the DIFX originate from Initial Public Offering (IPOs). As the DIFX expands, it is expected that institutions from outside the area will dually list their shares on the exchange, using their listings to tap a large pool of investable assets in the state through the type of securities it lists. The DIFX also intends to improve its innovative, worldwide product policy to make the DIFX more attractive as a listing target.

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132 The deeds of Kuwaiti Dar investment company were listed as having a value of 150 million dollars, which will make it the first stock exchange globally in terms of the total value of all listed deeds, which will rise to 11.4 billion dollars,’ said Pier Larson the Executive Chairman of the Dubai Global stock exchange. ‘Dubai global stock exchange the best choice for inclusion financial Islamic products, especially of being the only global stock exchange in the region’. See: Banking and Finance, 3rd year, (November 2006) Issue 36, p.20.
134 An IPO (Initial Public Offering) ‘occurs when a company first sells its shares to the public (to institutional and retail investors), to be traded on an Investment Market, such as the London Stock Exchange or the PLUS Market. A company can choose to come to the market for a number of reasons. Usually they do this to raise new capital through the sale of shares. This capital can be used to fund expansion, make acquisitions, pay-off existing investors or to restructure the company finances’. See http://www.allipo.com/ipo. Roger Harrold, Head of Domestic Custody Services at Deutsche Bank, declared, ‘We are committed to the DIFX as an international exchange and believe it has a great opportunity to become an important new market place for IPO listings originating in the Middle East’. See http://www.difx.ae/Public/press-centre/2007/2007-apr27.htm (7/9/2007).
135 Doing business in the DIFC, p. 19.
The achievement of a fair and informed market is the responsibility of the DIFX Markets Authority, whereas evaluating and approving applications for companies that desire their securities to be acceptable to the Official List are the responsibility of the DIFX Listing Authority.\footnote{Ibid., p.18.}

Investors who wish to purchase securities in the DIFX hail from countries all over the world, such as the UK, Germany, South Africa, Australia, Switzerland, India, Kuwait, Bahrain and Saudi Arabia, as well as the UAE, proving the worldwide reach of Dubai’s exchange. The exchange aims to set up other securities markets, such as derivatives and exchange-traded funds, many of which do not currently exist in the region.\footnote{http://www.difx.ae/Public/about-difx/about-difx.htm?__eo_obj_states=ASEBDw5TbGlkZU11bnUXOjBELA== (1/9/2007).} Bashir Ahmed, whose local firm includes 22 lawyers, states that he a significant benefit of the DIFX for clients from the US, the UK and South Africa: ‘Some are looking for a secondary listing, some to tap into liquidity in the market, while others are companies at the £100 million level, which look at the DIFX as another option to the Alternative Investment Market (AIM) in London.’\footnote{Sophie Evans, ‘The Middle East: A gateway to the new.’ Legal Week, (March 30, 2006).} The DIFX now lists a wide range of financial instruments, including equities, bonds, mutual funds, Islamic (Sharia-compliant) structured products, derivatives, index products and alternative risk products.\footnote{Doing business in the DIFC. p.18.}

In September 2009, the DIFX had 20-member stockbrokers, including leading international and regional banks.\footnote{http://www.difx.ae/Public/about-difx/about-difx.htm?__eo_obj_states=ASEBDw5TbGlkZU11bnUXOjBELA== (1/9/2007).} Adam Wilson, Chief Executive of Hichens, Harrison, commented, ‘Since the DIFX opened in September 2005 it has become established as the international exchange serving its region. We will be able to offer our
international and regional clients access to an exciting and growing range of securities from companies active in the Middle East and beyond.¹⁴¹

The DIFX poses a major challenge for other regional securities markets, as it attracts international and regional investments, leading a number of global brokerage firms and investment banks to establish a highly diversified base that is not influenced by any particular country. The Dubai Global Stock Exchange is gaining considerable distinction in the region.¹⁴²

1.6 Laws and Regulations at the DIFC

The DIFC is designed to create a world-class regulatory system for the creation and operation of an international financial center.¹⁴³ Therefore, DIFC Laws are based on the best practices of leading jurisdictions in Europe, North America and the Far East, while maintaining core principles of efficiency, transparency and integrity.¹⁴⁴ Entities that are registered and operate in financial services within the DIFC are not obliged to obey UAE Central Bank Regulations, but are subject to laws that apply to the DIFC. In particular, UAE anti-money laundering and criminal law are not implemented on any disputes arising within or connected with the DIFC. Rather, the DIFC is given the power to establish its own laws, as a free zone that is autonomous for all civil and commercial legal matters.¹⁴⁵

Legislation within the DFIC is designed to govern the day-to-day operations of financial institutions and corporate entities, including individuals within the DIFC. DIFC laws constitute a commercial code that includes company laws, contract laws, arbitration and

¹⁴² Sallam, p.47.
¹⁴⁴ Doing Business in the DIFC, p.62.
¹⁴⁵ Setting Up in the DIFC, p. 9.
insolvency laws, among others; all are administered by the DIFC Authority. The Financial Services Law includes Regulatory Law, Markets Law, Data Protection Law and the Law Regulating Islamic Financial Business. All of these laws are administered by the Dubai Financial Services Authority (DFSA).\textsuperscript{146}

The DIFC is subject to applicable rules under the core financial services legislation, which are considered subsidiary legislation. These rules can be located in the DFSA Rulebook, which is divided into specific modules that cover a variety of topics that are also applicable to individuals who utilize them.

It is important to note that parties are generally free to agree to the application of some substantive laws other than the Law of the DIFC. Thus, Article 6 of the Judicial Authority Law states:

\begin{quote}
The Courts shall apply the Centre’s Laws and Regulations, except where parties to the dispute have explicitly agreed that another law shall govern such disputes, provided that such law does not conflict with the public policy and public morals.\textsuperscript{147}
\end{quote}

One of most interesting aspects of Article 8 of Law No. 3 of 2004\textsuperscript{148} is that it provides that the laws of England and Wales be applied when no other applicable law can be ascertained. Thus, if the DIFC law No.12 of 2004 does not deal with a particular matter,

\begin{itemize}
\item \textsuperscript{146} Ibid., p.68.
\item \textsuperscript{147} Article 6 of Law No.12 of 2004 in respect for the Judicial Authority at DIFC.
\item \textsuperscript{148} Article 8 of Law No. 3 of 2004 states that, ‘(1) Since by virtue of Article 3 of Federal Law No.8 of 2004, DIFC Law can be applied in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws currently in force in the Jurisdiction chosen in accordance with paragraph (2).
 (2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:
 (a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,
 (b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,
 (c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,
 (d) the laws of any Jurisdiction that appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,
 (e) the laws of England and Wales’.
\end{itemize}
the ultimate fall back is the law of England and Wales. There is also a detailed regulatory structure that is familiar to anyone acquainted with the UK Financial Services Authority’s rulebook.\textsuperscript{149} However, does this Article create conflict when the laws of England and Wales and the UAE and DIFC laws differ? Why does the DIFC use the UAE laws as a last resort? Does this mean the UAE laws are deficient? If so, UAE regulators need to enable their legislation to improve and change according to a predefined international regulatory standard.

1.7 Dealers in the Stock Market

There are a variety of dealers in the securities markets including individuals, institutions and companies, which can be classified into categories as follows.

1.7.1 Investment Funds

Investment funds are restricted pools of currency with a number of savers, either persons or other companies\textsuperscript{150} who prefer their money to be invested over the long term to professionals or those who will increase value of investments extensively.\textsuperscript{151} These funds rely on pooled capital to provide higher price investments than are available to individuals who deal in these funds.\textsuperscript{152}

In fact, investment funds give those who do not have the capacity to manage their investments directly the opportunity to participate in global and local investment. Briefly, the idea of these funds is that a number of investors can pool their resources in

\textsuperscript{149}http://www.legalweek.com/Articles/1018796/Middle+East+and+India+Starting+from+scratch.html ‘Middle East and India: Starting from scratch’ (06/06/2007).
order to allow them to be managed by financial institutions to achieve benefits that cannot be achieved individually.\textsuperscript{153}

Funds are established by banks, insurance companies or joint-stock companies and run by joint-stock companies and independent bodies that have the necessary expertise and efficiency to manage investment funds. These companies issue investment documents and use proceeds from the funds to invest in securities, including achieving diversification and efficient returns for those documents.\textsuperscript{154}

In the UAE, the organisation of investment funds for trading must be in accordance with provisions of the Central Bank Law. Additionally, fund managers must obtain permission from the Emirates Securities and Commodities Authority (SCA). Investors must be notified regarding vital information via circulars that assess a fund’s performance and returns prospects, giving it full background and details of the institution that is being floated, as well as details as to the size of the fund and its investment purposes and dividend strategy. Thereafter, investment funds can decide which securities market in the UAE to use and inquire as to the listings on it.\textsuperscript{155}

In the DIFC, the Dubai Financial Services Authority (DFSA) follows the Collective Investment Law of 2006, which regulates collective investment funds.\textsuperscript{156} The legislative framework is drawn up according to these rules in order to operate and classify

\textsuperscript{153} Sabri Nofal, ‘Investment in Securities’, (Arabic) \textit{Iktisadi}, number 100, p.21.
\textsuperscript{155} http://www.dfm.co.ae/dfm/FundsRequirements/funds.htm#Fu_1. This is as to list a close-ended domestic fund. For more details on listing funds, either foreign or domestic, please see the ESCA’s website.
\textsuperscript{156} Al Tamimi, p.12.
numerous types of investment funds, such as Islamic funds, ‘funds of funds’, hedge funds, property funds and private equity funds.\(^{157}\)

The prescriptive regime of Collective Investment Law 2006 provides a high regulatory standard for the DIFC. The asset management community ascertains whether the benefits of market stability will create enough demand to encourage fund managers to submit their businesses to the regulatory scrutiny and compliance requirements associated with relocating to the DIFC.\(^ {158}\)

### 1.7.2 Brokerage Firms

Currently, there are 102 brokerage firms licensed by the UAE Securities and Commodities Authority (SCA).\(^ {159}\) These firms are licensed and regulated by the SCA. Under ESCA Law 2000, applicable regulations are issued.\(^ {160}\) Brokers and their representatives are required to avoid damaging the market, including its members or traders. They are also required to avoid purposefully deceptive transactions that are not genuine regarding securities transfers.\(^ {161}\)

Regulations and rules define brokerages in terms of the ways in which they persuade customers to enter into securities and commodity deals. A broker may use different means of communication to sell his securities or commodities, including face-to-face


\(^{161}\) Charles S. Laubach and Amjad A. Khan, ‘United Arab Emirates: Securities and Commodities Market,’(2000) 2 *Journal of International Financial Markets* 4, p 42. Article 27 of Federal Law No. 4 of 2000 mentions, ‘the activities of brokers that operate in the market have been regulated by market's board of directors. They may possibly impose disciplinary sanction on a broker by issuing a warning or levying a fine of up to Dh. 100,000 a broker may appeal such decisions to the Authority, and the Authority's decision on the appeal shall be final. The market's board of directors may also call upon all or part of the broker's bank guarantee or suspend the broker for up to one week. A broker may appeal such decision to the courts. In addition, the market's board of directors may recommend to the Authority the revocation of the broker's licence’. 
meetings in public places, visiting them at their places of business or at home, or contacting them by telephone. It should be noted that only an authorized broker can deal with customers. A broker who performs this type of business without official approval may face imprisonment or be fined. Regulations further empower the Chairman of the Authority's Board of Directors to suspend the activities of an unauthorized broker and to block his trades.162

The DIFX and the SCA work hand-in-hand to allow easy access to UAE brokers.163 At present, the DIFX has 20 members, among which are prominent global and regional banks.164 The target of DIFX's broker program is investment banks and brokerage houses that seek to learn how to trade on the DIFX. It offers opportunities for them to learn about the market, the DIFX’s registry and custody services, as well as how to set up direct market approach arrangements.165 EFG-Herm’s (UAE)166 became the first regional institution to gain membership in the DIFX and to join the exchange as a broker in the capacity of an Individual Clearing Member.167

In order for companies to access the huge and relatively available market, the DIFC offers basic grounds for investing in financial instruments. There are a variety of opportunities in the DIFC for those looking to participate in financial activities and invest via investment banks and financial intermediaries. In fact, the DIFC seeks to

166 In early 2005, they launch their brokerage business in the UAE, trading the Dubai Financial Market (DFM) and Abu Dhabi Securities Market (ADSM). Their strong execution capabilities and culture of service enable them to swiftly and consistently capture market share. EFG-Hermes Brokerage is the leading institution of its kind in Egypt, with dominant market share on the Cairo and Alexandria Stock Exchanges. They provide a range of equity and fixed-income products through their Financial Brokerage Group (FBG), which serves institutional clients and Hermes Securities Brokerage (HSB), which targets high net worth retail investors. For more details, see (http://www.efg-hermes.com/business_lines/SecuritiesAndBrokerage/default.aspx).
institute insurance, private equity, private banking, trade finance and operations for brokerage services.  

1.7.3 Clearing and Settlement

The department responsible for purchases and sales clearing is the Depositary, Clearing and Settlement Department for the Abu Dhabi Securities Exchange and the Dubai Financial Market. This department provides a location where securities are held by the market, giving investors’ confidence, security and stability while protecting their property through confidentiality.

One of the primary tasks of the Depositary, Clearing and Settlement Department (DCSD) is to exercise rigorous control over any broker's activities that are relevant to investor securities in order to protect investor's rights through concurrent establishment of a transparent and efficient market.

Due to the highly credible relationships between the DCSD and listed companies, it is able to store and protect securities listed in the market. It is responsible for management, safe guardianship, down payment and immediate transfer of securities resulting from sale and purchase transactions, or those transfer processes conducted outside the transactions room. The department also has one more responsibility, namely the arrangement of securities prices offered on the market, which it does by entrusting the recognised settlement bank to settle and clear the net due payment, while collecting payable amounts from authorised brokers.

\[168\] Doing Business in the DIFC, p.21.
In the DIFX, Euroclear Bank\textsuperscript{172} and its agent in Dubai, Deutsche Bank, have worked together since early 2007 to provide access to the DIFX Central Securities Depositary (CSD). The US dollar is the main currency of all Euroclear trades; Euroclear Bank offers transactions in 36 currencies.\textsuperscript{173} As E. Larsson, current Chief Executive of the DIFX, said, ‘Investors who want to buy or sell shares listed on the DIFX can now choose to settle the trades efficiently through Euroclear Bank. This agreement is based on the growing demand from investors internationally and locally to trade DIFX shares’.\textsuperscript{174}

The DIFX offers participants the most economic and internationally standardised, effective and affordable technological equipment. To achieve this, it contracts with AtosEuronext, a pioneer in IT services, to supply its automatic electronic trading platform. Another contract is held with Consultancy Services to provide software systems for the DIFX’s clearing and settlement services.\textsuperscript{175}

\subsection*{1.7.4 Foreign Investors}

Foreign companies that start-up businesses in partnership with UAE nationals are subject to specific legal restrictions.\textsuperscript{176} Upon the introduction of the stock market, the government encountered a crucial issue regarding the role of foreign investors.\textsuperscript{177} Article 22 of the FC law 1984, states:

\begin{quote}
Observing that certain commercial activities are confined to nationals as provided in this Law or in any other Law, every company incorporated in
\end{quote}

\textsuperscript{172}The Dubai International Financial Exchange (DIFX), Euronext, Atos Euronext, LCH. Clearnet and Euroclear announced in 3 March 2004 that they have signed an MOU to enter into exclusive negotiations for the building of the component parts of the DIFX. As it mentioned above that the DIFX is operating as part of the Dubai International Financial Centre (DIFC).


\textsuperscript{175}Doing Business in DIFC, p.18.


\textsuperscript{177}http://www.american.edu/carmel/Ifr2962a/finance.html accessed (16/9/2006).
the State must have one or more national partner whose share in the company capital must not be less than 51% of the company capital.\textsuperscript{178}

This article is interpreted as requiring that UAE nationals hold a minimum of 51% of any registered company in the UAE. As for companies with licensed foreign branches, UAE nationals must act as sponsors with the right to carry out all of the activities of the parent company.\textsuperscript{179} The aim of this policy is to encourage foreign companies to form partnerships with UAE nationals. The UAE government plans to amend and update the Commercial Companies Law; one amendment suggests making foreign ownership subject to fewer restrictions.\textsuperscript{180} Continuous development seems to be encouraged by the authorities, awaiting a real commitment to the UAE Stock Exchange, which has been under debate for some time.\textsuperscript{181} In contrast, foreign financial institutions need not look for a local partner when setting up business in the DIFC.\textsuperscript{182}

Opportunities in the UAE securities market are widely available for foreigners, through either nationals or brokerage companies. From 1992 to 1996 the number of foreign commercial companies in the UAE had grown by a remarkable 35% in Dubai, 14% in Abu Dhabi and 22% in the rest of emirates. By the end of 1996, these companies and their branches had reached 884 and 39, respectively. The study further indicates that European companies have comprised 55% of the total foreign companies in the UAE, while American companies have comprised 8.5%, Japanese 4.9%, Arab 8% and Gulf Cooperation Council (GCC) companies 6% of the same total.\textsuperscript{183}

\textsuperscript{178} Article 22 of Federal Commercial Law No.8 of 1984.
\textsuperscript{179} Setting Up in the DIFC, p. 9.
\textsuperscript{181} Setting Up in the DIFC, p.9.
1.7.5 Companies and Financial Institutions

Companies and financial institutions invest portions of their funds in securities, either for the purpose of investing the cash in securities for a short period of time, or for long-term investments. Among the recipient companies, the Abu Dhabi Investment Company, founded in 1977, was the first non-bank financial services company to be established in the United Arab Emirates, and is considered one of the most important financial services companies in the region. Further, throughout its long journey, the company has provided highly efficient treasury services, credit, joint loans, debt instruments, financial investments, asset management and intermediation for several categories of assets. Jassim Al-Zaabi, the present Executive Chairman of Abu Dhabi Investment Company, stated: ‘Our Company is one of the leading companies in joining the stock field of the Middle East and North Africa since 1994’.

1.7.6 Individual investors

The number of investments in the UAE securities market as of June 7, 2010 is 552,069 in the Dubai Financial Market while in the ADX there are 887,787 as of December 31, 2009. Significantly larger investors are characterised by how they direct their efforts, gathering information in sequence and monitoring market changes using various sources, so their investment decisions are typically based on certain standards. No such possibilities are available for smaller investors. Moreover, among small investors, there is a lack of investment awareness, which illustrates the need to raise awareness among this category of investors or direct them to invest their money through

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184 Abdel-Rasul, p.22.
186 Reported by the Research & Publications Department, in the DFM. June 8, 2010
187 Reported by the Data Management Specialist CSD & Registry Services Department ADX. June 8, 2010
investment funds in order to ensure that the market remains controlled while investors are not unnecessarily exposed to vigorous fluctuations.  

1.8 Types of securities that are trading in the stock markets

In the UAE, securities are customarily classified into two main groups: bonds and shares. Both are issued by joint-stock companies. The bonds are also issued by the federal or local governments, public authorities and public institutions of the state. Due to the economic instability of the region, these securities of tradable assets are subject to the risk of market price fluctuations.  

In accordance with UAE Company Law, the shares of a company must have the same value and cannot be divided. They must also bear the person’s name and be subject to negotiation. Companies may issue negotiable bonds with equal value to obtain loans, on condition of the approval of the shareholders meeting. The issuance of bonds is dependent on the company’s profit and loss accounts for the first financial year. In the case that the state, or one of the banks working under its authority, ensures reimbursement of the bonds or guarantees them by issuing instruments, the restrictions may be waived. In addition, bonds may be issued in a person’s name or to the bearer.

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188 Abdel-Rasul, p.22.
190 Article 154 of Federal Commercial Company law.
191 Article 177, ibid.
192 Article 179, ibid.
193 Article 178, ibid.
1.9 Conclusion

This chapter provided a brief historical overview of the evolution of securities market regulation in the UAE. As the second and third sections of the chapter show, from the foundation of the United Arab Emirates in 1971 until 2000, the securities market was unregulated; the primary reason for the market crash in the summer of 1998. These sections also showed that from 1971 to 2000, there was a dramatic change in the region’s economic environment that resulted in the UAE government’s efforts to enact legislation that covered all aspects of the business and financial sectors. These efforts were done through the issuance of laws such as the FC law 1984 and the ESCA Law 2000. The legislative authority believed that providing a safe regulatory environment would inspire investors with confidence. Thus, the primary goal of these laws has been to satisfy demand for change in economic conditions and also to approach a higher level of regulation.

The remainder of the chapter reviewed the three key financial markets: the ADX, the DFM and the DIFC. Likewise, it examined the regulation and management of the markets. The ADX and the DFM markets are governed by the ESCA Law 2000 under SCA supervision, while the DIFC market is governed by its own laws and rules, as a free zone. In fact, the two laws, the ESCA Law 2000 and the DIFC law No.12 of 2004, have similar aims, which are to regulate both the market and investor activities. Each law encompasses a different territorial jurisdiction. A question is then raised as to what occurs if there is conflict between these two laws? Nonetheless, both laws provide important protection for market investors from misconduct in the marketplace.

Finally, the chapter concluded by clarifying who the market players are, including details about the kinds of individuals, institutions and companies as well as the type of securities trading in the stock markets. The complexities of the market and its
importance to the economy of the UAE require that there be a set of clear and reasonable laws that deal with all of the matters related to the market. Current laws have some crucial deficiencies, which have helped to create less organization and efficiency and more insider trading and manipulation offences. Such illegal activities and their related issues will be discussed extensively in subsequent chapters.
CHAPTER TWO

REGULATION OF MARKET ABUSE: OVERVIEW

2.1 Introduction

In general terms, regulation can be defined as the ‘laying down of rules’.\(^{194}\) In this sense, regulation is related to governmental involvement in market activities, thus influencing the private sector’s actions. It can be argued that for an effective financial market there should be regulatory intervention. There are a variety of reasons for intervention that can take place in the market, mainly to ensure that the market operates fairly and efficiently. The basis for legislative intervention is, therefore, that without it the markets would malfunction. In this view, one major principle of the regulatory system is to combat financial crimes, and especially abusive conduct on the securities market.

The United Kingdom and the United States have both enacted regulatory legislation in response to crisis and scandal.\(^{195}\) A representative instance of this situation has been the UK’s Financial Services and Market Act 2000. FSMA 2000 came into force on 1 December 2001.\(^{196}\) The Sarbanes-Oxley Act of 2002 in the United States developed as a consequence of the large corporate financial scandals, which involved Enron, WorldCom, Global Crossing and Arthur Andersen.\(^{197}\) This chapter aims to establish the various approaches to the subject of market abuse regulation. This chapter will attempt

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\(^{195}\) Ibid.


to provide a general view of regulation of market abuse under three jurisdictions; UAE legal framework, the UK and the Dubai International Financial Centre (DIFC) regime.

2.2 General View of Regulating the Securities Market under the UAE Legal Framework

The UAE Government, like most governments, has stated that the principal aims of its established regulations are to preserve the integrity and accuracy of the securities market in order to protect investors.\textsuperscript{198} For this reason, the UAE enacted Federal Law No. 4 of 2000 concerning the Emirates Securities and Commodities Authority and Market (ESCA law 2000), to establish a public competent authority to regulate financial markets: the Emirates Securities and Commodities Authority (SCA). Article (2) stated that:

\begin{quote}
A public authority with the name of the "Securities & Commodities Authority" shall be established in the State's capital. It shall enjoy juristic personality and financial and administrative independence, and shall have the supervisory and executive powers necessary to perform its functions according to the provisions of this law and the regulations issued in implementation thereof. It shall be adjunct to the Minister...\textsuperscript{199}
\end{quote}

The most important objective of the UAE authorities in establishing SCA was to avoid the ambiguity of the market which accompanied the period of unregulated markets and to fill the vacancy which previously existed. While SCA seems intended to regulate financial services, in fact the capital markets in the UAE are regulated by several entities. There are two separate financial frameworks in the UAE, and each is regulated under a separate regulatory system: the Dubai International Financial Centre (DIFC) as a financial free zone inside the UAE, with its own financial services regulator and an

\textsuperscript{198} Article 3 of ESCA law 2000.
\textsuperscript{199} Article 2 of ESCA law 2000.
independent regulatory system; and the rest of the UAE for regulating financial services of local and federal stage.

There are some difficulties as a result of this arrangement. The major one is the different legislation at federal and local levels, as well as with the DIFC, which can lead to confusion. This raises questions as to the contrast and conflicts between the DIFC and UAE legislations, although that is outside the scope of this chapter. However, it is worth mentioning here that the DIFC laws are applicable to all civil and commercial disputes coming before court as long as they occur in the DIFC area or in connection with the DIFC. The DIFC law takes into account a matter to be heard either within DIFC Courts or in the court of another recognised jurisdiction, depending on the parties’ wish and which is appropriate to them. There is no obligation to apply DIFC laws on their issues unless there is any absence of an agreement to the contrary; DIFC laws will govern the agreement, by default. There is flexibility as there are different circumstances and requirements of companies and institutions, and this ensures that a dispute is heard within the legal framework which is best suited to the parties’ needs. Apart from criminal matters, all criminal cases are governed by the Federal Criminal Law No. 3 of 1987 in the UAE and the UAE courts. Accordingly, if any crime occurs in the DIFC jurisdiction, such as burglary or assault and battery, the Federal Criminal Law should be applied. However, market abuse practices are governed by the DIFC law if they take place within DIFC jurisdiction. This is likewise reflected in the ESCA law 2000 which governs market abuse in the financial markets of the rest of the UAE.

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204 http://www.difc.ae/difc-courts accessed (8-2-2011)
Another difficulty is that of federal financial services. As a matter of fact, several entities regulate the marketplace; The Ministry of Economy (MOE) is responsible for implementing company law, corporate governance standards for issuers, prospectus disclosure requirements and the pricing of initial public offerings. The Central Bank of the UAE (CBU) is responsible for licensing and authorizing banks and non-bank financial intermediaries, including brokers and investment companies.\(^\text{205}\) However, the SCA is responsible in the securities market for licensing intermediaries in conducting financial services on the three stock exchanges, the Abu Dhabi Securities Exchange (ADX) and the Dubai Financial Market (DFM) and the Dubai Gold and Commodities Exchange (DGCE). These stock exchanges act as self-regulatory organizations, giving permission for firms to pursue their activities on their various exchanges, setting listing standards and accepting listings of public company securities. The law delineates the regulatory powers of both the securities market and the SCA. However, one of the difficulties is that the markets have not had specific powers assigned to them by SCA.

To summarise, there is some duplication of the responsibilities of MOE and CBU authorities and SCA. The powers of the authorities engaged in financial services regulation need to be clearly set out, in particular more authority should be given to SCA.\(^\text{206}\)

In theory, a sufficiently developed legal framework should be effective in governing a financial market, and, in general, the UAE does have a sufficiently developed legal framework. However, this framework is inadequate to govern financial markets in the UAE successfully. This is important, as investors tend to depend heavily on safe and consistent information. In relation to the subject of this study, Article 399 of the Federal

\(^{205}\) For more details regarding this issue see: International Monetary Fund (IMF), United Arab Emirates: 2006 Article IV Consultation—Staff Report; Staff Statement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for the United Arab Emirates (Washington, D.C.: International Monetary Fund, 2006).p. 39.

\(^{206}\) Ibid.
Criminal Law No. 3 of 1987 in the UAE, related to fraud, is limited in its ambit. As this is a general anti-fraud provision, it is apparent that fraudulent activities in the marketplace cannot be pursued by such limited provision.

Therefore, it may be argued that the Federal Criminal Law No. 3 of 1987 in the UAE puts limits, or rather categorises what is a fraudulent offence, thus a fraudulent offence does not encompass all cases of persons charged with financial crimes. In fact, it only involves particular types of fraudulent procedure. The Federal Company Law No.8 of 1984 provisions represents an insufficient method of checking up on all the acts of market abuse, particularly in the securities market. Fraud is considered as a type of an element in crime, and fraudulent processes can include such activities as disposing of the money of others and taking a false name or a non-valid identity. These methods of fraud are, as a whole, fraud against an aggrieved party. In exercising these activities, the offender has the very specific aim of obtaining money. While the criminal law has identified methods of fraud, the provisions of the Federal Criminal Law No. 3 of 1987 in the UAE are inadequate in countering all fraudulent techniques.

The Civil Transaction Law in the UAE has been used by courts to seek civil liability in cases of violations of legal rights caused in this context. Despite being enacted in 1985, this law contains general principles that can be consulted with in the event of an absence of regulation in other laws as disputes arise. For example, Articles 185, 186, 187 and 191 can be applied when there are misrepresentations (a type of market abuse in some English Law has three differences of misrepresentation theories, which are categorised as follows: fraudulent misrepresentation, negligent misrepresentation, and innocent or good intention misrepresentation. The three types may accept for requesting nullification of contract, whereas claim of compensation is possible only the first and second one. For more details, see: A.G. Guest, ed., Anson’s Law of Contract, 26th edition, (Oxford: Clarendon Press, 1989), pp. 209-239. See also Ahmed Al-Melhem, ‘Insider Dealing in the Companies Act of Kuwait No. 15 of 1960’, (1998) 13 Arab Law Quarterly 1, pp.3-22.
reasonable views)\(^\text{208}\) in case of absence of securities regulation. These articles provide for instances when one of the parties is misled and/or deceived by another party, thus giving consent to the agreement without full knowledge. One example of this is that if a person remains silent deliberately, then that is equal to misleading the other party, and it should be considered that the party would not have agreed to the contract if he/she had known the reality. However, regulating the securities market through the civil law might introduce difficulties in the control of market relationships when fraud and other kinds of abusive behaviour are involved. The inadequacy of the general legislation to regulate the securities market is due to the special characteristics of such markets, which distinguish it from any other market of goods and services.

We now need to cover the theoretical background relating to the regulation of the market. Many theories have been developed regarding economic regulation. These will be examined in the following section.

2.3 Theories of Regulation of Economic Activities

Economic regulation is a main challenge for governmental intervention in the market. It refers to the governing of economic activities and it involves a variety of principles that may differ vastly in type.\(^\text{209}\) Several theories that deal with economic regulation and governmental intervention have been developed.\(^\text{210}\)

\(^{208}\) Non-disclosure can amount to a misrepresentation. The court in *Al-Nakib Investments (Jersey) Ltd. v. Longcroft*, for example, ‘The claim was based on negligent misrepresentations in a prospectus designed to promote a rights offering directly to existing shareholders... the court found that the company owed no duty of care with respect to the plaintiff’s secondary transactions that had not been directly promoted under the document’. See: Robert E. Kohn, ‘Civil Liability for Primary Securities Distributions in the United States and the United Kingdom’, (Autumn 1992) 55 *Law and Contemporary Problems, International Regulatory Competition and the Securities Laws* 4, pp. 399-424.

However, there are two theories which are the most significant: the public interest, and the public choice, theories. In order to identify and understand the system of regulation, the section below discusses briefly these theories.

(a) The Public interest theory

The Public interest theory, which is associated with Arthur Pigou,\(^{211}\) alleges that government interference depends upon public demand for regulation.\(^{212}\) Moreover, its purpose is for ‘the correction of inefficient or inequitable market practices.’\(^{213}\) The major criticisms of this theory are: first that it overstates the issue of market failure, and second that it does not include the factor of competition in dealing with the problem.\(^{214}\) However, Avgouleas alleges that government intervention comes from ‘a belief that the market is unable to regulate itself in a given field of social or economic activity’.\(^{215}\) The central feature of this theory is that it assigns collective aims to the architects of regulation. Opinions on a definition of the `public interest' differ. Amongst other factors, it depends so on the specific qualities of the activity subjected to regulation and the standards of the particular society where the regulation takes place.\(^{216}\) It is possible that this regulation results from the pressure of groups that will not necessarily benefit from it, but that ‘merely desire the outcome’;\(^{217}\) i.e. the outcome of benefiting the public.

\(^{211}\) Ibid.
\(^{212}\) Avgouleas, p. 160.
\(^{214}\) Stephen Weatherill, p. 273.
\(^{215}\) Avgouleas, p. 161.
\(^{216}\) Ibid.
\(^{217}\) Ibid.
(b) The Public choice theory

The Public choice theory of regulation reflects an inherent preference for market outcomes over regulatory procedures. Regulation, then, is not necessarily seen as for the public benefit. This view is reinforced by the fact that those who advocate the public choice theory frequently argue for more reliance on markets and less on governments. Controlling the power of the regulators would, they argue, improve social welfare, since the general interest would prevail over that of specific groups. This theory argues that although the results of the free market have disadvantages, they are preferable to the problems which regulation would bring. Stigler asserts that ‘regulation is acquired by the industry and is designed and operated primarily for its benefit’. Therefore, the government does not act for society’s benefit and the government is seen as rather ‘less benign and regulation as socially inefficient’. This theory suggests, then, that the regulatory authorities do not always act to benefit society. Rather, they act in order to benefit themselves. The heads of industry may also be complicit in this, seeking arrangements which will give them the most profit. This can possibly lead to unfair and unwise practices. One argument for opposing regulation strategies is that the creation of a strong relationship between regulators and the industry will create empathy for those that have committed a crime. The consequence may be that carelessness of enforcement of the regulations may develop.

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218 The public choice theory comprises a number of names such as Chicago theory of regulation, Economic theory regulation or Theory of capture. See eg: Baldwin and Cave, Understanding Regulation, p.22.
222 Ibid.
The two theories of regulation outlined here, the Public interest and Public choice theories, are the most popular ones that have been used by theorists in order to explain regulation. In this regard, defining the theories of regulation helps to create a greater understanding of the regulatory problems that exist, and an understanding of the arguments for and against regulation. It also facilitates in the development of a wide-ranging discourse on the subject of regulation.  

The public interest theory would seem to be an appropriate theory to regulate financial markets. This is the basis of UAE legislative policy. The UAE government interference aims for the protection of investors against market abuse. Therefore, regulation is assumed to be justified for the public interest because the unregulated markets will fail to protect investors and markets as well as the correction of market failures, unless the government intervenes to produce a legislative environment safe for the public interest.

A significant example of rationales put forward for the adoption of regulatory principles comes from the International Organisation of Securities Commissions (IOSCO). IOSCO is one of the regulators of international financial markets, and has developed 30 principles of regulation. These are guided by three main objectives which are related to securities regulation and supervision: ‘investor protection; market fairness, efficiency and transparency; and the limitation of systemic risk’. The rationale for regulating the financial market is in large part to provide investor confidence. It also ensures that suitable levels of protection are in place in order to guarantee the effectiveness and efficiency of the market.

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223 Avgouleas, pp. 164, 172.
224 Published in September 1998 as ‘Objectives and Principles of Securities Regulation’.
2.4 More Protection gives more Investor Confidence

The regulation of financial markets is necessary to ensure that markets remain stable and secure and to prevent a collapse of the existing financial and economic systems. Specific rules and regulations will, as Avgouleas maintains, ‘directly prohibit market abuse and maintain investor confidence’.  

Stability is a crucial issue in generating confidence in a market system. If investors see the market as unstable and dishonest, they will not invest their savings in the marketplace. When the market seems to be managed well and regulated, then investors are more likely to put their money in it. In this sense, the confidence of investors in the integrity of the market can be maintained by the use of government regulation and intervention. The regulatory authorities can especially protect the right of all investors to receive information in an equal manner. Thus, more protection leads to the maintenance of confidence in the market.

The experience here of the United Kingdom is important. In the United Kingdom, the FSMA has produced market abuse rules which could be applied ‘to member of the public as well as regulated individuals’. The FSMA has four regulatory objectives. They are: to maintain the confidence in the financial markets; to create public awareness; to decrease financial crime; and to protect investors. As the UK Government (HM Treasury) has pointed out, ‘We believe that it is essential to have a comprehensive market abuse regime to enable the Financial Services Authority (FSA)  

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227 The Financial Services and Markets Act 2000 (FSMA) put into force on the 1 December 2001, which eliminates the Self-Regulating Organisations (SRO). For more details see section 1.2 (Chapter One of this thesis). See also http://sharingpensions.com/fsma.htm.
to meet its regulatory objectives, in particular maintaining confidence in the UK’s financial system and reducing financial crime.\(^{229}\) Accordingly, the FSA has stated that:

> where market users rely on timely dissemination of relevant information (as in this case on Alternative Investment Market), those who possess relevant information ahead of its general dissemination should refrain from acting on that information. Confidence in such markets depends, in part, on market users’ confidence that they can deal with each other on the basis that they have equal, simultaneous access to information that is required to be disclosed.\(^{230}\)

Therefore, the aims of the FSMA 2000 are to promote fairness and efficiency in the market.\(^{231}\) The UAE has similar aims to those indicated by the FSMA 2000, as the government has endeavoured to build up legislation to protect the securities market.\(^{232}\) Article 3 of ESCA law 2000 states that SCA has the aim to make the investor feel protected through secure and reliable transactions, and thus through this protection, ensures that there will be a fair and normal supply and demand in relation to the fixing of prices. The SCA also educates and offers advice that will provide the investor with knowledge and understanding of his/her investments. It endeavours to maintain a stable economy and financial markets. In order the SCA regulator can achieve its goals, it must create a balance between promoting the opportunities for fair profit and limiting the opportunities for inequitable profit.

However, the question which follows from this is: has the recent regulation in UAE markets been sufficient to compensate for the shortcomings of the past? This applies especially to areas where regulation has long been considered inadequate, for instance,
the absence of laws on insider dealing, disclosure requirements concerning share ownership or business operations, and limited investor protection.233

2.5 Promoting the Effectiveness of Regulation and the Efficiency of the Market

Efficiency of the market has been a concern of those that have studied and developed regulatory practices. In terms of the literature available, most is not focused specifically on the topic of efficiency alone, but rather on the many different aspects of regulation. Nevertheless, by understanding the function that efficiency has in the market, one can understand just how essential it is. This applies not only to deterring fraud, but also to keeping prices low and assisting the securities industry as a whole to sell at high prices.234

While a main objective of regulation is the control of abusive behaviour, it is not the only one. Abusive behaviour can undermine confidence and damage integrity, for example with regard to insider information, but other motivations exist including regulation to deal with inefficiency and market failures. In this respect, the correct level of regulation in the securities market could increase market efficiency by imposing effective rules on members of the market to disclose important information and make it available to the market participants. The proper implementation of regulation reflects the integrity and strength of the market. This would be an incentive for markets to be efficient. Therefore, an efficient market exists when ‘it fully and correctly reflects all relevant information in determining security prices’.235 The efficient market should adjust quickly to all new information and hopefully would not be affected negatively by...
any information. An efficient market is one in which one investor does not have an advantage over another, and the values of the market are close to their estimated real value. As Beck-Dudley and Stephens state, ‘this definition implies that an investor's expected return will be consistent with the risk borne and that the prices of traded securities are accurate signals for capital allocation’.237

Lachlan Burn argues that ‘the regime should logically be extended beyond company reports to the full range of disclosures required of companies that are admitted to regulated markets’. 238 This would not be achieved without effective regulation, that is an imposed obligation on companies and other issuers to disclose all relevant information. Market prices should reflect all information that is available to the public and all information that is known only to the company and market specialists. However, it is not always possible to regulate the market in this manner, and very often market insiders will benefit from inside information. For this reason, the securities regulators should be concerned with the effect of information on the market, and they should aim to ensure the availability of information to the public.

In the UAE, one of the most significant studies of the efficiency of the UAE securities market was that by Jay Squalli.239 Squalli tested the efficiency of the DFM and ADX between 2000 and 2005 using daily indices. He believed that the markets had created a highly volatile market and a potential bubble.240 In order to cope with the open market and international standards, he showed, the UAE needs to develop a highly structured

and efficient financial system. Squalli suggested that the authorities had an important role to play in regulating the market, in order to keep it secure and away from the harm posed by such activities as insider dealing and the overpricing of stock.\textsuperscript{241}

A significant observation made concerning the above discussion is that there is an important link between the regulatory obligation to disclose information to the market and market efficiency. In order to improve the UAE’s market efficiency, the government impose transparency in financial reporting, develop accountability measures, and create and enforce financial standards that are equal to international standards.\textsuperscript{242}

2.6 Mandatory disclosure and Transparency under UAE Regulations

It has been established that disclosure is the core tool which ensures market transparency, and timely and full market transparency prevents the practice of market abuse and sustains market integrity. It has also been shown that there are deficiencies in UAE practice in this regard. It can be feared that both confidence in the market and investment in local projects will suffer if investors are frightened off by a lack of transparency and ignoring of the rules by listed companies. Without disclosure and transparency, the developing UAE markets have relied heavily on rumour.\textsuperscript{243} Because of the lack of comprehensive information and market inefficiency there has been a high risk factor and consequent investor losses. Action by the authorities is required in such situations to ensure a timely disclosure system is firmly applied. The focus of the disclosure system should be clearly determined: that of releasing all material


\textsuperscript{242} Ibid.

\textsuperscript{243} Tamim Al Jarkass, president of CFA Emirates, See: Arif Sharif , ’Call for better corporate disclosure rings in UAE’, gulfnews. Published August 08, 2006. Available at http://archive.gulfnews.com/articles/06/08/08/10058389.html Accessed (25/1/2009)
information into the market to enable investors to make informed investment decisions. Experience has shown that investors will direct their investments to markets which have transparency and a compulsory disclosure system. If insiders are not deterred from using their positions to conceal and monopolise material non-public information, there will not be a transparent market benefiting the economy of the country. The SCA occupies a central position here as the legitimate enforcer of rules relating to insider dealing and timely disclosure. The SCA authority is by law required to take the necessary steps to ensure investors’ rights of equal access to information. It is also obliged to deter insider dealing and to raise the level of transparency closer to international standards. In this regard the SCA should have introduced a clear policy to enforce the regulations.  

However, the fact is that ESCA law 2000 sustained principles which are an obligation on the securities market. For instance, the market’s board should present reports and information to SCA and make the necessary press releases in an attempt to ensure transparency of information and disclosure.  

Furthermore, the law requires companies whose securities have been listed to publish any descriptive information when it is demanded by investors and the market, particularly if such information relates to their circumstances and activities. Without doubt, this secures the integrity of the market and the confidence of investors.  

Although securities markets are commonly open to a variety of abuses, market integrity regulations have long tackled issues of market abuse such as fraud, manipulation and insider dealing.

244 See Albelooshi, pp. 61-2.
245 Article 22 (4) of the ESC law 2000.
246 Article 35 of the ESCA law 2000.
Disclosure and transparency are two terms which have come into frequent use in the capital markets. These terms are extremely important, a view which is confirmed by all of the legislation governing the capital markets which must be adhered to. The complexities of securities procedures and practices are well known thus, ‘the infamous complexities of securities practice arise from defining the details of disclosure and ascertaining which transactions are covered by the disclosure requirements’.  

The following two sub-sections will discuss mandatory disclosure and transparency for listed companies.

2.6.1 Mandatory Disclosure for listed companies

Mandatory disclosure rules are considered mechanisms of securities regulation in order to decrease the information asymmetries in capital markets and prevent insider dealing and market manipulation. This is achieved by compliance with the regulation that obliges the publication and disclosure of information to ensure transparency from companies who want to list their securities in the market.

In the UAE two rules regulate the procedures whereby companies may list securities in the securities markets. Under the first, the UAE Federal Cabinet has promulgated Resolution No. 12 of 2000 which concerns the listing of securities and commodities. The second is the decision of the Chairman of the Board of Directors of the SCA, Decision No. 3 of 2000 concerning of Regulations as to Disclosure and Transparency (SCA Decision No 3 of 2000). The aforementioned decision of the SCA Board repeated the UAE Federal Cabinet Resolution concerning disclosure and transparency. Article 29 of SCA Decision No 3 of 2000 states terms for listed companies, and this is repeated

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in Article 7 of Federal Cabinet Resolutions No. 12 of 2000. Obviously, the Cabinet Resolution would accomplish the objectives of Article 7 without the need to replicate the same provision issued by the Board of the SCA. However, the SCA is given the authority to issue and propose the regulations so that the investors will be reassured. The extra requirements and regulations will offer ‘protection [to] investors by establishing the basis for sound and just dealings between the various investors’.

Companies that want to list their securities must meet the specific criteria of the disclosure requirement before they may be listed. The disclosure regulations contain a number of provisions to which a company must comply. The regulator divides disclosure into two types: pre-listing disclosure and post-listing disclosure.

(1) Pre-listing disclosure

This section discusses pre-listing disclosure and makes use of four main articles: Articles 28 – 31 of SCA Decision No 3 of 2000. Article 28 deals with the prior approval of securities by SCA, without which it may be not listed in the market. The trade of securities in the latter case should take place through a broker registered in the markets. Article 29 provides the conditions for listing securities. It sets forth seven items and areas of information including a financial statement, in which registering companies are required to disclose the particular information and statements that reflect the true position of the company. Articles 30 and 31 explain the issue of liability of members of the board of directors for the completeness and accuracy of all information submitted, and dates and methods of disclosure by the two daily newspapers of wide circulation published in the Arabic language in the UAE.

249 Article 4 of ESCA law 2000.
250 Article 3 of ESCA law 2000.
251 See; SCA Decision No. 3 of 2000 regarding the Regulations as to Disclosure and Transparency comprises 40 Articles that regulate the disclosure whether as it relates to the ESCA; market; Entities and Companies.
Article 29 of the SCA Decision No 3 of 2000 embraces important items on the subject of pre-disclosure. The regulator desires companies to comply with extensive disclosure obligations. These include: a statement from the company regarding the significant events it has experienced; statements from each member of the board of directors and executive managers as to how many and in what shares they and close relatives own; and the names of those whose holdings (in addition to those of their minor children) amount to 5% or more of the shares of the company applying for listing. The information is of great value in understanding the position of the company. Arguably these obligations prevent market manipulation such as squeeze and corner practices. The chapter on market manipulation below will discuss such practices.

Article 29 of SCA Decision No 3 of 2000 requires listed companies to provide particular information as a reflection of the true position of the company. The Article is also statement of the significant events that the company has experienced from its incorporation up to the date of submitting the application for listing: Are there enough items to provide for disclosure regarding its true position? Also, what does a ‘significant event’ mean? Is it necessary that such an event should affect its business activities or financial position to be considered ‘significant’?

With regard to the expression ‘significant event’, the regulations do not clarify this term or give examples, while Article 33 defines the term ‘significant developments’\(^{252}\), which is the obligation on a company to notify SCA when it faces developments. The definition has been augmented by giving examples of such developments. However, the expression ‘significant event’ without any explanation from SCA shows the shortcomings of this article.

\(^{252}\) Discussion regarding significant development in terms of company will be under post-listing disclosure in following section.
Responsibility for the truth and accuracy of the statement made in a registration statement lies with members of the board of directors of any listed company. Even if SCA examines the statement, it is not necessarily enough to prove its truth and accuracy. In other words, SCA’s scrutiny of these statements does not guarantee that the statements are true and accurate, nor does it absolve the company from legal responsibility.253

The continuing obligations regulation imposes an obligation on listed public companies whose securities are approved for listing to disclose publicly annual financial statements. This should be done in print in two daily Arabic language newspapers in the country. The regulator considers that an annual financial statement is essential for investors to know about developments in the company and whether they are positive or negative. On the basis of this information, an investor may decide what to invest in, or to buy or sell his company shares. The statement should embrace an important analysis, a variety of financial data about the company’s annual and interim financial statements, and a summary of the Board of Directors' report submitted for the purposes of listing.254

(2) Post-listing Disclosure

According to the market regulation regime mentioned above, companies or entities whose securities have been listed in the market are compelled to perform fundamental duties for the purposes of disclosure. Articles 32 - 36 are designed to be adequate for the disclosure obligation regime. There are three underlying principles of obligation of disclosure embraced in the three articles in the post-listing disclosure rules. The three Articles are:

253 Article 30 of the decision the SCA No. 3 of 2000.
254 Article 31 of the decision the SCA No. 3 of 2000.
Article 33:
The company or entity whose securities have been listed in the Market shall notify the Authority and the management of the Market of any significant developments affecting the prices of such securities upon learning of the same, such as catastrophes, fires, mergers, the issue of new securities, the discontinuance of a production line, voluntary liquidation or lawsuits filed by or against the company affecting its financial position.
The board of directors of the Market shall have the right to publish any statement in respect of such developments in the local press and other media it deems appropriate.

Article 34:
A company or entity whose securities have been listed in the Market shall, when so requested, publish any explanatory information which relates to its circumstances and activities and is such as to secure the integrity of transactions and the confidence of investors.
If any change occurs in a significant matter contained in a previously published press announcement, such entity or company shall issue a press announcement reflecting the actual situation after the change, the subsequent press announcement to be issued in the same newspaper or newspapers as contained the earlier announcement.

and Article 36:
Entities and companies whose securities are listed in the Market shall notify and provide the Authority and the Market of and with the following:
1. All information and statistics requested by the Authority or the Market.
2. Transactions effected in such securities outside the Market, before entering them in the register of shares.
3. The number of shares owned by members of the company's board of directors, within fifteen (15) days as from their assumption of membership and also at the end of each financial year, and all trades effected by members of the company's board of directors and its executive management.
4. Details of the sale or purchase of major assets which affect the position of the company.
5. The documents relating to amendments introduced into the company's articles of association, as soon as approved.
6. Any change relating to the company's management structure at the level of the board of directors and the executive management.
7. Entities or companies whose securities are listed on the Market shall notify and provide to both the Authority and the Market short-form final accounts (preliminary financial statements which are unaudited and unreviewed) within forty-five days from the end of the financial year, signed by the board of directors or the person authorised to sign on its behalf.
b) Entities or companies whose securities are listed on the Market are required to notify and provide to both the Authority and the Market the following reports:

1. Interim financial reports (quarterly – half-yearly) which are reviewed by the external auditor of the company within forty-five days from the end of the specified time period, signed by the board of directors or the person authorised to sign on its behalf.

2. Annual financial reports which are audited by the external auditor of the company, within ninety days from the end of the financial year, signed by the board of directors or the person authorised to sign on its behalf.

8. Copies of all printed materials destined for the company's shareholders, as soon as issued.

9. The resolution of the board of directors of the company as to the distribution of profits to shareholders or the announcing of profits and losses, in order to obtain the approval of the management of the Market for the publication thereof.

10. The names of those who own, or whose holding together with their minor children reaches, 5% or more of the company's shares, this obligation also to be complied with upon each occasion when the holding reaches 1% of the company's shares over and above the 5%.

These articles include three principles. A brief analysis follows of the obligations imposed on companies and entities under these three principles:

- Informing SCA and the market management of significant developments.
- Disseminating any explanatory information which relates to its circumstances and activities.
- Disclosing of information and data on a regular basis.

(a) Significant developments

The regulator obliges all issuers whose securities have been listed in the market to inform SCA and the management of the market about ‘any significant developments affecting the prices of such securities’. This means that the significant developments must affect the prices of securities, otherwise there is no obligation on the issuer to disclose this information. However, it is not clear whether the ‘affecting’ is likely or

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255 Article 33 of the SCA Decision No. 3 of 2000.
definite\textsuperscript{256}. Without a clear definition from SCA, it is certainly an ambiguous proposition. On the other hand, the examples given of significant developments are a positive aspect of this article. The examples cited are ‘...such as catastrophes, fires, mergers, the issue of new securities, the discontinuance of a production line, voluntary liquidation or lawsuits filed by or against the company affecting its financial position’.

On the other hand, determining the time is essential for disclosure of information: when should the issuer make the disclosure? Article 17 of SCA Decision No. 3 of 2000 does not determine the time, but includes the expression ‘upon learning of the same’. For not determining the actual time in which disclosure is obligatory was a problem. However, this article has been amended according to SCA Decision No. (5\textsuperscript{R}) of 2008. The amendment gave ADX and DFM the responsibility to monitor ‘listed companies' obligations to make disclosure of significant matters and information and financial statements, the publication of the same, and the timing of such publication’. Timely disclosure of inside information is important for preventing exploitation of sensitive information. In other words, it is to prevent insider dealing taking place. If a company needs time to think and evaluate the significant event or information before disclosing it to the public, there is then a period of time for that. Should obligation for disclosure be immediate? The SCA gave this undertaking to the Markets to monitor listed companies.

\textit{(b) Disseminating any explanatory information}

If any circumstances or activities that are ambiguous are related to the issuer’s operation, there is responsibility on the shoulders of the issuer to publish explanatory information when required. However, the UAE market is deeply affected by rumours as

\textsuperscript{256} In fact that this expression of \textit{likely} is used for inside information under the CJA s 56(1), when it is having the greatest impact on share prices as it stated ‘...(d) if it were made public it would be likely to have a significant effect on the price of any securities’. Thus, in contrast of understanding, the \textit{definite} is contrary of \textit{likely}.
are many in the emergent markets. As Al Jarkass points out,\textsuperscript{257} ‘...investors in the UAE generally rely on rumours rather than on educated investment advice, which cause the wild gyrations in local stock markets....’. If there is any rumour disseminated in the securities marketplace in relation to a company’s activities or circumstances, the company should formally be obliged to respond to these rumours by giving at least explanatory details in the marketplace and to investors. In practice this may not happen.

For example, in May 2005, Amlak Finance and Real Estate Company’s shares rose on rumours about it approaching a rights issue. Even though the company formally denied that it had plans to expand its capital, a week afterwards the market rumours were proved true by an official announcement. Huge sums of money were made by those who pursued the market rumours and who possessed the advantageous information.

Neither SCA nor the company took action against the source of the information. The Company denied the rumours at first, then went ahead with the issue.\textsuperscript{258}

The SCA should in principle have taken definite action on this issue by obliging companies to disclose proper information which is relevant to any rumours which occur. Dissemination of false information or statements as rumours is a criminal offence under ESCA law 2000.\textsuperscript{259} An enforced free flow of information through disclosure and transparency tools would prevent such rumours, which amounts to market abuse.

\textit{(c) Disclosure of information and data on a regular basis}

As has been mentioned above, the disclosure requirement which is based upon Article 36 sets forth ten items and areas in terms of the listed companies. These items remain a central principle of the listing regimes for issuers after they have been admitted to


\textsuperscript{259} Article 36 of ESCA law 2000.
listing. The regulator clearly believes that continuing obligation to disclosure is indispensable for both investors and the market. It also helps SCA in the performance of its function of supervising dealings in the securities market.

There are other particular disclosure obligations under Article 36 (9) which require issuers to notify SCA and the market about any decision by the Board of Directors in terms of the distribution of profits, shareholders or the announcement of profits and losses. This however is not always done. For instance, Emaar Company Properties took possession of 40% of total trading volume in the securities markets and increased this portion by transaction to more than 45% during 2007. Emaar disclosed the value of its profits (which amounted to 6.37 billion dirhams) but did not disclose the distribution of profits to its shareholders. The proposed distribution of profits to shareholders is considered as fundamental and essential for investors. The board of Directors was supposed to disclose the information without reasonable delay. This produced an environment of rumours which were exploited by some speculators to manipulate the emotions of investors in the markets, and thus Emaar Company Properties securities prices fluctuated during February and at the beginning of March 2007. The practice broke SCA’s rule regarding ‘the resolution of the board of directors of the company as to the distribution of profits to shareholders or the announcing of profits and losses, in order to obtain the approval of the management of the Market for the publication thereof’.261

Disclosure obligations may be classified as periodic disclosure and continuous disclosure. Periodic disclosure is a requirement relating to the company’s financial

261 Article 36/9 of SCA Decision No. 3 of 2000.
position, as financial statements are supposed to be disseminated on a regular basis.\textsuperscript{262} Article 36 (7) of SCA Decision 3 of 2000 requires of a business, interim financial reports (quarterly – half-yearly) within forty-five days from the end of the specified time period and annual financial reports within ninety days from the end of the financial year.

Continuous disclosure requires certain information to be disclosed to the public on each occasion it arises. Companies that are listed are obligated to disclose information that can have an effect on share prices, including information that is not usually made public, such as ‘any significant developments affecting the prices’\textsuperscript{263} of securities. Disclosure allows investors to make completely informed decisions, and also stops insider dealers from taking advantage of significant developments affecting the company’s position in the case if delay in disclose of information. It also ensures that there is a proper market in the relevant securities.\textsuperscript{264}

\textit{2.6.2 Transparency of listed companies}

Transparency may be defined as the degree to which information about trading (both pre-trade and post-trade information) is made publicly available on a real-time basis. Pre-trade information concerns the posting of firm bids and offers in both quote and order-driven markets, as a means to enable investors to know with some degree of certainty whether and at what prices they can deal. Post-trade information is related to the prices and the volume of all individual transactions actually concluded.\textsuperscript{265}

\begin{flushleft}
\footnotesize
\textsuperscript{263} Article 33 of the SCA Decision No 3 of 2000
\textsuperscript{264} MacNeil,p. 233.
\textsuperscript{265} IOSCO, Objectives and Principles of Securities Regulation (May 2003).
\end{flushleft}
Market transparency refers to the openness of information that is available about a market, such as the pricing and availability of products within a market, so that consumers can make an informed choice. Market transparency should prevent market abuse and should help in the creation of a free market, that is one that is free of corruption and deceitfulness. It has been argued that an increase in the amount of market transparency will increase the quality of the market.\textsuperscript{266}

Market transparency then has become an important issue in terms of the regulation and structure of the market.\textsuperscript{267} Ariadna Dumitrescu describes transparency as ‘a central attribute of financial markets’. In particular, transparency ‘represents the degree to which information regarding quotations for securities, the prices of transactions, the volume of those transactions and source of order flow is made publicly available’.\textsuperscript{268}

Thus, the dilemma is how much information is actually available to be observed. Does the market participant know everything that it is possible to know about the product? For example, the pricing, the size of the product and the buyer of a product, are all vital information for market participants. Additionally, there is the question of who specifically is going to observe the information, and if this person is capable of making fair judgments. It is significant if the information can only be viewed by price-setting agents or if others such as those on the exchange floor, traders and potential traders can also view the information.\textsuperscript{269}

\textsuperscript{266} Laura Tuttle, ‘\textit{Can Electronic Markets be too Transparent}’? , Working paper submitted in Securities Market & Bourses Conference: Prospects and Challenges (The 15\textsuperscript{th} Annual Conference) which took place in (6-8 March 2007) Dubai Chamber of commerce and Industry, Published by UAE university, p. 91.
Markets fulfil this function by *inter alia* reflecting securities prices on all available information, and hence most securities appear to be fairly valued and in equilibrium. In this line of reasoning, the Securities and Investment Board (SIB) in the UK have raised the issue that in some instances transparency should not be allowed, in order to ensure the flow and liquidity of the markets.271

It is necessary, then, to know the extent to which transparency actually exists – since the markets and strategies are based upon the transparency of the market.272 In the UAE SCA has issued standard rules for disclosure and transparency in order to obtain a high level of transparency. As Rashid Al Baloushi273 states, SCA standard rules ‘...will improve transparency through extended disclosure requirements and will make the appointment of audit committees mandatory’.274 The Authority itself states that ‘The board of directors of the Market [ADX and DFM] shall issue the press notices necessary to ensure transparency of information and disclosure.’275 However, Mohammed Alqoseen276 has pointed out that although ‘...the levels of disclosure and transparency in the UAE in general are good, there is a need for more transparency’.277 The financial crisis has been in part blamed on the directors of the financial institutions who have shown to be not only deficient in terms of responsibility, but also deficient in transparency and providing financial reports.278

270 From October of 1997 Securities and Investment Board (SIB) renamed to the Financial Services Authority (FSA).
273 Rashid Al Baloushi, acting director-general of ADSM.
275 Article 18 of the SCA Decision No. 3 of 2000.
276 Chief Executive Officer of Atlas Financial Services.
277 *Al Itihad Newspaper*, 30 March, 2008. ‘Mediators consider that deepen transparency and disclosure is condition of the transition to advanced market’.
The establishment of SCA and the rules it brought out have not succeeded in improving market transparency to any great extent. There has been no real break from a past of corruption in public corporations, where material information was held and concealed (rather than disclosed) by directors and executives and those connected to them.  

2.7 Market Abuse Regulations under Three Jurisdictions: the UK, The DIFC and the UAE

Regulation of market abuse differs to some extent in the above three jurisdictions. This section will mainly focus on the legal and regulatory framework for dealing with market abuse that has developed in the UK and the DIFC. The intent is to provide a comprehensive analysis of market abuse and to define the UAE regulations which were created to combat illegal practices in the securities market. A comparison will be made whenever necessary with the UK’s FSMA 2000 and the DIFC law. The following looks at the reform of certain regulatory laws in these areas.

2.7.1 Definition of Market Abuse

Edward J. Swan has noted three types of behaviour that are considered to be an abuse of the market: misuse of information; giving false or misleading information; and distortion of the market. Misuse of information refers to information that may be available when investments are decided upon. Giving false or misleading information can involve the public or investors being misled over the price of the investment and the supply and demand of the product. Distortion of the market involves behaviour that leads to misrepresentation of it in some way. Avgouleas defines these illegal practices

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279 Albelooshi, pp. 61-2.
as follows: ‘market abuse predominantly takes the form of abuse of inside information (insider dealing) and market manipulation’.  

One of the first and most infamous cases of market abuses occurred in 1720 in England, leading to what was known as the South Sea Bubble. This was the first of many such incidents of abuse that has occurred in financial markets around the world. In the UAE, the financial crisis of the summer of 1998 reduced investor confidence and market efficiency. When securities were priced beyond their value, severe rumours created a bubble. Informal statistics indicate that the market price of traded securities was around 51 billion Dirhams at the beginning of 1998. The market price soared to 182 billion Dirhams by August 1998 and then declined sharply to 161 billion Dirhams in September 1998.

The creation of a regulatory system discourages abuse of the market. Those who participate in the market have a duty to act within the laws for the benefit of all concerned, most especially for investors and other participants. Swan asserts that, ‘…financial market participants have an overriding duty to ensure that the markets are run efficiently and fairly…not only for their own benefit, but for the benefit of market participants and investors generally’.

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281 Avgouleas, p. 4.
2.7.2 Market abuse under the UK jurisdiction

UK regulation against insider dealing as a form of market abuse comes under a dual regime\(^\text{286}\) which is based upon FSMA 2000 and Part V of the Criminal Justice Act 1993.\(^\text{287}\) The definition of insider dealing may be found under the CJA 1993 and FSMA 2000.\(^\text{288}\) In March 1994, the CJA 1993 came into force, having replaced the original Company Securities Act 1985. The CJA 1993 was in fact an ‘extension of the basis of liability for insider dealing offence’.\(^\text{289}\) Indeed, the purpose of a market abuse regime is to work in conjunction with criminal laws that already exist.\(^\text{290}\) In the light of this, the dual regime is discussed in the following sections.

(a) Companies Securities (Insider Dealing) Act 1985

The Companies Act came into existence after decades of attempts by the UK government to make insider trading a criminal offence. In the 1970s and 1980s, parliamentary efforts to enact legislation against insider dealing eventually led to the establishment of the Companies Act of 1985. Later provisions were added in 1985, and it became the Companies Securities (Insider Dealing) Act 1985. While the 1985 Act was important, it was limited in scope. It only allowed for the criminal liability of individuals who had used inside information. As a matter of fact, notwithstanding that insider dealing had been an offence since 1980, no convictions took place under the 1985 Act’s provisions until the late 1980s. However, in 1986 more provisions were added to the Financial Services Act to give the government further power to enforce the

\(^{286}\) In general theme See: Avgoulaes, p. 307.
\(^{288}\) There is no conflict between them, the
As a result, the provisions under both the Company Securities (Insider Dealing) Act 1985 and the Financial Services Act 1986 were repealed.\textsuperscript{292}

The Companies Securities (Insider Dealing) Act 1985 did prevent insider dealing, in that those with inside information were required to wait until the information was in the market before making use of it.\textsuperscript{293} The Companies Securities (Insider Dealing) Act 1985 was later superseded by the Criminal Justice Act 1993, and represented an extension of the basis of liability for the insider dealing offence. The CJA 1993 contains a wider definition of ‘securities’ and ‘insider’ than the 1985 Act and the nature of the inside information necessary to impose liability has been altered.\textsuperscript{294} Barry A K Rider argues that, ‘there are now only three distinct forms of offences listed: dealing while in possession of inside information; encouraging another to deal in such circumstances; and disclosing information out with the proper performance of employment or professional duties’.\textsuperscript{295} It can be argued that in order for these offences to be prosecuted there must be proof that an ‘insider’ had possession of insider information. Thus, the 1993 Act not only offers a larger interpretation of insider dealing than previous legislation,\textsuperscript{296} but also provides the authorities with the continued ability to enforce regulatory laws.\textsuperscript{297}

\begin{itemize}
\item \textsuperscript{293} Barry A K Rider, \textit{Market Abuse and Insider Dealing} (Haywards Heath, UK: Tottel Publishing Ltd, 2007), p. 4.
\item \textsuperscript{295} The EC Directive on Insider Dealing has also been given this interpretation. See Klaus J Hopt, ‘The European Insider Dealing Directive’, (1990) \textit{27 Common Market Law Reports} 51. The recital to the Directive states that investors should be ‘placed on equal footing’.
\item \textsuperscript{296} Rider, \textit{Market Abuse and Insider Dealing}, p. 4.
\end{itemize}
(b) Criminal Justice Act 1993 (CJA 1993)

Part V of the CJA 1993 establishes three types of prohibited behaviour that is classified as insider dealing: the act of dealing on the basis of inside information; the act of encouraging another person to be involved in the price affected securities on the basis of insider information; and the act of knowingly disclosing insider information to another.

Despite the regulations that exist, it is recognised that insider dealing can be hard to define. While there is often a lot of confidential information available in a company, as Kern Alexander notes, inside information is ‘a substantial amount of information [which] will be generated within a company and be available to its directors, employees, and advisers. Much of this information will be confidential, and may have some impact on share prices’. Alexander also states that during the UK parliamentary debate on this law, the ministers admitted their concern was over information about ‘dramatic events and major occurrences that would transform a company’s prospects’.

On the other hand, in order to prove an offence of insider dealing the prosecution must show that the offence has occurred beyond a reasonable doubt. If not, then the accused

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298 Section 52 of the CJA 1993 provides that offence as follow:
(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.
(2) An individual who has information as an insider is also guilty of insider dealing if-
(a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or
(b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

299 CJA 1993, Part V, s.52(1) and (2).


302 Ibid.
will be acquitted.\textsuperscript{303} Furthermore, while the CJA 1993 allows for criminal liability in such cases of insider dealing, there is no civil remedy that the company or careless investors can appeal to.\textsuperscript{304} The high standards required by criminal prosecutions have created a burdensome procedure, to the extent that it is difficult to use it as a successful regulatory implement. As the Economic Secretary of a Standing Committee points out, ‘there is a gap in the protections. The criminal law covers all market participants, but only a narrow range of serious criminal offences. The regulatory regime is capable of dealing with a wider range of damaging behaviours, but applies only to the regulated community’.\textsuperscript{305}

The case of \textit{Mackie v HM Advocate} supports this argument.\textsuperscript{306} Mr Mackie was a financial analyst who had a meeting with the chairman of a listed company. During the meeting, he was notified that in a short time the company would be giving a caution concerning the reduced profits in the Securities Market. Because of considerable sales in the market the share price fell significantly before any announcement of a profits warning was made. It was alleged that Mr. Mackie gave advice to his customers on the basis of inside information. He was accused of counselling or procuring other persons to deal in contravention of the Company Securities (Insider Dealing) Act 1985. However, because the case was subject to a criminal prosecution which required standards of proof, the case had to prove beyond a reasonable doubt what was said in the meeting. The case failed on appeal because there was insufficient evidence what Mr Mackie was

\textsuperscript{303} MacNeil, p. 301.  
\textsuperscript{305} Economic Secretary in Standing Committee A, November 2, 1999, c.652. The ability of an outsider to undermine a market was demonstrated by the effect Sumitomo Bank had on the London Metal Exchange even though it was not a member of that exchange, see Lord Bagri (Hansard, HL Vol.610, col.58 (February 21, 2000)).  
\textsuperscript{306} \textit{Mackie (Thorold) v HM Advocate}. High Court of Justice, 16 February 1994. Mr Mackie's case took place in March 1993 in the High Court of Edinburgh. Although this prosecution was adjudicated under the Companies Securities (Insider Dealing) Act 1985, it is example for supporting the argument that it is difficult to prove the elements of insider dealing as criminal offence and establish all material facts beyond a reasonable doubt.
told by the Chairman at the meeting or to prove that he disclosed that information to others.

The high standards of proof required by criminal prosecutions created a burdensome procedure to prove insider dealing cases. This was the main cause for the changes that were introduced in FSMA 2000. Another shortcoming was that the provisions did not cover all types of market abuse behaviours. Thus, FSMA 2000 came to fill the gap left by criminal provisions and self-regulatory rules.307

Sections 401 and 402 of FSMA 2000 provide the FSA with broad powers to take criminal action against several of the offences under FSMA and other regulations, for instance, offences related to violations of the FSA Listing Rules, specifically when there is an offer of new securities308 ‘to the public in the United Kingdom before the required prospectus is published’.309

The Financial Services and Markets Act 2000 provides a significant extension of the authority currently available to regulators to fight market abuse and insider dealing. Indeed, the regulation was intended to prevent such offences from taking place. The FSMA 2000 gives the FSA more power and strengthens its ability to enforce regulations and to investigate possible offences. The new legislation also provides the FSA with the ability to impose civil penalties and to obtain restitution for instances of abuse of information, whereas the Criminal Justice Act 1993 only provided for criminal

308 Section 84 of FSMA 2000.
309 Section 85 (1) of FSMA 2000, under subsection (2) of this section provides criminal penalty for a ‘person who contravenes subsection (1) is guilty of an offence and liable—
(a) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale;
(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both’.
In order to clearly understand the offence of insider dealing, the subsequent chapter offers an in depth discussion of it.

(c) The Financial Services and Markets Act 2000 (FSMA 2000)

The FSMA 2000 defined market abuse under Section 118 as an offence and contained behaviours of the offence. These behaviours may amount to market abuse practices.

However, the Market Abuse Directive described the abuse of market conduct in simple

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310 Rider, Market Abuse and Insider Dealing, p. 4.
311 The new section 118 of the FSMA 2000 determines behaviour amounting to insider dealing and market abuse as;
118 Market abuse
(1) For the purposes of this Act [FSMA], market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) which-
(a) occurs in relation to-
(i) qualifying investments admitted to trading on a prescribed market,
(ii) qualifying investments in respect of which a request for admission to trading on such a market has been made, or
(iii) in the case of subsection (2) or (3) behaviour, investments which are related investments in relation to such qualifying investments, and
(b) falls within any one or more of the types of behaviour set out in subsections (2) to (8).
(2) The first type of behaviour is where an insider deals, or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.
(3) The second is where an insider discloses inside information to another person, otherwise than in the proper course of the exercise of his employment, profession or duties.
(4) The third is where the behaviour (not falling within subsection (2) or (3)):—
(a) is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be effected; and
(b) is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.
(5) The fourth is where the behaviour consists of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which:—
(a) give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments; or
(b) secure the price of one or more such investments at an abnormal or artificial level.
(6) The fifth is where the behaviour consists of effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance.
(7) The sixth is where the behaviour consists of the dissemination of information by any means which gives, or is likely to give, a false or misleading impression as to a qualifying investment by a person who knew or could reasonably be expected to have known that the information was false or misleading.
(8) The seventh is where the behaviour (not falling within subsection (5), (6) or (7)) :—
(a) is likely to give a regular user of the market a false or misleading impression as to the supply of, demand for or price or value of, qualifying investments; or
(b) would be, or would be likely to be, regarded by a regular user of the market as behaviour that would distort, or would be likely to distort, the market in such an investment, and the behaviour is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.
(9) Subsections (4) and (8) and the definition of “regular user” in section 130A(3) cease to have effect on 30 June 2008 and subsection (1)(b) is then to be read as no longer referring to those subsections.

Abuse of the market arises when a market user has been put at an unreasonable disadvantage (whether directly or indirectly) ‘by one person alone or by two or more persons jointly or in concert’ in the market. Section 118 of the FSMA 2000 provides a definition of market abuse which can be broken up into three major categories of behaviour:

- using to their own benefit information which is not generally available to the relevant market.
- creating a false or misleading impression, or
- distorting the market in such investments.

These categories of market abuse are significant factors in creating inefficiency and incompetence in the market. They cause market participants to lose confidence and trust in the market.

In order to have a full comprehension of market abuse, there must be an understanding of the role of the regular user. Swan defined the regular user in these terms: ‘a hypothetical reasonable person; who regularly deals on the market in question; in investments of the kind in question’.

312 Recital 2.2 (Directive 2003/6/EC).
315 FSMA 2000, s 118(1).
316 Section 188(4)(a) of the FSMA 2000.
317 Section 118 (8) (a) of the FSMA 2000.
318 Section 118 (8) (b) of the FSMA 2000.
The FSMA 2000 required the FSA to issue a Code of Market Conduct in order to guide people trying to decide whether or not particular conduct constitutes market abuse, and which could provide safe harbours for those who act within its terms of market abuse.\(^{321}\)

While the FSA Code does not give a complete list of behaviour that is considered market abuse, the code looks at each type of market abuse and states the factors that determine whether abuse occurred. It then looks at whether the specific behaviour amounts or does not amount to market abuse. If a person behaves in a manner that the Code states is not related to market abuse, then they are not considered to have committed market abuse.\(^{322}\)

\section*{2.7.3 The Dubai International Financial Centre (DIFC): The Market Abuse Regime}

The DIFC law No. 12 of 2004 came into force on 16 September 2004 and was subsequently amended by DIFC law No. 2 February 2007. This contains the provisions relating to market abuse in Chapter 1 through to Part 8. Market abuse under the DIFC law No. 12 of 2004 refers to conduct which contravenes provisions.\(^{323}\) It is defined under provisions 36, 37, 38, 39, 40, 41, 42 and 43 which prohibit: fraud and market manipulation; misleading or untrue statement; misleading or deceptive conduct; misleading or deceptive statement; statement about future matters; inducing persons to deal; insider dealing; and providing inside information.\(^{324}\) It can be argued that market abuse...
A person shall not, in the DIFC or elsewhere, make a statement that the person knows or reasonably ought to know, at the time and in light of the circumstances under which it is made:
(a) is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and
(b) significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of Investments.
38. Misleading or deceptive conduct
A person shall not, in the DIFC or elsewhere, engage in conduct in relation to Investments that is misleading or deceptive or is likely to mislead or deceive.
39. Misleading or deceptive statements
(1) A person shall not make an offer of Securities under a Prospectus or Supplementary Prospectus if there is:
(a) a misleading or deceptive statement in:
(i) the Prospectus or Supplementary Prospectus;
(ii) any application form that accompanies the Prospectus or Supplementary Prospectus; or
(iii) any other document that relates to the offer, or the application form;
(b) an omission from the Prospectus, Supplementary Prospectus, application form or any other document as required by this Law or the Offered Securities Rules; or
(c) a new circumstance that under the Law or the Offered Securities Rules requires a Supplementary Prospectus to be filed.
(2) A person shall not in or from the DIFC make a misleading or deceptive statement in any document issued by him or on his behalf in connection with an Exempt Offer, whether in the DIFC or elsewhere.
40. Statements about future matters
(1) A person is taken to make a misleading statement about a future matter, whether by himself or his agent, if at the time of making the statement he did not have reasonable grounds for making the statement or causing it to be made.
(2) The onus for proving that reasonable grounds existed for the purposes of Article 40(1) is on the person who made the statement.
41. Inducing persons to deal
(1) A person shall not in the DIFC or elsewhere, induce another person to deal in Investments:
(a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive;
(b) by a concealment of material facts; or
(c) by recording or storing information that the person knows to be false or misleading in a material respect or may be materially misleading.
42. Insider dealing
(1) A Reporting Entity or person in a special relationship with a Reporting Entity shall not, in the DIFC or elsewhere, deal in Investments of or relating to the Reporting Entity if the person possesses material information that:
(a) is not generally available in the market; and
(b) has not been disclosed to the market in accordance with this Law or the Rules.
(2) In this Article: “Investments” does not include:
(a) options to acquire or dispose of;
(i) commodities of any kind; or
(ii) an option to acquire or dispose of an Investment of the kind specified by Article 42(2).
(b) rights under a contract for the sale of a commodity under which delivery is to be made at a future date and at a price agreed on when the contract is made; or
(c) any right to or interest in anything which is specified by Article 42(2) (a) and (b).
43. Providing inside information
(1) A Reporting Entity or a person in a special relationship with a Reporting Entity shall not inform, other than in the necessary course of business, another person of material information that is not generally available in the market with respect to the Reporting Entity, before the material information has been disclosed to the market in accordance with this Law or the Rules.
(2) A Reporting Entity or a person in a special relationship shall not procure another person to deal in Investments if that Reporting Entity or person has knowledge of the material information that is not generally available in the market or the material information has not been disclosed to the market in accordance with this Law or the Rules.
(3) In this Article: “procure” includes:
where a person induces or encourages another person by direct or indirect means.
misconduct in the DIFC law No.12 of 2004 is very widely covered. It seems to embrace all misconduct that constitutes market abuse. No importance is attached to the intention of the offender (as in the UK also). Rather, the prosecution is fully focused on the effect the action itself had.\textsuperscript{325} The focus is on the effect of the conduct, not on the intention that underlies it. It must have had significant effects, or would reasonably be expected to have a significant effect on the market price or value of the investment.\textsuperscript{326} In addition, the type of behaviour that may constitute fraud and market manipulation includes those which are done ‘directly or indirectly’.\textsuperscript{327} It can be implied by the law that it wants the DIFC market to have flexibility in dealing with cases of market abuse. However, this only relates to the jurisdiction of the DIFC and that which affects its markets and investors. The market abuse regime does not apply to conduct which occurs outside the DIFC jurisdiction unless that conduct affects the DIFC markets or users of the DIFC markets.\textsuperscript{328}

In fact the jurisdiction of market abuse under the DFIC Law is difficult to interpret because the rules relating to market abuse include complex terms. No case has been brought under these rules which may serve as a judicial interpretation, and there is rarely any academic reference in the field. However, there has been considerable work done on comparative jurisdictions, which can be approached whenever necessary.\textsuperscript{329} In the light of this, the rules will be compared to their counterparts under other systems (such as the UAE and the UK) in the following chapters.

\textsuperscript{325} Article 41(a) of the DIFC Law.
\textsuperscript{326} Article 37 (b) of the DIFC Law.
\textsuperscript{327} Article 36 of the DIFC Law.
\textsuperscript{328} Article 44 of the DIFC Law.
\textsuperscript{329} Albleooshi, p. 181.
2.7.4 Market abuse under the Federal Law No. 4 of 2000 (ESAC law 2000)

The UAE formulated the ESCA law 2000 in order to strengthen the securities regulation in its struggle against illegal practices on the market, such as insider dealing and market manipulation. The ESCA law 2000 provides a framework for the UAE securities market regulation against market abuse. It also protects market participants through Articles 26(2), 36, 37 and 39 of the law.

The ESCA law 2000 sets out provisions which are aimed at combating market abuse as follows:

Article 26 (2)
Licensed brokers and their representatives shall abide by the following:
…Refraining from any act such as to harm the reputation of the Market, its members or transacting parties therein, or arranging or participating in any fictitious transactions not conducive to a true transfer of the Securities or funds which are the subject of the dealing.

Article 36:
‘The furnishing of false information, statements or data such as to affect the market value of Securities and an investor's decision to invest or otherwise shall not be permitted.’

Article 37:
‘The exploitation of undisclosed information which could affect prices of Securities in order to achieve personal benefits shall not be permitted. Any dealing effected in contravention of this shall be null and void.’

Article 39:
‘It shall not be permitted for any person to deal in Securities on the basis of unpublicized or undisclosed information he acquired by virtue of his position. It shall not be permitted for any person to spread rumours regarding the selling or buying of shares.

Nor shall it be permitted for the chairman and members of any company's management or its employees to exploit their inside information as to the company in the purchase of shares or the sale thereof in the Market. Any transaction effected by any person in contravention of the provisions of the two preceding paragraphs shall be null and void.’
In addition, SCA is empowered to issue rules and enforce such rules in order to maintain the securities markets’ ‘fairness and efficiency’. The ESCA law 2000 permits SCA to make suggestions and delegates it the authority to issue regulations to exercise its power.\textsuperscript{330} On this ground, SCA issued a number of resolutions and rules such as the Regulations as to Disclosure and Transparency.\textsuperscript{331} One area in which SCA used the powers delegated to it by the ESAC law 2000 is in the regulation of manipulative conducts which are damaging to the market. The SCA Decision No 3 of 2000 implemented the above-mentioned Articles under the ESAC law 2000, which are directed at market abuse. There are three articles stipulating the punishments for such abuse. They read as follows:

Article 37:
1-Pursuant to Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority and Market, any person shall be liable to imprisonment for a period of not less than three months and not more than three years and a fine of not less than one hundred thousand (100,000) Dirhams and not more than one million (1,000,000) Dirhams, or either of these penalties, if he:
   a. Furnishes any data, or proffers any declaration or information being untrue and such as to affect the market value of the securities and an investor's decision to invest or otherwise.
   b. Deals in securities on the basis of unpublicised or undisclosed information he acquired by virtue of his position.
   c. Spreads tendentious rumours regarding the selling or buying of shares.
   d. Exploits unpublicised information which could affect the prices of securities to achieve personal benefits.

   Any dealing or transaction effected on the basis of the preceding shall be null and void.

2- The Board may, in the event of contravention of the provisions of the Authority’s law and regulations, impose administrative sanctions by levying a monetary penalty and by barring any investor from trading, whether a natural or juristic person, for a period not exceeding one year from the date of the rendering of the decision to bar him, or either of these two sanctions.

\textsuperscript{330} Article 4 of ESCA law 2000.
\textsuperscript{331} Regulations as to Disclosure and Transparency, Decision No. 3 of 2000 which amended by decision No. 155 of 2005.
Article 38:
The chairman and the members of the board of directors of a company whose securities are listed in the Market and its general manager and any of its employees shall be liable to imprisonment for a period of not more than three years and a fine of not less than one hundred thousand Dirhams and not more than one million Dirhams, or to either of these penalties, if he effects dealings through himself or through others in any transaction in the securities of the company, before disclosing to the Market the purchase or sale transaction, the quantities and prices thereof, and any other information required by the Market, and the obtaining of the approval of the Market's board of directors for such transaction. Any transaction not effected pursuant to such disclosure shall be null and void.

Article 39:
Any chairman and any of the members of the board of directors of any company or any of its employees who exploits his inside information as to the company in the purchase of shares or the sale thereof in the Market shall be liable to imprisonment for a period of not less than three months and not more than three years and a fine of not less than one hundred thousand Dirhams and not more than one million Dirhams, or either of these penalties. Any transaction so effected shall be null and void.

As a result, Articles 37, 38 and 39 of the SCA Decision No 3 of 2000 are an implementation of Articles 26 (2), 36, 37 and 39 of the ESCA law 2000. Similarly, Articles 15, 16 and 17 of Regulation as to Trading, Clearing, Settlement and Transfer provide for an annulment of transactions. 332

Article 15:
‘Any transaction in Securities effected by any person shall be null and void if:
1. The transaction is effected on the basis of unpublicised or undisclosed information the transacting party acquired by virtue of his position.
2. The transacting party is the chairman of the company, or a member of its board of directors, or an employee of it, and has exploited his inside information as to the company in his transaction’.

Article 16:
‘Any dealing in Securities with the aim of deceiving other transacting parties shall be null and void.
Resort to a series of illusory transactions representing essentially fictitious Trading conducive to the deluding of others as to the

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332 Articles 15, 16 and 17 of the Regulations as to Trading, Clearing, Settlement, Transfer of Ownership and custody of Securities which amended by Decision No. 9 of 2006.
existence of an active market in the Securities traded shall be deemed a form of deception.’

‘Any act aimed at causing a rise or a fall in the price of any Securities with the intention of encouraging other transacting parties to join in, whether as sellers or purchasers of the Securities, as the case may be, shall be null and void’.

Article 17:

‘No person, whether alone or in collusion with others, shall be permitted to effect any dealing or disposition conducive to the fixing of the price of any particular Securities in a manner which is artificial and contrary to the provisions of the laws and regulations in force in the Market’.

Accordingly, the major prohibited actions may be categorised as the following types of behaviour:

- Furnishing any data or information being untrue which affects the market value of the securities and an investor's decision.
- Dealing in securities on the basis of inside information he acquired by virtue of his position.
- Spreading rumours regarding the selling or buying of shares.
- Exploiting unpublicised information which could affect the prices of securities to achieve personal benefits.
- Arranging or participating in any fictitious transactions not conducive to a true transfer of the Securities or funds.
- Any act such as to harm the reputation of the Market

All of these prohibited behaviours affect transactions in the securities market in the UAE. These actions can be done ‘alone or in collusion with others’. They might lead to price fixing and could affect any financial dealings. Thus they are illegal and against the market regulations. The operation of trading should reflect the real conditions of supply and demand for the financial instrument in question. However, the ESCA law 2000, and SCA’s regulations do not refer explicitly to the meaning of market abuse.
Rather, they refer to courses of conduct which amount to market abuse, such as ‘dealing’ or ‘furnishing’ or ‘transactions’ or ‘exploitation’ that occur which affect the market value or investor’s decisions on the basis of a misleading statement. They also refer to affecting the prices of securities based on the use of inside information with intent to achieve personal benefit, or if a person uses inside information obtained through his position (insider information). In ESCA law 2000, there is no clear definition of market abuse, whereas the FSMA 2000 in Pt. VIII in the original Section 118 clarifies and gives an official comprehensive definition to cover a wider range of activities that may amount to market abuse.

2.8 The UAE judicial system

In the UAE, the seven emirates of the federation are under the UAE Federal Judicial Authority. However, the Federal Constitution of the UAE allows each emirate to establish its own judicial authority. Abu Dhabi, Dubai and Ras Al Khaimah decided to create and maintain their own judicial systems, which therefore are not under the Federal Judicial Authority of the UAE. Abu Dhabi only recently formed its independent judicial authority under law No. 23 of 2006. This judicial authority is called ‘The Abu Dhabi Judicial Department’. With the federation of the UAE in 1971 until June 15, 2007, Abu Dhabi was under the Federal Judicial Authority.

The UAE courts, whether at the federal or local level, are similar to the court systems of most of the other countries in the region. The court systems are divided into two main divisions, criminal and civil courts. The Shari’ah court is a separate third division of the court system that was created at first to adjudicate disputes of a personal nature.

333 Regarding the federation of UAE, see Chapter One.
There are generally three stages of litigation in the criminal and civil courts: the Court of First Instance, the Court of Appeal, and the Court of Cassation, which is equivalent to the Federal Supreme Court of the UAE. Federal laws are applied in the courts of the UAE. The local courts first apply the federal laws, such as criminal laws or the Civil Code. When federal laws are absent or do not address a certain matter, laws and decrees are issued by the ruler of the emirate (Abu Dhabi, Dubai and Ras Al Khaimah).

Matters are adjudicated in the courts by one or more judges depending upon the court. The jury system is not practiced in the UAE, which is in contrast to the UK system. Each of the three courts, the Court of First Instance, the Court of Appeal and the Court of Cassation, requires a different number of judges to hear a case. The Court of First Instance is presided over by one judge; the Court of Appeal is presided over by three judges, and the Court of Cassation is presided over by five judges. The highest court in the UAE is the Federal Supreme Court, which is also presided over by five judges. The Court of Cassation exists at the local level in only the three emirates: Abu Dhabi, Dubai and Ras Al Khaimah. In the other emirates, final cases for appeal are heard by the Federal Supreme Court, which is located in Abu Dhabi. Both the Cassation Court and the Federal Supreme Court hear disputes only on matters of law. Legal standards and opinions that have been decided by the Federal Supreme Court and the Court of Cassation must be accepted by the lower courts.

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334 In the UAE legal jurisdiction, when a criminal act has taken place, the case will be prosecuted in the jurisdiction where the crime occurred. After the crime is committed, a complaint is filed at the local police station in the area in which the crime occurred. The police investigate the matter fully and take information and statements from all relevant persons. Once the preliminary investigation is completed, the local police will typically send the case to the office of the prosecutor. This happens within forty eight hours of the initial complaint being filed. In some cases, the police will seek the counsel of the prosecutor as to whether charges should be filed and if the matter should even reach the prosecutor’s office for further action.
A basic explanation of the UAE legal system is necessary to understand the following sections that discuss the specialist courts and judges. The purpose of creating a specialist court for the financial market is to enable judges to make proper decisions when dealing with technical issues arising from the financial market. The specialist court would be created in the belief that, by giving judges specialised knowledge, their competency will be enhanced, which will lead in turn to greater uniformity and justice in applying the law. Overall, an erudite judge will make better and more judicious decisions. The following section will discuss the idea of establishing a specialist court for the financial market in the UAE.

2.9 Specialist courts for the financial market

This section endeavours to present the important role that establishing a specialist court could have for the financial market in the UAE. A specialist court, one in which the court has expertise and knowledge of the type of cases that are to be adjudicated by it, is important in that its expertise may create speedy and consistent decision-making. In terms of financial market lawsuits, a high level of technical or specialised expertise is needed. In fact, the development of a vital facility, such as a judiciary with a specialist court, that is specialised in financial markets would result in the growth of the skills of the justices. It is important to look at the possible significance that specialisation can have on judicial decision-making.\(^{335}\)

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\(^{335}\) To show the impact that non-specialised courts have, we can look at the events of October, 2008, in Kuwait, when a regular (non-specialised) court issued an unacceptable verdict. The decision was made to close the Kuwaiti stock market and stop all trading in it. The court said that the reason for the verdict was that, if the stock market remained open, it might threaten the interests of the investors and the individuals. This was why such a risky verdict occurred in Kuwait. Since the stock market reflects a country’s economy, it is not easy or beneficial to close or stop the work of the stock market except when there is a unique issue or a severe economic issue. However, this verdict lasted only one day, as it was given over on a Thursday before the weekend. The following Monday, the verdict was cancelled by the Court of Appeal. This verdict shows the importance of the specialised courts. See Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, *Interview conducted in May 2010*, *Abu Dhabi*, United Arab Emirates.
The Chief of the Appeals panel in the Dubai Appeal Court Judge Ayssor, supports the idea of creating specialised courts. He insists that the financial market in the UAE should have a specialised court. He suggested that dealers in the financial market believe that judges are not qualified to deal with such lawsuits. The specialised court may, he added, lead to a speedy decision and keep in line with the so-called ‘modernisation of justice’. He ended this discussion by re-iterating his wish that the legislators in the UAE would establish a specialist court for the financial market.  

In cases that are particularly complex, the specialist court could render a decision quickly. Thus, the expertise of the specialist judge would be essential. Once judges of the specialist court gain more experience, they are likely to become more efficient in such cases. Even if judges do not have much experience in the specific technical area, in time, they will gain knowledge of the specialised issues and become proficient in them. Therefore, with increasing experience in the same field, they should be able to understand and comprehend the technicalities of the securities market. They also might be able to judge and decide the lawsuits without the assistance of various experts. Even when a judge needs an expert’s opinion for a specific lawsuit, in time, the judge should be able to make his own evaluation. After the judge evaluates the expert’s work, the judge will then be able to render a decision more rapidly. Making informed, speedy decisions is required, as the situation cannot bear tardiness, since tardiness will affect the markets’ efficiency.

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336 Judge Ayssor is a Chief of the Appeals panel in the Dubai Court of Appeal, Interview conducted, May 2010, Dubai court, United Arab Emirates.
339 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010 , Abu Dhabi, United Arab Emirates.
The value that proficient, specialist judges would have should not be ignored, especially when complicated and difficult cases come before the court. A judge with specialised knowledge would simply make more speedy faster decisions than a non-specialist judge.\textsuperscript{340} Complicated and intricate cases, such as those dealing with the financial markets and thus possibly with extremely technical regulatory issues, are difficult for any judge to decide but certainly more so if the judge has not been deeply engrossed in this area and lacks experience in it. According to Ellen R. Jordan, when cases are brought before a general court, the judges may not even understand the complex issues brought before them, which increases the incoherency and delays in decision-making and creates further problems for the public at large. It is considerably wasteful in terms of resources and time.\textsuperscript{341} In addition, it has been noted by Jordan that such complex cases are a burden for judges who are not experts in these areas and inflict a heavy weight upon them because of indecision, interruptions, and the simple waste of judicial resources.\textsuperscript{342}

During the interviews with specialists and legal experts conducted in the UAE by the researcher, a majority of interviewees agreed that a specialised court for the financial market would achieve justice. As the Legal Consultant at the SCA in the UAE stated, ‘a specialised judiciary in the financial market guarantees speedy and specialised justice.’ He also pointed out that the lack of knowledge by judges regarding technicalities of the financial market means that ‘the judges will completely depend on the experts and will not be able to use their own thinking and judgment, thus the verdicts, in addition to being slow in waiting or the experts opinions, will also be issued only according to the

\textsuperscript{340} Jordan, ‘Specialized Courts: A Choice?’, p 146.
\textsuperscript{341} Ibid., p 145.
\textsuperscript{342} Ibid., p. 146.
experts reports’. As an example, this exact situation arose in a case involving Dubai Islamic Bank’ shares. The Dubai Court of Appeal completely relied upon expert opinion and thus acquitted the accused according to the expert report. The Dubai Islamic Bank’ shares case will be discussed in Chapter Four.

Some interviewees argued against the need for a specialist court for the financial markets in the UAE. Ghanaim stated that there is no point in establishing a special court for the financial market, because actual practice has proven that financial markets are covered within a comprehensive legislative system. The legislative system has proven its effectiveness since the establishment of the financial markets. He added, however, that there would be nothing wrong if the regulator were to establish the specialised courts under what is called a legislative policy. One should, nevertheless, consider this approach from another angle. Judge Al Hammadi disagreed with the concept of a specialised court. His argument is based upon the difficulty of establishing a special court for every new law that arises in the future. He asked, if a specialist court were to be created for financial law, should a specialist court also be created for terrorism law or the money laundering law? He believed that it is better to have a specialist panel in the ‘regular’ court than to establish a specific specialist court.

The conclusion can be drawn from all of the above that a specialised court for the financial market in the UAE is important. The reason is that the financial market in

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343 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, *Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.*

344 Hussein Ghanaim (PhD in Law). Former lecturer in law faculty in the UAE University, he was a member of the legislative committee that drafted ESCA Law 2000. Currently, he is a legal counsellor, *Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.*

345 Judge Hassan Al Hammadi,(PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, *Interview conducted, June 2010, Abu Dhabi, United Arab Emirates.*

346 In the questionnaire, an anonymous person, who answered the open-ended question, believed that it is important to have a specialised court for the financial market. He said: ‘I think it is appropriate now to think of establishing a specialised court for the financial markets.’ See appendix 2.
the UAE is considered an emerging market. Thus, there is a need for such a court to deal with complex matters that may arise related to the financial market. Judges who are in the specialist courts will have the knowledge necessary to enable them to work more efficiently. Furthermore, the decision of a specialist court will be made swiftly. The expertise of the specialist judge would be considered essential. While the research has shown that there is a need to create a specialist court to deal with financial criminal cases, in some instances there are other solutions rather than actually going to court. A very real alternative to a judicial proceeding and indeed to settling lawsuits outside of the courtroom is the concept of criminal reconciliation.

2.10 Criminal Reconciliation

This section endeavours to present the concept of criminal reconciliation as an alternative to criminal prosecution. Criminal reconciliation is an appropriate approach for the market abuse problem. The argument in favour of criminal reconciliation will be developed through a review of literature on the subject and through interviews with legal experts and judges in the UAE. The research aims to show that there is a way to resolve illegal practices without depending upon the traditional criminal justice system.

All legal matters, whether criminal or civil, take a period of time before they are adjudicated by the court. Criminal reconciliation occurs when parties are willing to settle their matters before traditional criminal prosecution takes place.\textsuperscript{347} In other words, people who are involved in criminal cases and do not want to face criminal prosecution may choose to avoid criminal prosecution by using the criminal reconciliation system. The system is an instrument for the redemption of the accused and also for restitution, as the accused must agree to render financial compensation paid to the government, the

\textsuperscript{347} Group 3, Economic Crime in a Globalizing Society its Impact on the Sound Development of the State, 126th international senior seminar reports of the seminar, Resource material series no.66, p. 217.
authority, or the victim.\textsuperscript{348} The exact financial settlement to be paid by the accused is determined by law. The resulting settlement may be recorded by an officer of the court.\textsuperscript{349} However, if the accused fails to agree to the settlement, he or she will be referred to the criminal court. The victim will then be able proceed with a civil suit.

On the whole, criminal justice systems today centre their attention on abuse or violation of the law, making sure the accused is held accountable and punished for his or her crime. The victims of the crimes themselves are often secondary to the legal procedures. In a legal sense, a crime is seen as having been committed against the public, and, as a result, the state has the right to prosecute as it sees fit. The system is in this way single-mindedly focused upon the criminal wrongdoer and not upon the victim.\textsuperscript{350}

The criminal system does not fully consider the complete circumstances of the crime simply because of the system’s organisational limitations. These shortages in the system can be compensated for in a legal and social sense by the use of criminal reconciliation. Criminal reconciliation is a subject of much interest today, as there is a focus and desire for more consistency, efficiency and pragmatism in the criminal justice system. However, even among those who work in the criminal justice system and among legal theorists, criminal reconciliation is seen as something of a Western idea or a modern idea.\textsuperscript{351}

\textsuperscript{348} Abdel-Rasul, p 382.
Once a case has been dealt with through criminal reconciliation, the criminal case is terminated. It can be argued that criminal reconciliation is a way to redress reparation claims and can sometimes become the core principle of the final penalty. It can be seen that the trial in a criminal prosecution seeks retributive justice, while mechanisms of criminal reconciliation focus on restorative justice. Minow noted that criminal prosecution acts against reconciliation, because ‘all of the practical dimensions of prosecutions could work against the goals of healing, reconciliation, and full truth-telling’.

Restorative justice is commonly known in western countries as criminal reconciliation and is considered a third alternative to either retributive or rehabilitative justice. Restorative justice is concerned with the actual crime but also looks at it as an ‘inter-relational problem,’ while retributive justice focuses upon crime and punishment of the wrongdoer, and rehabilitative justice looks at the recuperation and reintegration of the wrongdoer. In restorative justice, the wrongdoer must accept the blame for his actions and the results, including the damage that the victim endured, whether the damage was physical or emotional. This acknowledgement of the crime and its effect on the victim can also influence the victim in becoming part of the process of restorative justice, which can offer the victim redress and reparation. Accepting

353 Cynthia Alkon,‘The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?’, (2007) 8 Pepperdine Dispute Resolution Law Journal, p. 44. The countries of Europe have outpaced America in terms of the development and action in support of restorative justice. Among the European nations, in 1988, Austria became the first country in the world to have a policy committed to the implementation of mediation related to the victim-offender. Other countries have taken up this policy of supporting restorative justice and victim-offender mediation. In England, for example, there has been a call on the national level for the government to implement victim-offender mediation and restorative justice practices and policies. Throughout Europe, programmes number over 468 with 13,600 cases referred every year. The other countries of Europe that have created such programmes related to this type of mediation are: Denmark, Finland, Sweden, Ireland, the Netherlands, Luxembourg, Switzerland, Albania, Slovenia, Romania, Poland, Bulgaria, Italy, Spain, and the Ukraine. See Umbreit et al. , pp. 251-304.
culpability for one’s actions, keeping to agreements, and establishing reconciliation are a few of the aspects of mediation and restorative justice.  

2.10.1 Criminal and civil reconciliation

Despite the fact that criminal and civil reconciliation differ, they both rely upon convergence of the wills of their parties to determine the compensation based upon their agreements. Civil reconciliation is concerned with a civil dispute about private interests. In contrast, criminal reconciliation is related to a crime having been committed, which affects the public. Criminal reconciliation is in effect a consensual civil contract for the parties to the conflict, including the authority to act in their own private interests, and it also contains a concession by both parties. In a sense, judicial intervention is completely eliminated.

When criminal reconciliation occurs, the parties involved in the criminal case are willing to end the conflict and desire not to pursue criminal proceedings. Reconciliation is different in a civil case, in which the relationship is based upon the consensual acceptance of the offender to pay an amount as compensation or reparation to the victim. In a criminal case, paying a financial settlement is the result of a violation of the law or the rules by the accused.

In the UAE, the criminal law system does not provide for criminal reconciliation as a third option. However, civil and commercial reconciliation is in force, since its promulgation by Federal Law No. 26 of 1999 regarding the establishment of the Reconciliation & Settlement Committees (RSC law 1999) in courts. Moreover, this law provided that the Reconciliation & Settlement Committees (RSC) are competent to

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355 Abdel-Rasul, , p. 382.
settle civil and commercial disputes, whatever the amount in controversy might be, as well as disputes that do not involve money damages, through reconciliation. The law also gave the RSC the right to access papers, documents, records and other evidence that it deems appropriate without being bound by the Law of Civil Procedures and Advocacy Law and official working hours. The law aims to facilitate the RSC’s work to achieve its objectives.

Legislators in the UAE found that reconciliation is important because of its benefits. Reconciliation represents an easier and faster way to solve conflicts, and it saves time and money for the parties to the conflict. Therefore, the legislature decided that the Court of First Instance cannot record any claims that are under the jurisdiction of the RSC. This rule can be avoided only in cases where the beneficiaries have a non-objection statement from the RSC allowing them to take their case for consideration by the courts. Each party can explain in writing to the RSC why each is unwilling to resolve the dispute through reconciliation. In order for a dispute to be adjudicated before the courts, the RSC must give a no-objection statement to them.

2.10.2 Criminal and administrative reconciliation

There is a difference between criminal and administrative reconciliation. Administrative reconciliation is concerned with a dispute between the government’s administration and personnel. Therefore, if reconciliation fails, jurisdiction will be held by the civil or the administrative courts to prosecute the case. If criminal reconciliation fails to take place, the case will be prosecuted through the criminal justice system.

356 Article 2 (1) RSC law 1999.
357 Article 2 (2) RSC law 1999.
358 Article 3 RSC law 1999.
2.10.3 Criminal Reconciliation in legal perspective

The concept of criminal reconciliation is based upon a civil agreement. This agreement imposes a monetary and administrative penalty on the accused. In such cases, the administration will try to ease the severe penal provisions and avoid legal proceedings by the payment of a sum of money set by law.\(^{360}\) Accordingly, it is a consensual and just administrative agreement.\(^{361}\)

2.10.4 Defining Reconciliation in a legal perspective

Reconciliation can bring about a satisfactory and agreed upon punishment. This is important for certain types of crimes, such as market abuse cases, that do not have to be prosecuted under the judicial authority. When an agreement is made between with the offender, it is considered an administrative agreement and not a criminal punishment. By agreeing to the reconciliation process and coming to an agreement, the offender will voluntarily accept his guilt and pay the penalty to the administration, which can deter him from returning to criminal behaviour again.

The result of using the reconciliation system is that it makes crime the subject of reconciliation and then of an administrative status, which also leads to the establishment of a special link between the offender and the government administration. As a result, an administrative agreement is reached and implemented by the administration and not by a judicial or a punitive authority. The administrative agreement differs from one carried out by the judicial or punitive authority, which would be in accordance with the substantive procedural rules established by the legislature in this regard.\(^{362}\)

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\(^{360}\) Adel Khaznah Katibi, *Criminal Procedure* PhD Dissertation (Cairo: Cairo University, 1980), p. 98.


\(^{362}\) Abdel-Rasul, p 382.
During the process of interviews, the researcher found that the concept of criminal reconciliation has been considered to be a third option in lawsuits involving the financial market. All of the interviewees agreed that the criminal reconciliation system could be a perfect solution, as the main direction these days is in terms of adopting the alternative option to settling disputes instead of going to court.\textsuperscript{363} As Judge Al-Hammadi said, the basic desire in resolving a case is reconciliation; and it is better to not submit cases to the courts where reconciliation can solve the issue. However, he added, it should be up to the SCA to decide whether the case should be handled in the criminal courts or if it should go through the process of reconciliation.\textsuperscript{364} Once reconciliation is completed, the claim will end.\textsuperscript{365}

One official in the Dubai Financial Market believes that there is a good reason to accept this concept of reconciliation, since a majority of the investors do not have enough knowledge of the laws and regulations. Their lack of knowledge leads them to committing unintentional errors.\textsuperscript{366} This idea is supported by another official,\textsuperscript{367} who is the Manager of Market Operations and Surveillance at the Abu Dhabi Securities Exchange. The Manager said that a majority of the violators who commit acts of manipulation do not realise that they are manipulating. They want only to gain as much as they can as quickly as possible. In the meantime, however, they are manipulating and harming serious investors by their acts.

\textsuperscript{363} Hussein Ghanaim (PhD in Law). Former lecturer in law faculty in the UAE University, he was a member of the legislative committee that drafted ESCA Law 2000. Currently, he is a legal counsellor, \textit{Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.}

\textsuperscript{364} Judge Hassan Al Hammadi,(PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, \textit{Interview conducted, June 2010, Abu Dhabi, United Arab Emirates.}

\textsuperscript{365} Hussein Ghanaim (PhD in Law). Former lecturer in law faculty in the UAE University, he was a member of the legislative committee that drafted ESCA Law 2000. Currently, he is a legal counsellor, \textit{Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.}

\textsuperscript{366} Anonymous 3, Dubai Financial Market, \textit{Interview conducted, April 2010, Dubai, United Arab Emirates.}

\textsuperscript{367} Abdullah Salem Al Naimi,Manager of Market Surveillance, Market Operations and Surveillance. \textit{Abu Dhabi Securities Exchange, Interview conducted, April 2010, Abu Dhabi, United Arab Emirates.}
The use of the reconciliation system is an effective way to compensate the government for the damage it has undergone, especially when a settlement may be difficult to obtain through conventional procedures.\textsuperscript{368} The researcher supports the reconciliation system regarding financial market crimes because of the difficulty of proof and prosecution, which make guilty verdicts difficult to obtain, as the result of which the perpetrators may remain unpunished. Moreover, criminal reconciliation is an alternative penalty to achieve the concept of public deterrence. The punishment of the criminal provides a general satisfaction that justice has been served. Adopting a reconciliation system for the crimes of the financial market is a comprehensive, speedy and fair conclusion to a criminal case, thus easing the burden on the court system.

2.11 The criminal liability of market abuse

Criminal liability always uses a construct that presumptively is based upon two factors: a guilty act (\textit{actus reus}) and a guilty state of mind (\textit{mens rea}). \textit{Actus reus} refers to ‘all the factual objective elements of the offence, as distinguished from its mental elements.’\textsuperscript{369} Accordingly, \textit{actus reus} is a technical term under Federal Criminal Law No 3 of 1987 in the UAE and ‘consists of the material elements of the criminal activity to commit an act or omission where the commission\textsuperscript{370} or omission\textsuperscript{371} [is] considered as criminal in law’.\textsuperscript{372} Criminal liability then refers to an act defined by the law as criminal and that produces prohibited consequences. The \textit{actus reus} of a crime is attached to three components – behaviour, which refers to the actual physical action of the accused; causation, which refers to the causal link between a criminal action and the result of the
crime; and the consequence, which is the effect of the conduct that occurred under the associated circumstances. In this sense, the actus reus ‘means the whole definition of the crime with the exception of the mental element’.  

However, once an act is committed that violates the criminal law, it is essential to know the state of mind (mens rea) of the accused. Article 38 of Federal Criminal Law No 3 of 1987 states that the mental element of the crime is ‘available at the will of the offender to commit an act or omission where this commission or omission of criminal law and the intent to cause a direct result of, or any other criminal law as a result of the offender may be expected’. Therefore, the mens rea encompasses the state of mind of the accused in connection with the actus reus. The essentials of the actus reus must have occurred simultaneously with the mens rea. The illegal behaviour can be punished as a crime only if it is associated with a certain mental state. Accordingly, the mens rea determines whether the accused intended to commit the crime or not, intentionally or recklessly.

Analysing elements of market abuse as an illegal activity in financial crimes does not differ from studying elements of any typical criminal action as defined and applied by the criminal law. However, studying a crime and its perpetrator under criminal law is beyond the scope of this section. This section will concentrate on demonstrating and explaining a guilty act (actus reus) and a guilty state of mind (mens rea) under the ESCA law 2000 and will be divided into two subsections; the guilty act and the guilty state of mind.

2.11.1 The guilty act in market abuse according to the ESCA law 2000

The guilty act consists of three basic elements that have been committed or practised: conduct, causation and result. The actor must commit a criminal act. The act can be active or passive conduct. Such an act should lead to a specific result in the form of a violation of the interests protected by the law. It is necessary that this specific act or behaviour is directly connected to this specific result, which is the causal link between the guilty act and the result. If the act is not performed, then the result is not reached. This is called the cause and result connection, where the action or behaviour causes the result. The legislation exists to try to prevent crime from occurring.

Market abuse under the ESCA law 2000 shows that it can be classified under the group of crimes that require a physical act or behaviour, where the physical part of the crime is confirmed or ascertained, i.e. the criminal originated or initiated an act or a behaviour depending upon his or her voluntary physical act. In most of the stock market crimes, the physical element of the crime is represented as a positive act or behaviour, which is forbidden by the legislator as clearly stated in the words and phrases used in the context of the ESCA law 2000. Such words include to ‘furnish,’ ‘exploit,’ ‘fail,’ ‘deal’ and ‘spread.’ All of these actions are based on the guilty act (actus reus).

In the UK, market abuse under FSMA 2000 refers to behaviour that includes action or inaction. For example, if one acts ‘by word or conduct’ on behalf of an issuer or

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375 The term ‘causation’ is defined in criminal law as ‘The relationship between an act and the consequences it produces. It is one of the elements that must be proved before an accused can be convicted of a crime in which the effect of the act is part of the definition of the crime.’ See Elizabeth A. Martin, (ed.), *Oxford Dictionary of Law*, 5th edition (Oxford: Oxford University Press; 2001), p. 68.
376 Swan, *Market Abuse Regulation*, p. 32.
377 MAR 1.2.6 F(1).
any person who has a duty under law or regulation, and ‘he has not done so’, the accused can be guilty of market abuse, even if the actions were passive.\textsuperscript{379}

The criminal behaviour represented is as a positive action; it is also a negative action or behaviour, because it is a failure to act in a positive manner (omission).\textsuperscript{380} An example of a positive action with an insider offence occurs when an insider commits an act (the guilty act) positively in the sense of engaging in a trading transaction that is the result of using inside information. The negative action (failure to act or ‘omission’) occurs when there is an obligation, for example, to disclose information, but the accused fails to do. Such an obligation is mentioned in Article 9 of ESCA law 2000, which sets up a duty for each member of the Securities and Commodities Authority Board to declare in writing, forthwith upon assuming his or her duties, to the Authority (SCA) regarding the securities he or she owned by himself, his spouse and his minor children. Hence, if any member fails to disclose such information, he or she will be guilty. This is a so-called negative action.

Accordingly, the question is when is it considered that an act of a person constitutes a crime? For example, will a person be considered guilty of insider dealing if he or she merely gives an order to a broker to buy or sell securities? Or does a person’s liability start when the broker executes the insider’s order? So the \textit{actus reus} of this offence is to ‘exploit’ and ‘deal’ with the inside information or to ‘disclose’ the inside information to another party. Insider dealing offences will be discussed in the following chapter.

\begin{itemize}
\item \textsuperscript{378} MAR 1.2.6 F (2).
\item \textsuperscript{379} Swan, \textit{Market Abuse Regulation}, p. 32.
\item \textsuperscript{380} \textit{Ibid}.
\end{itemize}
The question of when exactly the crime begins was raised in an interview conducted in the UAE. Ghanaim stated that a criminal act may start as soon as an order has been given to the broker, even if the transaction is not carried out for reasons beyond the insider's control. However, it could be argued that, if an order is given to the broker, who does not carry it out, the order constitutes a so-called attempt. An attempt is a crime, which is defined ‘where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed.’ An attempt then is trying and failing to complete a crime; its consists of actus reus and mens rea.

There are instances when an insider cannot go through with a crime because of reasons beyond his or her control, such as when there is a sudden disruption to the electronic system and the order cannot go through or even when a broker does not carry out the order for a myriad of other reasons. These attempts by the insider or the manipulator are not criminalised under the ESCA law 2000.

2.11.2 The guilty state of mind in market abuse according to the ESCA law 2000

The state of mind of a person who has committed a crime is important. It establishes whether the accused is guilty or not. Thus, the criminal act (guilty act) is not enough, because the accused must also have had a guilty state of mind when he or she committed the act to constitute the offence. State of mind must also be determined to

381 Hussein Ghanaim (PhD in Law). Former lecturer in law faculty in the UAE University, he was a member of the legislative committee that drafted ESCA Law 2000. Currently, he is a legal counsellor, Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.
382 People v. Lee Kong, 95 Cal. 666, 668, 30 P. 800, 801 (1892)
decide whether the act was committed accidently or deliberately. The difficulty is how to present conclusive evidence that a practice is illegitimate, as the standard of proof required for a criminal offence is always proof beyond reasonable doubt.

In general, the legal construction of a crime must include the element of intention, without which the action cannot be considered a crime legally. Accordingly, crime does not occur without intention. The ESCA law 2000, in Judge Al Hammadi’s opinion, is different from the Federal Criminal Law No 3 of 1987, which penalises any person who commits a reckless or deliberate action. The Federal Criminal Law No 3 of 1987 stated that, if a deliberate action was not explicitly mentioned in any of the law’s articles, the criminal still has legal responsibility for his or her actions, be they intentional or reckless.

The ESCA law 2000 requires that crimes and offences be committed intentionally to be punishable. If the accused discloses information as a result of his or her neglect or recklessness, the accused will not be punished criminally for his or her unintentional act. This means that, under the ESCA law 2000, there is no evidence of the state of mind when the accused acts in a negligent and reckless manner.

The ESCA law 2000 requires that any person who engages in market abuse have intended to commit the act. Therefore, in the criminal court of the UAE, for a guilty verdict and punishment to be handed down for the act of market abuse, there must be

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385 Judge Hassan Al Hammadi,(PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, *Interview conducted*, June 2010, Abu Dhabi, United Arab Emirates.
387 Judge Hassan Al Hammadi,(PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, *Interview conducted*, June 2010, Abu Dhabi, United Arab Emirates.
sufficient proof that the offender had a guilty state of mind when he or she engaged either in insider dealing or market manipulation. However, insider dealing behavior does not just require general criminal intent; it requires specific intent. The ESCA law 2000 requires under Article 37 that the defendant must have acted (the exploiting act) with the specific intention of achieving personal benefit. If the defendant did not have this specific mental state, he or she will not be guilty.\textsuperscript{388} On the other hand, the accused could be guilty under Article 39 of ESCA law 2000.

In the UK, contrary to UAE jurisdiction, the FSMA 2000 does not include the requirement of intent; the law ‘does not require the person engaging in the behaviour in question to have intended to commit market abuse.’\textsuperscript{389} The purpose of the law is to deter insider dealing and market manipulation, but the prosecution would face a great difficulty if it had to prove intent. There is a similarity with the DIFC law No.12 of 2004 in that intent is not required to find the offender guilty. Rather, the prosecution is fully focused on the effect the action itself had.\textsuperscript{390} The focus is on the effect of the conduct, not on the intention behind it.

The difficulty involved in establishing criminal liability is that the prosecution is obliged to prove market abuse, insider dealing or market manipulation beyond a reasonable doubt. This standard of proof is especially difficult with regard to such crimes, because most market abuse cases are based upon circumstantial evidence. There must be evidence that the accused intended to induce investors, or either created a misleading impression or created an artificial price.

\textsuperscript{388} Article 37 of ESCA law 2000. For more discussion regarding this issue, see ‘Insider dealing Chapter’.
\textsuperscript{389} MAR 1.2.3 G.
\textsuperscript{390} Article 41(a) of the DIFC Law.
2.12 Punishments of market abuse under ESCA law 2000

The purpose of punishment is to combat market abuse, deter offenders and protect investors. None of this can be achieved without an appropriate punishment. However, one question pertaining to criminal punishments under ESCA law 2000 is the extent to which the punishment accomplishes its goals. This section and chapter five will provide an answer based on investors’ opinions. The ESCA law 2000 contains the following three articles for punishing market abusers:

Article 41:
Any person who contravenes the provisions of Articles (36, 37) and (39) of this Law shall be liable to imprisonment for a period of not less than three months and not more than three years, and to a fine of not less than one hundred thousand Dirhams and not more than one million Dirhams, or to either of these penalties.

Article 42:
Any person who contravenes the provisions of Article (38) of this Law shall be liable to imprisonment for a period of not more than three years, and a fine of not less than one hundred thousand Dirhams and not more than one million Dirhams, or to either of these penalties.

Article 43:
Without prejudice to the penalties prescribed in this Law or in any other law, any person who contravenes any other provision of this Law and the regulations issued pursuant thereto shall be liable to imprisonment and a fine, or to either of these penalties.

These Articles categorise two types of punishment: imprisonment and fines. Imprisonment should be for not less than three months and not more than three years. A fine should be not less than one hundred thousand Dirhams and not more than one million Dirhams. In this sense, the judge has discretionary authority to impose one or both penalties. The UAE legislature determined that the maximum fine is one million Dirhams. This decision to set this limit on has been criticised by researcher as not commensurate with the damage caused by market abuse in the securities markets and not high enough to deter potential offenders.
Market abuse practices may negatively affect the market place and harm investors. However, there has been no proportionality between fine that is imposed and the damage which may have been inflicted on investors and the market. In the case of the Dubai Islamic Bank, for example, the Court of First Instance applied Article 41 of ESCA law 2000 and fined defendants 1,000,000 Dirhams, but the value of the transactions carried out by the defendants reached Dh9.34 billion. The fine imposed should not be less than the expected profits to be obtained or the loss to be avoided. These proportional fines will be discussed in the next section.

The UK jurisdiction has adopted a dual regime for punishing market abuse offenders: criminal punishments and civil penalties. Criminal sanctions aim to deter market abuse and punish offenders, while the civil sanctions give compensation to market participants who have been harmed by misconduct or where the criminal proceedings have not been satisfied with the standard of proof of criminal misconduct. The FSA has the discretion to decide when criminal or civil action is appropriate. If there is sufficient evidence to prove market abuse is beyond reasonable doubt, there may be a criminal prosecution; otherwise civil action will be initiated. Accordingly, market abuse practices could be punishable by an unlimited fine or imprisonment of up to seven years. In the UAE, imprisonment for market abuse is limited to three years and fines to one million Dirhams. The Legal Consultant at the SCA stipulates that the punishments provided by the ESCA law 2000 are insufficient to deter or combat market abuse.

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394 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010 , Abu Dhabi, United Arab Emirates.
2.13 The proportional fines and media publishing

This thesis suggests two alternative penalties. The first type is the fine penalty, which is the so-called proportional fine. The proportional fine would be paid by offenders to the Authority, the amount corresponding to the graduated gain or avoided losses. The legislature should take into consideration the consequences of such crimes and the resulting damages. Most of those interviewed by the researcher agreed that the proportional fine should be imposed on defendants. One of the interviewees stated ‘the fine penalties should be double [the amount lost]. So we call it the proportional fine. In some countries the fine can be paid to the Authority up to three or four times of the individual’s gains or avoided losses’. The proportional fine is imposed in the United Kingdom. Under Part VIII of the FSMA 2000, in civil proceedings there could result in civil penalties of an unlimited fine; ‘There is no "cap". The financial punishment can be as severe as the FSA deems it is sufficient to inflict’. The FSA also authorised to bring a wider range of disciplinary proceedings and civil penalties. For example, it has the power to order the repayment of the losses of damage to another party who has suffered a resulting loss due to market abuse. To make these penalties of market abuse effective, the FSA has recourse to the judiciary. Under sections 381 and 383 of FSMA 2000, the FSA can apply to the court for an injunction restraining or an order of restitution, respectively. The FSA also has authority to issue a notice to require compensation in compliance with section 384 of FSMA 2000. It seems that the trend in UK jurisprudence is to depend on the financial penalties regime to deter and combat market abuse. It can be seen that a financial regime is more efficient than a criminal

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395 The researcher conducted an interview in the UAE during April, May and June 2010
396 Anonymous 2, the SCA, Interview conducted in May 2010, Abu Dhabi, United Arab Emirates
399 Swan, Market Abuse Regulation, p. 113.
regime. This is also the issue in the DIFC, which has instituted financial penalties against market abuse.

As second alternative punishment of market abuse that this thesis suggests is for the SCA to publish violators’ names in the media. Publishing violators’ names, their punishment and the kind of offence which they have committed may discourage market abuse in the financial market. Publishing such statements in the media is not common in the UAE legal system and the SCA would need permission from the UAE legislature. However, this punitive approach has been evident in recent legislation in the UK. For example, under Section 123(3) of the FSMA 2000, the FSA is given permission to publish a statement which names people who have committed market abuse. Public statements about misconduct are public censure and called ‘naming and shaming’. The FSA has a choice either to impose a fine or publish a statement about a person’s conduct. Nonetheless, the FSA takes into account all circumstances of a case before deciding a fine or publishing a statement. 400

This issue has been raised in an interview and in a questionnaire that will be discussed in chapter five. The majority of interviewees agreed with this practice. However, ‘naming and shaming’ or issuing a public statement of defendants’ behaviour and name are reputational penalties. The effect of this penalty may be greater than that of a financial penalty.

2.14 The SCA as Monitoring and Punishment agency

The SCA has authority to monitor the transactions in securities and participants in the market place. Articles 4 and 12 of the ESCA law 2000 authorised it to monitor the

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400 See the FSA Handbook Enforcement Manual, 14.34 G, 14.6.2 G and 14.6.3 G. See also Swan, Market Abuse Regulation, p. 117.
operational transactions in the marketplace to ensure that the regulations mentioned in ESCA law 2000 are applied. Article 12 (2) of the ESCA law 2000 authorised the SCA to receive notifications and complaints relating to the activity of the markets or brokers and to take appropriate resolutions according to the provisions of ESCA law 2000. However, one can ask if the SCA has the authority to punish investors. What is the nature of the relationship between the SCA and investors? Which sort of appropriate resolutions can the SCA take? Answering these questions is not easy because issues are left vague by the ESCA law 2000 itself. This function has been repeated under Article 11 of the Council of Ministers Decision No. 11 of 2000\(^\text{401}\) which states:

\begin{quote}
The Authority may take receipt of information laid and complaints made relating to Market or broker activity, conduct the necessary investigation, require any person to submit a written statement as to the circumstances and concomitant factors relating to the contravention which is the subject-matter of the information or complaint, and take appropriate decisions pursuant to the provisions of this Law and the regulations issued in application thereof.
\end{quote}

Some observations could be made from the above Article. Under this Article, the SCA became empowered with three functions: it is capable of just receiving complaints; it can conduct the necessary investigations; and it can take appropriate decisions according to the provisions of ESCA law 2000. However, what kind of decisions may it take? Does this mean that the SCA is entitled to impose penalties? Can it decide whether or not to transfer cases to the Court? The Article is vague. It could be argued that if UAE legislature wants to give the SCA the authority to impose penalties, the legislature would express that explicitly as it did about markets when it (the legislature) gave the markets authority to impose administrative penalties on brokers. This is found under Article 27 of ESCA law 2000. In comparison, the FSMA 2000, in the UK as

\(^{401}\) The Council of Ministers issued Decision No. 11 of 2000 concerning the regulations as to market licensing and supervision.
mentioned above, has given the FSA explicit authority to impose a wider range of penalties and unlimited fines.

It could be said that the ESCA law 2000 restricts the authority of the SCA to impose penalties against offenders. However, the SCA recently, in fact, has imposed monetary fines and taken some actions which are mentioned under Article 27 of ESCA law 2000. Accordingly, this Article sets out a range of penalties which are imposed only on brokers by markets; as has been stated explicitly, ‘the Market may impose on Brokers’ penalties.402 The researcher strongly criticised the SCA for imposing penalties on investors without citing any text from the ESCA law 2000 (which empowers the SCA to take such action). In an interview conducted in the UAE, a lawyer interviewed by the researcher stated that ‘there is neither offence nor punishment which is not set out in the law. Therefore, the SCA has not got the right to address and impose penalties on the investors. Whereas, this right has been given to the SCA for imposing penalties on brokers according to the ESCA law 2000, because the broker has had a relationship of subordination with the SCA while investors do not.403

However, Judge Al Hammadi said ‘the UAE legislature authorised the SCA to issue rules and disciplinary regulations and thus as long as investors entered the market, it means that s/he agree and accept those rules and regulations. Therefore, the SCA has the

402 Article 27 of ESCA law 2000 states, ‘The board of directors of the Market may impose on Brokers any of the following penalties:
1 - A warning.
2 - A monetary fine not exceeding one hundred thousand Dirhams.
3 - Encashment of the bank guarantee in part or in full.
4 - Suspension of the Broker from activity for a period not exceeding one week, and if the period of suspension exceeds one week, the matter shall be referred to the Authority to take action as it sees fit.
5 - A recommendation to the Authority to remove the broker from the register of Brokers licensed in the Market.
403 Sammer Ja’afar, Legal Consultant, Ja’afar Alwan, Al Jaziri & Associates; Advocates & Legal Consultants. Interview conducted, June 2010, Dubai, United Arab Emirates.
right to impose punishment when the investor is found guilty of violating law or regulation.\footnote{Abdullah Salem Al Naimi, Manager of Market Surveillance, Market Operations and Surveillance. Abu Dhabi Securities Exchange, Interview conducted, April 2010, Abu Dhabi, United Arab Emirates.}

In fact, this seemed a controversial issue because it is not clear which kind of power – ‘to prosecute’ or ‘to punish’ – has been given to the SCA. This shows the difficulties brought by the shortages of the ESCA law 2000.

2.15 Conclusion

This chapter has attempted to provide a comprehensive theoretical explanation of economic regulation and market abuse. It offered criticism when it was deemed necessary. The chapter criticised the role of the SCA for imposing penalties and presented the importance of establishing a specialist court and the concept of criminal reconciliation as an alternative to criminal prosecution. The following conclusions can be derived from the discussions in this chapter.

There is no doubt that the UAE government needs to play an important role in adopting regulation in order to take action against market abuse to correct insufficient regulation in order to promote fairness and efficiency in the marketplace. A regulated marketplace contributes to limiting violations and standardizing economic activities. Edward J. Swan states that ‘The regulation of any behaviour is not an exact science with clearly defined boundaries. It can probably only be understood as a mandated direction of travel, the exact route of which will have to be modified as a result of unforeseen events and changing conditions as the journey progresses.’\footnote{Swan, Market abuse Regulation , p. 14.}

\footnote{Abdullah Salem Al Naimi, Manager of Market Surveillance, Market Operations and Surveillance. Abu Dhabi Securities Exchange, Interview conducted, April 2010, Abu Dhabi, United Arab Emirates.}

\footnote{Swan, Market abuse Regulation , p. 14.}
Under ESCA law 2000, the present system of UAE federal securities regulation is far from perfect. In terms of regulation by SCA, there appears to be an inability of the authority to perform its natural role of controlling the mechanisms of the market or in reducing illegal practices engaged in the market. A practical example of the weakness of supervision of SCA is the Dubai Islamic Bank (DIB) share collapse. There was a huge circulation of DIB shares on the Dubai Financial Market because of the manipulation of the market. This eroded public confidence in the markets and served as an example of the need for more supervision. As Lilian Miles argues, in the case of Malaysia, poor regulation and weak enforcement meant that there is no simple way to deal effectively with the violent fluctuations in securities prices and to prevent fraud and market abuse. Moreover, the authorities cannot tackle market manipulation, false and misleading disclosure, insider trading and unclear accounting and reporting practices. Measures against all of these are crucial to the proper functioning of any financial market. If investment is to be encouraged, then markets must be regulated more strictly by supporting regulations and instituting effective enforcement mechanisms.


Miles, ‘Waking up after the 1997 Financial crisis: Corporate Governance in Malaysia’, pp. 21-32.
CHAPTER THREE

THE REGULATION OF INSIDER DEALING

3.1 Introduction

The case of insider dealing in the UAE law is one of the main issues of this thesis and will be examined in this chapter. It is at the centre of a situation that requires a solution. Insider dealing in financial markets has been a dominant topic of concern to the legal community as well as to scholars of the economy. It is a vague concept, and there is no global agreement regarding its definition. Regulatory solutions relating to different aspects of insider dealing are still discussed widely. However, in general, it is agreed that insider dealing should be forbidden.

This chapter will examine the issues involved in the criminal misconduct of insider dealing from a criminological viewpoint. It will be more specific than the previous chapter (The Regulation of Market Abuse), treating insider dealing as one form of market abuse. However, the manner in which Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority (ESCA Law 2000) has shaped the offence of insider dealing will be discussed. The analysis will be pursued through a comparative study that will examine the different juridical actions taken under the UAE law, UK laws and Market Law No. 12 of 2004 of the Dubai International Financial Centre, and will consider the advantages of each. The study will be supported by the opinions and knowledge of legal experts in the UAE as gathered from interviews conducted.

The core questions addressed in this chapter are the extent to which the regulation of insider dealing under the UAE jurisprudence is efficient and how has it been applied to protect market integrity and the market participants by remedying illegal practices regarding insider dealing. Therefore, the point at which the determination of irrefutable insider dealing has occurred must be considered. Other dimensions also need to be explored. Who is defined as the player in insider dealing? What kind of behaviour constitutes insider dealing? What information should be considered as coming from an inside source and therefore banned from being exploited? Is it sufficient to put market participants on an equal level in terms of information? Although no doubt exists that the UAE Authority has spared no effort to regulate the behaviour of market participants, are these actions sufficient to deter market abuse? Seeking answers to these questions is not an easy task, but it is essential to look carefully at the UAE law in comparison with the law of the UK and the DIFC. This chapter will offer a comprehensive overview of insider dealing and will analyse the rules relating to its regulation, illustrating their deficiencies in the UAE legal framework.

The chapter will deal with seven main areas. The first area concerns the economic and legal aspects of regulating insider dealing. This is needed to lay the foundations for its regulation. The second part of this chapter will evaluate the regulation of insider dealing under UAE law. This will be followed by a definition of inside information, and an attempt to define exactly who an insider dealer is. Finally, the chapter will look at the lack of a definition of insider dealing under UAE law, criminal offences and the ‘exploitation’ of the offence of insider dealing.
3.2 The Economic and Legal Aspects of Regulating Insider Dealing

There is general agreement that insider dealing should be forbidden. In spite of this, the ethical and financial debates about whether insider dealing is damaging are on-going. In these arguments, economists frequently use ethical reasons to justify the prohibition of insider dealing. They often employ straightforward arguments, such as ‘it’s just not right’ or ‘it’s unfair’. The issue of the regulation of insider dealing is one of the most divisive among legal and economic scholars. This section will offer a short analysis of the arguments put forward. It will look at the development of the dialogue at both social and academic levels. While not providing a new approach to the subject or going into a detailed analysis of these debates, this discussion will help to broaden our understanding of the economic and ethical features of the debate.

The debate on insider dealing has divided scholars into two main camps: those who are in favour of regulating insider dealing based upon fairness and moral considerations (this includes the belief that those with privileged information should not be unfairly enriched) and those who have argued against regulation based upon the grounds that insider dealing enhances market efficiency without regard to fairness and equality. As pointed out by Huddart et al, the regulatory goals of free accessibility to the disclosure of insider transactions are aimed at decreasing the information asymmetry between insiders and market participants, restricting the unjust enrichment of those who have the right of entry to inside information, and protecting marketplace integrity. Laura Nyantung Beny has asserted that, from an economic perspective, the vital issue for legal scholars is whether insider dealing is ‘economically inefficient’ and should be under the

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410 Avgouleas, p. 199.
influence of government regulation or, on the other hand, whether it is ‘economically efficient’ and, as a result, should not be regulated. According to K. Krawiec, ‘insider trading inspires immediate and passionate reaction among legal scholars, regulators, and the general public’. In fact, economists and law professors have different points of view concerning the regulation of insider dealing. The debate on regulation is divided between those who support Professor Manne’s theory, which asserts that insider dealing is beneficial because of its ability to improve efficiency in the financial market, and those who favour prohibiting insider dealing. As the argument continues, disputes have arisen as to whether insider dealing should be prohibited.

3.2.1 The Economic Arguments over Insider Dealing

The economic disputes largely concern the issue of deregulation of insider dealing. In this regard, Professor Manne was the first scholar to address the concept of deregulation of insider dealing in his book Insider Trading and the Stock Exchange. Manne advanced two main arguments outlining the way insider dealing brings advantages for people or companies whose shares are insider traded. Firstly, he asserted that an insider’s trade causes the price of shares to move in a proper direction more rapidly than would occur in the absence of insider dealing. Thus, insider dealing is

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415 It is claimed that Professor Manne was the first scholar who criticised insider dealing, but he is not the only one. See: Robert W. McGee, ‘An Economic and Ethical Look at Insider trading’ In: Paul U. Ali and Greg N. Gregoriou (eds) Insider Trading: Global Developments and Analysis, (Boca Raton: CRC Press, 2008), p. 40.
excellent because of increased financial efficiency.\textsuperscript{417} If so, both the investors and the company receive a benefit from the process of raising the price. Secondly, he viewed insider dealing as an efficient method of rewarding executives for having produced information. In this case, both the company and society profit: directly in the case of the company, since executives have a substantial inducement to generate extra information regarding value to the company, and indirectly in the case of society.\textsuperscript{418}

In fact, Manne has continued this debate not only in his book but also in an article entitled ‘In Defense of Insider Trading’.\textsuperscript{419} The tone of his views is economic rather than legal. He does not contend that there is nothing morally wrong with insider dealing. The fundamental hypothesis of Manne and others that insider dealing is favourable has not been followed at the policy level, but in academic circles those propositions are still interesting and valuable.\textsuperscript{420} The arguments fall into three main categories: (1) the enhancement of market efficiency; (2) a form of executive compensation argument; and (3) the victimless crime argument. This section will examine each of these arguments separately.

\textit{(1) Enhancing market efficiency}

The first justification for the deregulation of insider dealing was developed by Manne denoting that the transaction of insider dealing guides a security’s price gently in the proper direction. This will be recognized as noteworthy by participants in the marketplace and will be believed to be something interesting in relation to securities.

\textsuperscript{417} McGee as in Ali and Gregoriou, p. 36.
The result will be an increase in the demand for securities. Increasing a security’s price will continue steadily until the information reaches the market. The disclosure of inside information will certainly increase the price but not as much as insider transactions that have already caused the price to rise.\textsuperscript{421}

The simple answer to this was provided by Roy A. Schotland, who asserted that the reachable ‘empirical evidence’ pointed to insider dealing not having a strong effect on the market value of securities. In addition, despite the possibility that academic investigations may be inaccurate or their deductions unsuitable to a marketplace with no limitations, it is doubtful whether permitting insider dealing would cause any considerable variation in prices. When the price rises without providing the public with any reason for the increase, some investors might be linked to insiders on the ‘buy’ side. On the other hand, some people will decide that the share is priced beyond its value and will offer their shares for purchase or sale short. It is improbable that insiders can organize adequate wealth to move the stability price up even close to the point at which it will escalate on public announcement.\textsuperscript{422} In contrast, short-term dissimilarities in the supply and demand for securities could briefly have an effect on prices. However, because of the lack of new information in relation to the price of securities, any price changes caused by insider dealing are expected to be short-lived.\textsuperscript{423} Indeed, allowing insiders to exploit inside information on the pretext that it increases market efficiency is an unacceptable argument, because it tempts directors to delay the public disclosure of valuable information to benefit from inside information to the maximum extent possible.

(2) An argument for executive compensation

Not many writers argue that making financial gains from insider dealing is a suitable compensation for company insiders.\textsuperscript{424} Yet, such arguments do exist. It can be said that insider dealing encourages executives to act in the company's interest. Insider dealing inspires entrepreneurship.\textsuperscript{425} According to Manne, the salary market is not capable of sufficiently compensating these people. He points out that insider dealing gives entrepreneurs in the business world the ability to promote their ideas.\textsuperscript{426} Despite the fact that the typical entrepreneur gains the greatest advantage from the improvement, the company's stockholders, not the administration, enjoy the fruits of change. As a result, encouraging executives to be motivated and to make changes needs the presence of inducement. As Hartmann has asserted, insider dealing raises inventive behaviour.\textsuperscript{427} In addition, Manne has stated that a law that would give insiders the capacity to trade without inhibition might help to keep the current corporate system going. Trying to stop insider dealing actually may unintentionally disrupt ambition and wealth.\textsuperscript{428}

Manne paid attention to company executives, who were compensated in the course of insider transactions 'for their entrepreneurism,'\textsuperscript{429} while insider dealing on non-public information (deemed as a compensation implement) submissively acts in an unreasonable approach somewhat unconnected to the assistance that, in Manne's vision, is projected onto compensation.\textsuperscript{430} There are so many ambiguities and qualifications that Manne's hypothetical defence is hard to evaluate. Apparently, many people who

\textsuperscript{427} Hartmann, \textit{Insider Trading: An Economic and Legal Problem}.
\textsuperscript{428} Manne, \textit{Insider Trading and the Stock Market}, p. 110.
carry out ‘entrepreneurial services’ agree that stock options, bonuses, and other remuneration instruments are sufficient payment.\textsuperscript{431} Such executives are not the only insider dealers. Others, such as clients or customers of a company, also act as insiders.

(3) The victimless crime argument

Major controversy exists in the regulation of insider dealing concerning the identification of an individual victim who is harmed by insiders. Insider dealing is often described as a ‘victimless crime’.\textsuperscript{432} Herzel and Katz stated that ‘insider trading lacks credible plaintiffs, not victims. The two are not the same’.\textsuperscript{433} Questions have frequently been raised regarding this issue. Who, in fact, is victimized by the act of an insider? Is it the person who has sold his shares or is it the company itself?\textsuperscript{434} Even though every single transaction that arises out of insider dealing has one or more specific victims, these injured parties are unidentified. They exist, yet no specific person can be verified.\textsuperscript{435}

The difficulty stems from the fact that stock transactions are usually enacted in a particular manner at ‘arms length.’\textsuperscript{436} The majority of insider dealing takes place on the impersonal, unknown securities market, where there is no possibility of setting up any connection between insiders and outsiders, apart from the coincidence of both being in

\textsuperscript{434} Norman, Insider Dealing — An Exploration into the Existing Law and Practice, p. 28.
\textsuperscript{436} Norman, ‘Insider Dealing — An Exploration into the Existing Law and Practice, p. 28.
the securities market simultaneously. Furthermore, it is hard to make a distinction between a deal made for this reason and another that would have been made in any case. Also, it may not be easy to distinguish information that arises from legitimate research from that which is the result of an illegal tip. Moore argues that it is improper to claim that insider dealing is a victimless crime, as its proponents claim. However, it is not easy to recognize accurately who the victim is and the degree to which he or she has been injured.

2.2 Arguments for Regulating Insider Dealing

Those who want to prohibit insider dealing have used a number of arguments. These arguments rest upon three main bases: the logic of fairness, property rights in information, and damaging a third party. Each one of these is briefly summarized below.

(1) The logic of fairness

The main argument against insider dealing is that it is unfair or morally wrong. Insider dealing is seen as immoral, and its main characteristic is a ‘disparity of information’ between the parties to the deal. Insider trading should be based upon a so-called ‘level playing field.’ Advocates allege that the ‘disparity of information’ inclines the playing field in the direction of one player and against the other player. Since there is no ‘equal access’ to inside information for both parties, and the parties do not have ‘equal information,’ any transaction between them could be seen as unfair. It could

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be asserted that this fairness argument derived from legal scholars who were aroused against a practice which they considered unethical.

Equal access to material information is a fundamental legal principle. The Second Circuit Court of Appeals in *SEC v. Texas Gulf Sulphur* emphasized that ‘all investors trading on impersonal exchanges have relatively equal access to material information’. ⁴⁴² Some others argue that the concept of equal access is still unclear. ⁴⁴³ Judge Frank Easterbrook ⁴⁴⁴ has contended that ‘access to information’ has to take account of the cost of obtaining such information. He has stated: ‘People do not have or lack "access" in some absolute sense. There are, instead, different costs of obtaining information. An outsider's costs are high; he might have to purchase the information from the firm....’. Moore ⁴⁴⁵ maintains that there is no injustice, nor is there anything wrong with, individuals profiting from information advantages obtained through their own efforts. Moore also believes that citing justice as the basis for seeking ‘equal access to information’ is not an absolute rationale.

To conclude, then, the fairness justification for equal access means that outside investors should receive equal access to important information upon which to make proper investment decisions. Disparities in information between insiders and outsiders create bad investment decisions. This occurs when there is unequal access to the information. Equal access, then, may be reached by disclosing important information without delay in the securities market in order to keep dealing on an equal footing. The fairness of equal access concerns who obtains information on equal terms.

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Suggestions of this vision of justice are present in some of the legal views of Lord Lane, UK Chief Justice. He has maintained verbally that ‘gaining an unfair advantage...[is] cheating the other party to a transaction ...’. If an insider profits at the expense of another party who is not on an equal footing, it is considered unfair, because they are not equally well-informed concerning the subject of the transaction. Disparity of information based upon the fairness argument has been resorted to as a justification for prohibiting insider dealing, because any variation in the information available to insiders and outsiders in the securities market is unfair and, therefore, unethical. When justice and fairness for investors are underestimated, this treatment will affect investors’ confidence in the integrity of the securities market.

(2) Inside information as an intangible property right

The view that inside information is a property right that insiders should be authorised to use is rejected as morally unpleasant and legitimately unsound. Inside information is considered a beneficial, valuable and allegedly intangible property right. Intangible property rights, referred to as intellectual property rights, include trademarks, patents, copyright, and confidential information. The assertion that inside information material is a type of property leads to the conclusion that insider dealing breaks the law, because it involves an infringement of property rights. As Irvine points out, this is the ‘theft

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theory’. If one party discovers material information and therefore such information belongs to this party, then insider dealing can be deemed theft when some other party benefits from the information by exploiting it in a way for which it was not meant. Moore\textsuperscript{451} asserts that, if non-public information were property that belongs only to the company that produced it, insider dealing would be immoral if the possessor company forbade the employment of it. It would, in this case, be a breach of contract.

\textit{(3)Harmful and damaging counterpart}

The exercise of insider dealing is harmful to regular investors who take part in trading with insiders. This leads to participants in the market withdrawing and thus damaging the marketplace in a general sense.\textsuperscript{452} The investors who are harmed or damaged by insider dealing have a vital role in justifying the prohibition of such practices.\textsuperscript{453} While Manne\textsuperscript{454} argues that academic research shows that there is no financial damage worthy of attention done to any distinguishable investor from insider dealing, but the lack of study in this field might explain this lack of any convincing proof. A claim for damages can be reasonable seen in the emerging securities markets and cannot be easily disregarded in this way.\textsuperscript{455}

The harm of ordinary investors occurs when insider dealing takes advantage of material information before it is disclosed to the capital market. In this case, insiders use inside information at the expense of others. This certainly harms the ordinary investor and the

\begin{thebibliography}{9}
\bibitem{Moore} Moore, ‘What is Really Unethical About Insider Trading?’, pp. 171–182.
\bibitem{Hartmann} Ibid.
\bibitem{Manne} Hartmann, \textit{Insider Trading: An Economic and Legal Problem}.
\end{thebibliography}
market as a whole. The other version of this argument, as Mine Cinar points out, relates to when the public sees insider transactions in the financial markets that take advantage of investors. This will certainly result in a loss of confidence and will lead to investors ending their investments. The public will have a lack of confidence and a negative opinion of any financial market that is established in the knowledge that insiders benefit from information to the detriment of other stockholders. This conclusion is the result of the first practice of insider dealing, which leads to the destruction of investor confidence in the market.

The idea that individual investors have experienced financial damage may not in itself be a strong basis for a new law, as it is difficult to show a causal link between insider dealing and the damage arising from the impersonal securities markets. However, this does not mean that all acts protecting the individual investor by regulation are rejected. An enactment of laws is essential not only to protect ordinary investors, but also to maintain high standards of confidence and integrity in the financial market.

3.3 Evaluation of Insider Dealing Regulation under the UAE Law

Insider dealing has been a criminal offence in the UAE since the ESCA law was enacted in 2000. During the preceding period, especially in the summer of 1998, the corruption of insider dealing and other market misconduct had reached a volatile peak. According to the International Monetary Fund (IMF), a flawed regulatory system permitted:

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\text{the market [to be] susceptible to abuse by insiders as well as other forms of market malpractice. Following market disruptions in 1997 and 1998, the UAE authorities decided that [an] effective regulatory}
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456 Ibid.
457 Hartmann, Insider Trading: An Economic and Legal Problem.

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regime was needed to address the negative market perceptions and improve the integrity of the markets.\textsuperscript{458}

The principle problem was the previous absence of specific legislation to remedy such offences. Even if executives of several companies, or other insiders who possessed confidential information, exploited it for personal gain or disclosed it to another party, the lack of clear rules left authorities debating which law could be applied to the abuses and even if it were possible to prosecute those individuals for insider dealing offences.

Prior to the establishment of ESCA Law 2000, Federal Company Law No.8 of 1984 was applied to perpetrators and provided for the criminal liability of company officers.\textsuperscript{459} Article 322(7) of this law stated that the punishment would be imprisonment for a period of not less than three months and not more than two years and/or a fine of not less than ten thousand Dirhams and not more than one hundred thousand Dirhams.\textsuperscript{460} Either of these penalties was to be imposed upon each manager, member of the board of directors, member of the board of supervisors, consultant, expert, auditor, his assistants or employees and any person entrusted with the inspection of the company who disclosed secret information that had reached him as a result of his position in the company, or who exploited such secrets to obtain personal benefit for himself or another person.

This provision involved two prohibitions upon insiders. The first banned disclosure of company secrets that had reached an employee through his position in the company. The second related to the exploitation of the information to obtain a personal benefit for

\begin{footnotesize}
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\item \textsuperscript{458} International Monetary Fund, \textit{United Arab Emirates: Financial System Stability Assessment}, \textquote{including reports on the Observation of Standards and Codes on the following topics: Monetary and Financial Policy Transparency, Banking Supervision and Payment Systems,} (Washington, D.C.: International Monetary Fund,2003), p. 19.
\item \textsuperscript{459} Articles 417 to 422, in the UAE Federal Criminal Law No. 3 of 1987 provide for strong sentences to be imposed in cases of fraudulent bankruptcy. Articles 399 and 423 are used for cases where technical fraud is used for personal gain and fraud in trade, respectively.
\item \textsuperscript{460} This provision stipulates that these penalties should be used without prejudice to a more severe punishment provided in another law.
\end{itemize}
\end{footnotesize}
himself or for another person. However, it is unclear whether an insider who exploits secret information aiming to gain some benefit but is unable to obtain this benefit due to an unforeseen event would be subject to criminal responsibility under this aforementioned proviso. The culpability of a person who has not been mentioned in this provision and is not in direct connection with the company (such as secondary insiders [tippees]) needs to be considered. Would he or she also be subject to this provision?

However, the regulatory provision of the Federal Company Law No.8 of 1984 was intended to preserve company secrets that may be considered so-called trade secrets or business secrets, not to regulate inside information that the market might rely upon to determine the price of whatever commodity is the subject of the market. Thus, the term ‘trade secrets’ is defined as any valuable business details that are retained as confidential to preserve an advantage over competitors, that cannot be disclosed without a breach of trust, and that are the subject of reasonable efforts to protect confidentiality. Frequently, inside information has two characteristics: firstly, it is not generally available, and, secondly, it can affect the price of the company’s securities if divulged. It can be argued that the UAE regulatory agency’s wording limits the capacity of this provision, because it could not be applied to those individuals (the secondary insiders) who come into possession of a company secret but do not have a direct connection to the company. Yet, this provision is a good step toward deterring to some degree the illegal practice in question and achieving some protection against criminal access to secret information. The key element in the prohibition is the idea that a business secret was used or given to attain an advantage. However, the Federal Company Law No.8 of 1984 is not within the scope of this study. An exhaustive

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461 For a definition of ‘tippee,’ see below under the subsection on secondary insider dealing.
462 Article 322(7) of Federal Company Law No. 8 of 1984.
discussion of all of its aspects will thus not be offered, except to the extent necessary to explain issues concerning insider dealing.

In contrast, provisions specifically outlawing criminal insider dealing are found under Articles 37, 38, 39 and 41 of ESCA Law 2000. Indeed, this law defines certain prohibited activities and criminalizes acts which amount to insider dealing. Moreover, the SCA Decision No 3 of 2000 promulgated in Articles 37, 38 and 39 in accordance with the ESCA Law 2000 imposed a similar criminalization of actions and raised administrative sanctions. The following sections will evaluate these provisions through comparative study.

The starting point for any consideration of insider dealing should take into account what is meant by ‘inside information’ and who exploits such inside information, the possession of which is the key to being within the legislative provisions. This does not mean simply that obtaining information about a company is prohibited. Instead, it means that access to privileged confidential information at the expense of others could lead to a breach in the principle of equality of access to information. This is based upon the ground that the practice offends the basic notions of fairness when the possessor exploits such confidential information in the securities market to gain financial profit. Since not all information should be considered inside information, it is essential to determine the content and characteristics of information prohibited from use in the securities market by insider dealers. What are the elements required to determine that an individual did indeed possess inside information?
The section below attempts to offer a definition of inside information under three jurisdictions: UK law, DIFC\textsuperscript{465} Market law and the UAE federal law.\textsuperscript{466} The UK definition of inside information is covered by two pieces of legislation: the first appears in the Criminal Justice Act 1993 (CJA 1993), and the second is in the Financial Services and Markets Act 2000 (FSMA 2000).

\subsection{3.4 Defining Inside Information}

The gears of financial markets turn on information, and the open flow of information is essential to supporting a knowledgeable and effective market. Data, news, statistics, and personal insights form the stuff on which the market depends to select the cost of a particular type of goods. However, does every piece of information that has not yet reached the public constitute inside information and the behaviour of its exploiter constitute an illegal act? It is not an offence to use information, however important it is. But there are certain features that have an effect on the emergence of the responsible use of this information. Delineating between ‘public information’ and ‘inside information’ is critical to this process. Public information can be accessed at any time and lawfully used by any individual. In contrast inside information may be restricted in some way. Even if it is leaked, the inside information cannot be considered public information unless it is in accordance with the applicable rules of disclosure.

Legislators are agreed on the need to resolve the exact character of inside information, because establishing a unified, distinct denotation of inside information is critical. The determining characteristics should delineate between readily available, widely used public information and discrete inside information that forms the essence of the issue of

\textsuperscript{465} Dubai International Financial Centre (DIFC).

\textsuperscript{466} Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority and Market (ESCA Law 2000).
a variety of regulatory mandates, exemplified by the control of insider dealing and timely disclosure.\textsuperscript{467}

In the UAE, inside information is defined in the ESCA Law 2000 as:

Article 37:

\textit{The exploitation of undisclosed information which could affect prices of Securities in order to achieve personal benefits shall not be permitted...}

Article 39(1):

\textit{It shall not be permitted for any person to deal in Securities on the basis of unpublicised or undisclosed information he acquired by virtue of his position...}

These Articles contain no clear definition of inside information. However, they do determine some characteristics of inside information, such as ‘affect[ing] prices of Securities’ and ‘unpublicised or undisclosed information’. This definition is insufficient, because it does not specify the dimension of the sway on prices that may have been induced by information released into the market or, conversely, whether this data is specific, precise, or factual. Even non-factual innuendo may affect the worth of securities in the marketplace.\textsuperscript{468} In this regard, the ESCA Law 2000 still remains vague. The Legal Consultant\textsuperscript{469} at the Securities and Commodities Authority (SCA) alleged that ESCA law 2000 identifies three features of inside information which are: unpublished, a significant influence and precise. Two of these features are included in Article 37 and the third was not mentioned in Article 37 and there is no not need to mention it. He added ‘I cannot say that this is a deficiency in Article 37 of ESCA law 2000 for not mentioning a precise feature, although it would be better if the regulator were to define inside information as precise and accurate’. The interviewee concluded by saying that inside information must not have been previously released to the public.

\textsuperscript{467} Albelooshi, p.234.
\textsuperscript{468} On a similar theme, see: Ahmed Al-Mehlem, ‘Insider Dealing in the Companies Act of Kuwait No. 15 of 1960’, \textit{(1988) 13 Arab Law Quarterly} 3, pp. 4-5.
\textsuperscript{469} Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, \textit{Interview conducted in May 2010}, Abu Dhabi, United Arab Emirates.
(unpublished); it must be precise and not unclear or vague; and it must have a significant influence on the securities price.

In the UK, the definition of inside information comes under two laws: the CJA 1993 and the FSMA 2000. Section 56(1) of the CJA 1993 and Section 118(2) of the FSMA 2000 require that inside information be a vital element of the offence. The CJA 1993 defines inside information by mentioning four characteristics as provided in Section (56):

‘inside information’ means information which—

(a) relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally;
(b) is specific or precise;
(c) has not been made public; and
(d) if it were made public would be likely to have a significant effect on the price of any securities.

(2) ... securities are ‘price-affected securities’ in relation to inside information, and inside information is ‘price-sensitive information’ in relation to securities, if, and only if, the information would, if made public, be likely to have a significant effect on the price of the securities.’

The FSMA 2000 has also adopted the same meaning of characteristics as provided in Section 118C:

(1) ‘... ‘inside information’ for the purposes of this Part.
(2) In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which—
(a) is not generally available,
(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and
(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments...

(5) Information is precise if it—
(a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and
(b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.

(6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.’

It is vital to highlight the differences between the FSMA law and the UAE law in interpreting the term ‘insider information’. The characteristics and components of inside information should encompass details that correspond to a distinct category as well as to a specific security, while eliminating general information. The FSMA 2000 general information, then, is that which can be acquired by research or analysis by or on behalf of users of a market.\textsuperscript{470}

The DIFC Market law is similar to the UK laws to some degree, defining inside information (in DIFC law No. 12 of 2004 in Sections 42 and 45(1)) as material information that is ‘... not generally available’ or that ‘has not been disclosed to the market in accordance with Law or the Rules’ as material information, as opposed to the UK term of inside information. Section 45(1) states that meaning material information relates ‘to investments..., to the affairs of a reporting entity\textsuperscript{471} and to a change in the business, operations or capital of the reporting entity,’ and that such information ‘significantly affects, or would reasonably be expected to have a significant effect on the market price or value of the Investments in or related to the reporting entity’.

Almost all of the comparable legislations in question agree that the characteristics of inside information are essential elements to be evaluated, and the determination will


\textsuperscript{471} A Reporting Entity is a person who has made a Prospectus Offer in the DIFC or has securities admitted to an Official List. He then becomes a Reporting Entity. A Reporting Entity is required to report certain information as prescribed in the Offered Securities Rules (OSR) which relates to itself and the securities it has issued. For details, see: http://www.dfsa.ae/Pages/DoingBusinesswithDFSA/BeingSupervised/ReportingEntities.aspx.
depend in each case upon whether the information possesses these characteristics. However, as a result of the absence of a clear definition of inside information under the ESCA Law 2000, comparable legislation should be referred to here as that provides a greater understanding of elements that are key to determining the definition of inside information. The subsections below will discuss the characteristics of inside information extensively and in sequence.

3.4.1 The Characteristics of Inside Information

Identifying inside information, to prohibit the exploitation of such information, is vital in a legal sense. Four characteristics of inside information are found under the aforementioned comparable legislation: non-public information, price sensitive information, specific or precise information, and relevant information to specific issuers or securities.

(1) Non-public information

Non-public information is distinguished from information that has not yet been made public. Insider dealing is done on the basis of using non-public information, that which is not publicly available. Thus, the insider is able to use non-public information to gain an advantage at the expense of other investors. This is the main reason for prohibiting insider dealing.

There are variations in the definition of ‘public’ information. In the ESCA Law 2000, Article 37 requires that the exploitation should use ‘undisclosed information,’ whereas Section 42 under DIFC law No. 12 of 2000 requires that the information should be ‘not generally available in the market’ and adds ‘not disclosed to the market’ in accordance with law or the rules. The UK uses two terms: ‘not generally available’ under the
FSMA 2000 and ‘has not been made public’ under the CJA 1993. In the UAE, the ESCA Law 2000 uses different two terms: ‘unpublicized information’ and ‘undisclosed information’.\(^{472}\) These terms do not provide the regulator in the UAE with a clear picture of the issue in question.

In the UK it can be argued that using different terms under the CJA 1993 and the FSMA 2000 is a reasonable choice if these two terms emphasise the critical issue of having the information available to market participants and not having it available to the general public.\(^{473}\) It remains to be determined if the two phrases can be used interchangeably or if they are synonymous. At this time, no clear decision presents itself. The confusion stems from the use of the term ‘inside information’ on two occasions, each providing a different definition of the same term. Yet, when evaluating the definitions applied to the two acts, it is possible to say that the two phrases refer to the same behaviour.\(^{474}\) If divulged according to the systems of disclosure rules in the securities market, information can be deemed ‘made public’; the ESCA Law 2000 in Articles 33, 34 and 35 regulates the disclosure of inside information in this regard.\(^{475}\) Accordingly, information that is required to be published and is divulged via the systems provided will be considered data that has been made public.

The UK legislation provides the most clarity in defining the moment when company details are ‘made public.’ In this law, information does not have to be broadly announced or made available to a large sector of the public, but only to a limited segment. Additionally, the ‘made public’ heading includes information that can be

\(^{472}\) See Articles 39/1 and 37 of ESCA law 2000.


\(^{474}\) Albelooshi, p. 245.

\(^{475}\) For more details, see: Regulation of Market Abuse in the UAE, chapter two, section on ‘Mandatory disclosure and Transparency under UAE Regulations,’ p. 17.
obtained only by individuals ‘exercising diligence or expertise’ and can be comprised of information made available to a segment of the population outside of the UK.  

However, even making insider information public will not necessarily completely diminish the ability of insiders to take advantage of the market, as a time lag exists between the publication and absorption of information. It is common knowledge in the financial field that the cost of securities does not immediately alter even upon the disclosure of material information. The critical issue is whether the information was made public before or after dealing occurred.

The Economic Secretary to the UK Treasury highlighted the importance of this detail when he stated that, when someone has access to inside information intending to make it public, but uses it before it has actually been divulged publicly, then that person can be considered guilty of insider dealing. Yet, the person who possesses inside information and releases it before taking action on the information has done nothing wrong. The issue is the timing of the deal. Whether a deal is made before publication of the information or after determines whether the act is insider dealing or not. The moment when data becomes public is critical, because that determines, within the pertinent laws of insider dealing, whether the behaviour occurring before or after is legal or illegal. Data essentially enters the public domain at the time of publication or disclosure, but it does not need to be assimilated and assessed by other investors before dealing can take place.

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478 The Economic Secretary to the Treasury, Mr Anthony Nelson. See the report of Standing Committee B, 10 June 1993, at columns 180-181, 186.

479 See the comments of the Economic Secretary to the Treasury, Mr Anthony Nelson, in the report of Standing Committee B, 10 June 1993, at columns 180-181, 187.

480 Wooterspoon, (, p. 424.
Once sensitive information has been introduced to the public, it is no longer possible to consider this information ‘inside information’. Thus, the laws for insider dealing will not apply, and anyone who deals in the relevant securities may do so with impunity.481

A landmark case in insider trading, the case of Cady, Roberts & Co., explains this perspective:

Analytically, the obligation [to disclose non-public information earlier than trading] rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.482

The concept of fair play is at the root of these opinions, and the precept that fair play is necessary to preserve the coherence and soundness of the securities markets, as well as to retain the overall confidence placed in them by the general public, is vital. Beyond that, the point of equal access to material information suggests that the rule should be extended to encompass all material non-public information, even if it is accessed by an inside source or someone outside of the company.483

A clearer set of standards regarding the denotation of the term ‘made public’, allowing for greater distinction, is provided by the CJA 1993. In this definition, the moment that information is ‘made public’ can only happen when information is released from the company announcements office, and specific stipulations provide guidance for the permissible recipients of the release through that office. For instance, if the announcement is made outside of the business hours of the Regulatory News Service, the rule stipulates that the information must be sent to two or more UK publications and to two separate news agencies to provide satisfactory coverage. The company

481 Brazier, Insider Dealing: Law and Regulation.
announcements office must receive this information before or at the same time that it is
given to the other entities to permit the information to appear to have been made public
at the moment of the newspapers’ publication. According, the Economic Secretary
to the UK Treasury added that information can be submitted directly to the stock
exchange, and, through its agreements with press firms and purveyors of news, it can
be released broadly to the public. The third method is to release the information directly to
news sources, press firms, and a variety of other recipients at the same moment that it is
released to the stock exchange.

(2) Price sensitive information

The second characteristic of ‘inside information’ is that it is information that has an
effect on the price of securities. To qualify under this definition, the information must
be likely to have a significant effect on the price of any securities if it were made
public. This is the most essential feature of the statutory definition of inside
information. The court’s determination of whether a business fact is considered inside
information pivots, then, on the significance and scope of its effect at the moment when
a transaction occurs, rather than on the breadth or depth of the information itself. This is
the distinguishing quality that underlies the concept of price sensitivity, a critical
moment during the transaction when information remains unattained by the general
public.

In the DIFC market, the Dubai Financial Services Authority (DFSA) asserted that
price sensitive information is that which is most likely to generate significant changes in

485 Mr. Anthony Nelson, (He was the Economic Secretary to the Treasury) see; House of Commons
Debate, 18 May 1993, vol. 225, cc112-3W.
488 The Dubai Financial Services Authority is the sole independent regulator of all financial and ancillary
services conducted through the Dubai International Financial Centre (DIFC) a purposely-built free zone.
the cost of securities, as well as to hamper the ability of debenture issuers to meet their commitments. The DFSA concluded that the Reporting Entity is best qualified to evaluate if information is most likely to instigate significant changes in the price of its securities, as the particular varieties of situations related to the company will determine what information will be considered price sensitive.489

The UK case of *R v. Asif Nazir Butt*490 is a practical example of one person taking advantage of inside information that qualified as price sensitive information. Mr Asif Nazir Butt worked in an investment bank and, through his position as vice president, had access to highly confidential inside information. The price sensitive details or price-affected outcomes concerned the status and performance of companies that his employer was advising. Over a period of three years, he used confidential inside information relating to these companies for personal gain before such information was released to the public. As a result, he was convicted of committing insider dealing in contravention of Section 52(1) of the Criminal Justice Act 1993. The clearest determination can be made if the employee conducts transactions for personal gain very close to, but before, the moment when the crucial company details become public knowledge.

The FSMA 2000 uses language that is parallel to that used by CJA 1993. It specifies that inside information ‘… *would be likely* to have a significant effect on the price of

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489 The DFSA *Rulebook* Offered Securities Rules (OSR) Guidance in relation to sections A2.1, A2.3 and A2.4, and to Sections A7.1(4) and (5).

490 *R. v Asif Nazir Butt*, Court of Appeal, 12 January 2006 [2006] EWCA Crim 137, [2006] 2 Cr. App. R. (S.) p. 295. On 20th December, 2004, Asif Nazir Butt was declared guilty of conspiracy to engage in insider dealing contrary to s.52 (1) of the Criminal Justice Act 1993 and s.1 of the Criminal Law Act 1997. As a result, he was sent to prison for five years. A confiscation order was subsequently made in the sum of £348,325, and the Butt was ordered to pay £60,000 towards the prosecution costs.
any securities...’, whereas DIFC law No. 12 of 2004, Section 45(1) states that ‘...information that significantly affects, or would **reasonably be expected** to have a significant effect, on the market price or value …’ (Emphasis added). Obviously, a slight difference exists between the words of the DIFC and the counterpart phrase in the UK Law. However, the DIFC law No.12 of 2004 uses the phrase ‘reasonably be expected,’ which implied a meaning derived from the term ‘would be likely’. The ESCA Law 2000 also refers to information ‘...which could affect prices of Securities’ 491 (Emphasis added). Accordingly, the use of these similar terms under each separate piece of legislation supposes that the possibility of this action influencing the price of securities is enough, whether moving them upward or downward, even if a resultant effect does not actually happen.

Moloney492 argues that the controlling terms (that the information ‘would...be likely’ to have a ‘significant’ effect) are adequately ambiguous to provide considerable flexibility in the execution of this requirement. However, very little difference in potency exists between the phrases ‘reasonably expected’ and ‘would be likely’. Both terms offer the sense of a fair probability. The precise alignment that suggests the potential for an effect is not sufficient. A level of probability that borders on certainty is not very important. Arguably, this presents a precarious situation in which the effect of this possibility on prices must be evaluated in terms of the level of probability that the possession or use of such information creating an effect on the price could occur with any reasonable expectation.493

491 Article 37 of the ESCA Law 2000.
The critical issue here is to understand the actual meaning of the term ‘reasonably be expected.’ As part of this understanding, identifying whether the test of reasonableness is subjective or objective is critical. From the perspective of the person who is in possession of the information, the subjective approach is applied. In this way, the term ‘reasonably be expected’ expresses more of a determination of what a reasonable participant should have been able to comprehend of the incident when the pertinent action occurred. Consequently, it is reasonable to expect that the test of preciseness should be an objective one. However, a dual test is applied by US courts. It is both subjective and objective in determining if the information in question has any effect on the price of securities. In Basic, Inc. v. Levinson, the United States Supreme Court determined that details would be considered price-sensitive information if there was a substantial likelihood that a reasonable investor would deem the release of this information as having certainly changed the ‘total mix’ of data released. Yet, there is no definition under UK laws of the term ‘significant effect.’ How can the concept of ‘significant effect’ be measured? Neither the Act nor the General Note to the Act puts forward any explanation. The new guidance on the subject issued by the Stock Exchange also offers no assistance, as it denies the feasibility of being able to isolate any percentage movement in a share price that could clearly make released information price sensitive. It further suggests that attempts at achieving a more precise definition of

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494 Ibid.
498 White, p. 163.
the term ‘price sensitive’ are impossible for a triad of reasons: the volatility of each share price, the actual price of the share, and the dominant market trends at the time of the incident. In addition, the document details how the increasing level of specificity of the information released correlates with the increasing risk of it also being price sensitive.499

In securities markets, various kinds of information connected to a company may cause significant movement in securities prices. These include information which relates to a new item for consumption, the fact that the company has received a large order or begun a major redundancy programme, or the transaction of a new product that is not meeting investor expectations. In the meantime, to make an immediate and accurate determination of the potential effect of any released details, businesses and executives should be aware of the market expectations that are part of each organization’s share price. This awareness is critical to a prompt and decisive determination.

However, the absence of a definition of ‘significant effect’ or ‘effect on securities prices’ makes it seem that the ESCA Law 2000 and its counterpart legislation in question expected the court system to engender the guidelines that would determine if information has an effect on a company’s securities price or not. A decision such as a merger or failure of a merger, or a transaction in a large project, or discovering an oil well, or metals, can each subjectively raise or lower the financial state of the company, which in turn raises or lowers the value of the share. Thus, the measure of this issue is seen as dependent on subjective criteria, to be evaluated by the judge of the subject matter, and is controlled by the judge’s evaluation. As a result, it is not required that

influence actually takes place. The measurement is the possibility (potential) for it to be influential.\textsuperscript{500}

Some bias underlies the seemingly objective test that can be applied by the law, because it seems to favour skilled investors and, in particular, those investors who work at an institution, as they are more likely to connect disclosed data with a seemingly insignificant piece of non-public information that would allow them to make an advantageous determination about their shares. Private investors normally would not have the experience or immediate access to the information to enable them to make these links. This distinction inherently causes a disadvantage to private investors.

(3) Specific or precise information

There is no particular requirement under either the ESCA Law 2000 or the DIFC law No.12 of 2004 as to whether inside information should be specific or precise, in contrast to the UK laws. The CJA 1993 employs two terms: ‘specific’ and ‘precise’ information. It states that inside information means information that is ‘specific or precise,’\textsuperscript{501} while the FSMA 2000 expressly refers to ‘precise nature,’\textsuperscript{502} rather than using two terms as in the CJA 1993. Therefore, it seems that the CJA 1993 requirement that inside information must be ‘specific or precise’ was drafted in a less narrow way than the FSMA 2000, which requires no more than being of a ‘precise nature.’

It may be questioned how the use of the words ‘specific’ and ‘precise,’ alternately, contribute to fighting insider dealing. It has been argued that the UK government was concerned ‘...that precise alone might be interpreted narrowly be the courts, so specific,

\textsuperscript{500} Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, \textit{Interview conducted in May 2010 , Abu Dhabi, United Arab Emirates.}

\textsuperscript{501} See Section 56 (b) CJA 1993.

\textsuperscript{502} See Section 118C (5) of the FSMA 2000.
which is employed in existing legislation, has been added...’ 503 With regard to ‘specific’ or ‘precise’ information, an example was given by the Economic Secretary to the UK Treasury. 504 At a luncheon or meeting, a company executive might disclose to an analyst that ‘the outlook for the company exceeds market expectations.’ The disclosed information would not be considered precise, as the executive did not say exactly what the results were believed to be. However, the statement could be considered specific, because the executive clearly would be speaking about the company’s results. 505

The term ‘specific,’ as explained by the Economic Secretary to the Treasury, was retained as a buffer against the ‘narrow, exact, and definitive’ meaning suggested by the use of the word ‘precise’ alone to describe the pertinent information. In his communication to the Standing Committee, 506 he provided an anecdotal description of a situation in which one individual had knowledge of an impending takeover bid. He made clear that the knowledge of this takeover bid would be deemed precise information. 507 This was an attempt to exclude any information that could be construed as ‘rumour’.

In contrast to this approach, the FSMA 2000 identifies ‘precise information’ as that which: (a) indicates circumstances that exist or may reasonably be expected to come into existence, or an event that has occurred or may reasonably be expected to occur; and (b) is specific enough to enable a conclusion to be drawn as to the possible effect of

503 See the report of Standing Committee B, 10 June 1993, at column 173.
504 Mr Anthony Nelson, the Economic Secretary to the Treasury. See report of Standing Committee B, 10 June 1993, at column 175.
505 See report of Standing Committee B, 10 June 1993, at column 175.
506 Ibid.
507 Wotherspoon, , p. 421.
these circumstances or the event on the price of qualifying investments or related investments.

Consequently, this FSMA 2000 approach to the term ‘precise’ would include information suggesting ‘circumstances [which] may reasonably be expected to come.’ As a result, it is likely that the term ‘precise’ has a broader application. These definitions engage the idea of ‘precision,’ a word that suggests in this context situations that may exist or are reasonably likely to exist. These situations contain enough specific detail that a surmise may be produced regarding the changes that would result in the price of any investments. The information in question would qualify only if it is likely that a thoughtful and reasonable investor might use it as a determiner in his market activity choices. In the case of *Arif Mohammed v. FSA*, Mr. Arif Mohammed was employed as an audit manager for an accounting firm whose work encompassed details regarding Delta plc. As a result, he accessed the confidential data that Delta was preparing to offer its electrical division on the market. Even though he was told that the details he had accessed were deemed highly confidential and should remain undisclosed in any fashion, he acquired shares in Delta. Once the announcement of the sale was communicated publicly, Mr. Mohammed made a profit by trading his shares. This action was found to be a breach of Section 118 of the FSMA 2000; investigators alleged his conduct was a ‘misuse of information.’ He filed an appeal to the Financial Services and Markets Tribunal regarding this determination.

As part of the appeal, Mr. Mohammed conceded that he was aware of the impending sale of the electrical division, yet he argued that his knowledge of the impending sale

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508 This viewpoint has also been mentioned by Albelooshi, pp. 236.
was not ‘specific and precise’. He argued that this lack of specificity and precision derived from a lack of significant corollary information related to the sale, such as the price and profit data, the stipulations of the sale, and whether the amount to be received overall posed a benefit that might provide an increase in the company’s share price.\textsuperscript{511}

After deliberating on the points of this appeal, the Financial Services and Markets Tribunal determined that, when Mr. Mohammed bought the Delta plc shares with the minimal information of an impending deal, he was fully aware of the ongoing transaction. This fact provided the Tribunal with grounds for assessing that the information alone was specific and precise. The Tribunal’s reasoning stated that Mr. Mohammed had access to certain data that other market participants may have only conjectured, that Delta had initiated a transaction that might, in the event that the sale was completed, affect the share price of the company. Even without certainty as to what the outcomes of the impending transaction might be, the data that prompted his purchased of Delta shares before the completion of the sale were considered specific and precise.\textsuperscript{512}

The particulars of this appeal highlight some refined delineations of the nature of ‘precise’ information. First, the premise that information must be true and objective at the moment it comes into the possession of the user to make it ‘precise’ overrides any subsequent proof of its inaccuracy that may occur if, for instance, a merger fails or an offer for purchase is withdrawn. Another aspect precludes the consideration of any rumour or speculation that at some later time may provide a positive result or generate a successful evaluation. Furthermore, the details in question do not have to refer to only one event nor do they need to be wholly specific to qualify as ‘precise.’ According to

\begin{footnotesize}
\textsuperscript{511} Financial Services and Markets Tribunal, Arif Mohammed and the FSA, March 2005, p.16.
\textsuperscript{512} Financial Services and Markets Tribunal, Arif Mohammed and the FSA, March 2005, p.16.
\end{footnotesize}
this approach, a decision by one company to take over another can be considered ‘precise’, even if the amount payable had not yet been proffered. In this same manner, data detailing potential actions directed at one of the several businesses can be included under the rubric of ‘precise,’ and the subsequent trading in either or both of the companies, or the suggestion to others to engage in such conduct or to divulge pertinent data, would comprise insider dealing, even if the action to bid or take over was directed at only one of the companies.513

(4) Relevant information

Inside information is non-public, specific or precise, price sensitive information that would be likely to have a significant effect on the securities after announcement. It should be information relevant to specific issuers or securities. It appears that this element in defining the inside information in question is logical, because inside information would not be exploited by the insiders aiming to gain benefit, but only with regard to the sale or purchase of securities. Clearly, relevant information should pertain to the issuer or its securities.

In the UK, both the CJA 1993 and the FSMA 2000 require information to be relevant to particular securities or to an issuer of securities. This aspect of the requirement pertains to how the information relates to the issuers, to the securities, and to the sectors in their entirety. The CJA 1993 provides interpretation under Section 60(4) regarding this issue by stating: ‘For the purposes of this Part, information shall be treated as relating to an issuer of securities which is a company not only where it is about the company but also where it may affect the company’s business prospects.’ The scope of the application of the term ‘inside information’ then broadens to encompass the entire industry in which a

513 This viewpoint is based upon the Committee of European Securities Regulation guidance, which has been emphasised by Avgouleas, pp. 257-258.
company does business.\textsuperscript{514} In contrast, in the ESCA Law 2000, this obligation was omitted by the UAE lawmaker.

The DIFC market law imposes this requirement using different wording, stating that the meaning of ‘inside information’ relates to investments and to the affairs of a Reporting Entity, and information relating to a change in the business, operations or capital of the Reporting Entity.\textsuperscript{515} The FSMA 2000\textsuperscript{516} defines ‘inside information’ as that which relates, directly or indirectly, to one or more issuers of qualifying investments. The DIFC Market law omits making a determination that information should be that which directly or indirectly relates to the particular issuer or to its securities. The omission of an explicit statement by the DIFC Market law that information should include what can be considered as ‘indirectly’ relating to the securities or the issuer left a shortfall. The provisions which have included a more explicit delineation of the term and the application of ‘indirectly’ as related to inside information. The available denotation encompasses those persons who acquire information related to an impending takeover, as well as those who come into possession of this type of data as a result of a loose association that connects them indirectly through a business or other professional interaction.\textsuperscript{517} However, it is important to note that the information in this instance can also be generated by persons outside of the issuing company while simultaneously being directly related to the issuer.

\textsuperscript{514} Rider and Ashe., p. 30.
\textsuperscript{515} See; Section 45(1) of DIFC Market Law.
\textsuperscript{516} Section 118C(4)(c) of the FSMA 2000.
\textsuperscript{517} Albelooshi, p. 240.
3.5 Who is categorized as an insider?

Understanding the meaning of insider dealing depends upon the exact definition of an insider. The underlying principle for banning insider dealing refers to an unjust exploitation of information by someone with a special position. A good example of an insider is referred to in SEC v. Texas Gulf Sulphur, in which a company owned a piece of land that had massive mineral deposits. As soon as the media learned of this, they contacted the company for confirmation. The company denied the report. The managers of the company (i.e. the insiders) then exploited the situation by buying a significant number of company shares before the deposits were announced publically. This certainly affected the market, as the company’s shares increased rapidly, enabling the managers of the company to make huge profits. This demonstrates that the insider is the one who exploits the power of his or her position to profit on price-sensitive information.

The generic concept of defining insider dealing refers to the one who has access to sensitive and non-public information by means of his or her position, such as a corporate officer, director or other position closely connected with the company. As a result, persons holding such positions take advantage of inside information either to deal for themselves (i.e. sell and buy securities) or for other people by encouraging them to trade dishonestly.

The question that may arise is to the extent to which securities law should broaden the definition of insider dealing to embrace those who access to inside information indirectly. Defining insider dealing differs from one jurisdiction to another, because it

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depends upon the broad concept of an insider. Scholars define an insider as someone who has access to inside information but who is prohibited from dealing irrespective of how he or she accessed this information. On the other hand, other jurisprudence scholars define an insider by referring to his or her relationship with the issuer whether through broad membership, employment or professional duties, whom they call a ‘primary insider’. In other words, the meaning of an insider in the insider dealing laws could be based upon two different insider approaches; the so-called ‘person connection’ and the ‘information connection.’ The former considers the person an insider due to his connection to the public issuer of securities, while the latter views the insider as any person who has access to price-sensitive information that is related to the issuer. Jurisdictions always endeavour excessively to avoid any loopholes or leave any gap in the law through which insider dealing might escape prosecution. Perpetrators commonly use ambiguity as a justification for engaging in market misconduct. For example, the appellant, Asif Nazir, in the case of R. v Asif Nazir Butt, claimed to have found a loophole in the law and did not believe that he would face criminal charges.

There are, then, two scenarios that can exist. First, the insiders obtain direct profit from a gradual increase in the price of the issuers’ shares when positive news is announced or to attempt to avoid loss when the news is negative. Second, insiders who take advantage of their authority to access inside information and then pass it on to other parties, by ‘tipping’, either to make financial gains by sharing or by just guaranteeing profit to the

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519 Welch et al., p. 9.
521 R. v Asif Nazir Butt, Court of Appeal, 12 January 2006,[2006] EWCA Crim 137,[2006] 2 Cr. App. R. (S.) p 295. On 20th December, 2004, Asif Nazir Butt was declared guilty of conspiracy to engage in insider dealing contrary to s.52 (1) of the Criminal Justice Act 1993 and s.1 of the Criminal Law Act 1997. As a result, he was sent to prison for five years. A confiscation order was subsequently made in the sum of £348,325, and the applicant was ordered to pay £60,000 toward the prosecution costs.
third party. This scenario involves dealing with outside traders, who are not well informed of the material of inside information.  

Different jurisdictions, then, have defined an insider in their own ways. UK law defines insiders by highlighting the distinction between primary and secondary insiders. This produces justified clarity as specific acts could only be forbidden for ‘primary’ or ‘secondary’ insiders. Some other jurisdictions, however, simply define insider dealing, by prohibiting any person who deals on the basis of non-public information that he or she obtained by virtue of his or her position. This, in fact, leaves grey areas in the law. This issue is discussed in the section below entitled ‘Lack of insider definition in the ESCA law 2000’.

It is important to understand the differences between ‘primary’ and ‘secondary’ insiders. Primary insiders are most likely to possess inside information from its primary source by virtue of their service or other position, and have a relationship with the company or entity, which enables them to access inside information. Secondary insiders, contrary to primary insiders, are neither in a relationship with the company or entity nor directly have access to inside information but they directly or indirectly receive inside information from a primary source. To categorise those into two groups is important in terms of a legal aspect. As Farghaly makes clear that, a primary insider, as the regulator assumes, knows of inside information, and he or she will not attempt to deny knowledge of such information. Thus, when a primary insider deals on the basis of inside information, he or she cannot claim, in response to an accusation or investigation authority, that he or she was not in the know about inside information. The legislator assumes that the primary insider knows inside information. The secondary insider,  

however, is not assumed by the legislator to know inside information.\textsuperscript{523} In any event, some cases require a determination of the category of insiders in which each has fallen and who engages in the act of insider dealing, whether he or she is responsible for an offence or not.

To appreciate the practice in the jurisdictions in question (UK laws, DIFC market law and the UAE law), it is essential to look at the specific meaning of an insider under each of these regimes. However, it is not easy to illustrate DIFC law No.12 of 2004, because of the complicated terms and the lack of academic sources in the field. The following section will shed more light on the two categories.

\textbf{3.5.1 Primary insiders}

‘Primary insiders’ refers to those individuals who, by virtue of their service or other position, are enabled to access inside information.\textsuperscript{524} The classification adopted by the securities laws both of the UK and DIFC laws in question identifies two specific types amongst primary insiders: \textsuperscript{525} (1) true insiders, who have access based upon their position in the issuers, such as directors, managers or other officers; \textsuperscript{526} and (2) quasi-insiders, who have privileged access depending upon the services they provide to the

\textsuperscript{523} Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, \textit{Interview conducted in May 2010 , Abu Dhabi, United Arab Emirates.}  
\textsuperscript{525} Commentators have approached defining insiders differently, which is according to legislation and to how insiders possessed inside information by their access; Z. Su M.A. Berkahn divided primary insiders into two categories, traditional insiders, such as directors, officers and majority shareholders, and temporary insiders, such as lawyers, brokers and accountants. see Z. Su and M. A. Berkahn, ‘The Definition of “Insider” in Section 3 of the Securities Markets Act 1988: A review and comparison with other jurisdictions,’ (November 2003) ISSN 1175-2874, Massey University, School of Accountancy, Discussion Paper Series 218, p. 4. Michael T. Ashe defined insiders under provisions of the Insider Dealing Directive into three categories of persons. Primary insiders are those who have access to the inside information of a company by virtue of their status. See Michael T. Ashe ‘The Directive on Insider Dealing’ (1992) \textit{13 Company Lawyer} 15, p. 17. Albelooshi has pointed out in his dissertation that there are two categories of primary insiders: traditional insiders and access insiders. See Albelooshi, pp. 207, 214.  
issuers, such as professional advisers, lawyers, auditors and financial advisers. Quasi-insiders have a connection with the issuers that enables them to have a right of entry to inside information.

(a) True insiders

In the UK, the CJA 1993 defines true insiders as those who ‘have information from an inside source if and only if (a) he or she has it through- (i) being a director, employee or shareholder of an issuer of securities...’. Accordingly, under the CJA 1993, a true insider is the one who obtains information from an inside source through being a director, employee or shareholder of an issuer of securities. Certainly the directors of a company are capable of having much more information under their control on the subject of the company. Therefore, it is expected that they can be in an advanced position when trading their securities. For this reason, directors are automatically considered insiders under the CJA 1993 law. In particular, all staff members hired by a company are considered insiders ‘through being’ employees; it is not necessary to prove that the employees are in a position that will most likely allow them to access inside information. The office cleaner, for instance, who is a capable of accessing and viewing written secret memoranda unintentionally left behind on the copy machine, is automatically an insider under the CJA 1993. This is a significant breakthrough in the law that seeks to grasp illegal behaviour by individuals who have not got any connection but have direct access to price-sensitive information. Insider dealing

528 Section 57(2)(a)(ii) of CJA 1993.
530 Wotherspoon, pp. 419-433.
531 White, pp. 163-171.
provisions were drafted in the CJA 1993 as to meet the requirements of the European Directive on Insider Dealing.\textsuperscript{532}

The FSMA 2000 defines a true insider as any person who has access to inside information. Section 118B (a) and (b) states: ‘…an insider is any person who has inside information- (a) as a result of his/her membership of an administrative, management or supervisory body of an issuer of qualifying investments, (b) as a result of his/her holding in the capital of an issuer of qualifying investments…’ Therefore, the FSMA 2000 provides that true insiders are members of an administrative, management or supervisory body, or shareholders.\textsuperscript{533} However, do all these positions encompass all managers and staff members of an issuer? This gives the impression that confusion exists under the FSMA 2000,\textsuperscript{534} because the regulator explicitly states ‘members of an administrative, management or supervisory body.’ Is the office boy, for instance, considered an insider under the FSMA 2000? Nonetheless, if the office boy is not included under this law, he may be included under another category of insiders, such as quasi-insiders, who may share in the knowledge of inside information in the course of their professional responsibilities by virtue of their employment, or secondary insiders, as both will be explained below. Both the CJA 1993 and the FSMA 2000 automatically confer insider status upon individuals who might have non-public information as a result of their positions. Consequently, amongst the primary insiders, there are those who have naturally been expected to have inside information as a result of their status or connection to the issuer. This, in turn, qualifies them to have direct access to the top


\textsuperscript{533} Section 118B(a) and (b) of the FSMA 2000: ‘…an insider is any person who has inside information- (a) as a result of his membership of an administrative, management or supervisory body of an issuer of qualifying investments, (b) as a result of his holding in the capital of an issuer of qualifying investments,…’

\textsuperscript{534} This viewpoint has also been mentioned by Albelooshi, p 209.
secret information that is related to the issuer. Therefore, their first priority should be to abstain from misusing their capacity to achieve personal financial profit.\textsuperscript{535}

However, it is noteworthy that the CJA 1993 applies only to individuals (natural persons), while the FSMA terms relate to any person. To be precise, ‘anyone’ is meant to include persons and issuers, both natural and legal persons. Similarly, the FSA Code of Market Conduct takes the same attitude in applying provisions to both natural and legal persons. The FSA glossary defines a person as ‘including natural and legal persons.’\textsuperscript{536} The DIFC Market law defines a person to include any natural person, body corporate or body unincorporated, including a legal person, company, partnership, unincorporated association, government or state.\textsuperscript{537} All of these aforementioned jurisdictions define which kind of person will probably have legal responsibility. In contrast, the ESCA Law 2000 does not provide any definition of a person whether he or she is natural or legal.

Shareholders have the status of insider under both the CJA 1993 and the FSMA 2000. Regardless of how many shares they hold, there is neither obligation of domination shareholding nor minimum of holding shares. Nevertheless, a shareholder who owns a large number of shares is practically expected to have more access to non-public information.\textsuperscript{538}

In contrast to the UK, the DIFC Market law divides insiders into complex sub-categories. An insider is considered ‘a person in a special relationship,’\textsuperscript{539} who shall be deemed to have access to sensitive information, details of which are set out under

\textsuperscript{535} Ibid.
\textsuperscript{536} Welch, et al., , p. 9.
\textsuperscript{537} See Article 1 of Schedule 1 to the Regulatory Law of DIFC Law No 1of 2004.
\textsuperscript{538} Albelooshi, p 209.
\textsuperscript{539} Section (45)(2) of DIFC Law No.12 of 2004,
Section 45(2)(a) of the DIFC law No.12 of 2004, which states that: ‘…a person that is a director, officer, employee, affiliate, associate or adviser of:

(i) the relevant Reporting Entity;
(ii) a person that is proposing to make a Takeover Offer under Part 7 for the shares of the Reporting Entity; or
(iii) a person that is proposing to be involved in a takeover with the Reporting Entity;

The DIFC law No.12 of 2004, in this sub-section, provides characters of persons who are regarded as insiders; a person who is a director, an officer, an employee, an affiliate, an associate or an adviser pertinent to the Reporting Entity. Directors as

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540 The DIFC Market defines a director or equivalent member of an entity’s governing body. See; Article 3 under Schedule to interpretation of the DIFC Law No.12 of 2004.

541 Associate is defined as a term under The DFSA Rulebook, Glossary Module, which is:

(1) In AUT [The Authorisation module of the Rulebook] and ASP [The Ancillary Service Providers module of the Rulebook], means, in respect of a Person ‘A’ holding Shares or entitled to exercise, or control the exercise of voting power, in an Authorised Firm or a Holding Company of an Authorised Firm means:
(a) the spouse of A;
(b) a child or stepchild of A;
(c) the trustee of any settlement, including any disposition or arrangement under which property is held on trust or subject to a comparable obligation, under which A has a life interest in possession;
(d) an Undertaking of which A is a Director;
(e) a Person who is an Employee or partner of A;
(f) where A is an Undertaking:
   (i) a director of A;
   (ii) a subsidiary or wholly owned subsidiary of A; or
   (iii) a Director or Employee of such a subsidiary or wholly owned subsidiary; or
   (g) a Person who has an agreement or arrangement with A with respect to the acquisition, holding or disposal of Shares or other interests in the Authorised Firm or the Holding Company of an Authorised Firm or under which they undertake to act together in exercising their voting power in relation to an Authorised Firm or the Holding Company of an Authorised Firm that other Person.
(2) Except in AUT and ASP means in respect of a Person ‘A’, any Person, including an affiliated company which is:
(a) an undertaking in the same Group as A; or
(b) any other person whose business or domestic relationship with A or his Associate might reasonably be expected to give rise to a community of interest between them which may involve a conflict of interest in dealings with third parties.’ See; The DFSA Rulebook, Glossary Module, P 5

542 Reporting Entity The DIFC Market Law, under Article 3 of Defined Terms of interpretation schedule, defines Reporting Entity as a person and it states that “Reporting Entity is a person - 1) Subject to (2), a person is a Reporting Entity if:
(a) the person has or had Securities admitted to an Official List of Securities at any time;
(b) the person has filed a Prospectus with the DFSA under Article 15;
(c) the person merges with or acquires a Reporting Entity; or
(d) the person is declared in writing to be a Reporting Entity by the DFSA.
(2) A person is not a Reporting Entity if:
(a) the person is a properly constituted government, a government agency, a central bank or other type of national monetary authority of a country or jurisdiction, a supranational organisation whose members are either countries, central banks or national monetary authorities, a public authority or a state investment body; or
(b) (i) the person previously had Securities admitted to an Official List of Securities;
   (ii) the person currently has no Securities admitted to an Official List of Securities; and
primary insiders should be aware of their duties, whether in relation to conflicts of interests and misuse of position or restrictions and prohibitions under insider dealing regulation.\textsuperscript{543} Those individuals, who have a special relationship with the Reporting Entity due to their positions or services, and who have access to inside information, are categorized under ‘true insider’ status. An affiliate, an associate or an adviser should not have access equivalent to those who have access, such as a director. They have access to insider information only as the result of their offered services. They are not classified as an ‘affiliate, associate or adviser’ in the ‘true insiders’ category. Despite this, the DIFC law No.12 of 2004 gives an affiliate, associate or adviser the same status as a director, because their position may be reasonably expected to give them access to relevant information concerning the Reporting Entity.

Another type of insider under the DIFC law No.12 of 2004 covered in the above subsection, are persons who propose to make or get involved in a takeover bid offer for a particular Reporting Entity. Such a person could be a director, officer, employee, affiliate, associate, adviser or any other person who proposes or is involved in a takeover bid relating to the Reporting Entity. Therefore, these persons are considered primary insiders due to their connection with the offeree or with a targeted issuer. In general, the offer which is made may include sensitive inside information. The DIFC law No.12 of 2004 considers such individuals to be primary insiders whether they possess relevant information relating to Reporting Entity or have a connection with material takeover information as an insider. In other words, an insider is referred to as ‘someone who is in a special relationship’.\textsuperscript{544}

\textsuperscript{543} See Annex A Takeover Rules Module (TKO) 1.5. 2 Guidance.
\textsuperscript{544} Section 45(2) of DIFC Law No. 12 of 2004.
(c) Quasi-insiders

Another category amongst primary insiders in the UK may be so-called quasi-insiders. As mentioned above, this group has access to inside sources by their offered services. According to both laws, the CJA 1993 indicated that ‘...a person has information from an inside source if and only if (a) s/he has it through- (ii) having access to the information by virtue of his/her employment, office or profession;’ while the FSMA 2000 stated that ‘...an insider is any person who has inside information ...(c) as a result of having access to the information through the exercise of his/her employment, profession or duties, (d) as a result of his criminal activities...’ These provisions refer, in fact, to a broader category of those who have access to the inside information by virtue of his or her employment, office or profession, such as investment bankers, the securities issuer's lawyers, and accountants, who may become privy to inside information in the course of their professional responsibilities. Nonetheless, there were major differences between the FSMA 2000 and the CJA 1993 concerning the definition of insider dealing. The FSMA 2000 required that inside information be obtained by insiders’ activities, as it refers to ‘his exercise or activities’ through the services provided, while the CJA 1993 under Section 57 requires that the information in question be obtained only ‘as a result of his position’. This difference indicates that the CJA 1993 requires proof that the insider knew that he or she was in possession of price-sensitive information and that he or she obtained it from an inside source, such as a director, employee, or shareholder of an issuer of securities.

545 Part V of CJA 1993, Section 57(2)(a)(ii). In the sense of criminal activities; the first time that the FSA launched a criminal investigation into such criminal activities was on October 31, 2007. Two men were investigated regarding their association with a firm called Universal Management Services (UMS) and were arrested by the FSA. They were accused for assisting illegal boiler room operations. See; Jason D. Haines, ‘Boiler room operations: legal and regulatory action: Part 2’. (2008) Company Lawyer, 29(11), 345.
Keith Wotherspoon\textsuperscript{546} comments that the wording of the ‘by virtue of’ requirement under section 57(2)(a)(ii) might have created some difficulties. To be more specific, he provides an example by asking what happens if the barman working at the golf club overhears a conversation of two senior executives as he provides their order? Does he become as insider because of this action? Obviously, it would be difficult to make a prosecution, because there is a need to prove that this is either a business or a professional relationship between the person and the corporation as implied by the ‘access by virtue’ classification of insider under the CJA 1993. This law makes no mention of an issuer’s securities. There is no doubt that it remains ambiguous whether there has to be a functional relation between the individual’s employment or career and the corporation or the securities with which the information is connected. \textsuperscript{547}

In contrast to the UK law, the DIFC law No. 12 of 2004, Section 45(2)(b), (c) and (d)\textsuperscript{548} categorizes insiders ‘quasi-insiders’ into four classes;

1- A person who is involved in an engagement or who proposes to make an engagement in any business with the Reporting Entity.

2- A person who is engaging in professional activities with the Reporting Entity or on behalf of the Reporting Entity with a person who is proposing to make or to be involved in a takeover with the Reporting Entity.

3- A person who is a director, officer or employee of the entity which is engaging in business or proposing to engage or is providing professional activities with the Reporting Entity.

\textsuperscript{546} Wotherspoon, pp. 419-433.
\textsuperscript{547} Filby, p. 363.
\textsuperscript{548} Markets Law, DIFC Law No. 12 of 2004, Section 45(2)(b), (c) and (d):
(b) a person that is engaging in or proposes to engage in any business or professional activity with or on behalf of the Reporting Entity or with or on behalf of a person described in Article 45(2) (a)(ii) or (iii);
(c) a person that is a director, officer or employee of the entity described in Article 45(2)(b);
(d) a person that learned of the material information with respect to the Reporting Entity while the person came within Article 45(2)(a), (b) or (c);…
4- A person who knew of the material information regarding the Reporting Entity while providing professional activities or being a director, officer or employee of the Reporting Entity.

As discussed earlier, the DIFC law No.12 of 2004 provides a significantly broad regulatory regime for financial services in the DIFC Market. It attempts as much as possible to prevent all individuals from misusing inside information. This includes those individuals who have access to the Reporting Entity by means of any business or professional activities, such as lawyers, auditors and financial advisers. The phrase ‘propose to engage in’ might mean that the criminal project has already begun but not been completed to completion. Nevertheless, such a project is considered as an aiding and abetting offence or part of a conspiracy to commit an offence. Thus, the regulator aims to prevent a criminal action before it occurs by deeming an attempt to commit insider dealing itself to be an offence.

The category of individuals who are engaged in business relationships with the companies, such as professionals in the fields of law and finance and those in advisory positions, have the benefit of substantial right of entry to inside information. These professionals are aware of facts about the Reporting Entity or about a particular business. They also have sufficient familiarity with the securities markets to use the information without difficulty.

Shareholders, however, have been omitted by the DIFC law No.12 of 2004 from the category of specific insiders, contrary to the UK law. Nevertheless, shareholders may be caught under a secondary insider category. The omission from the DIFC law No.12 of 2004 can raise a question related to the position of institutional or controlling shareholders who often have an overall information benefit considering their importance.
to the issuer, their close relationship with the company board and, in relation to institutions that invest large sums of money, their relationship with fund managers and analysts. However, the reasonable explanation behind this lies in the fact that shareholders are not connected with a company as are its directors and members of the Board, whose liability is based upon the theory of breach of fiduciary duty. Barry Rider et.al state that, ‘in the vast majority of legal systems, the relationship between a shareholder and his company is purely contractual and does not involve obligations of a fiduciary or confidential character’. 549

On some occasions, inside information is received either directly or indirectly by other parties who are categorized as secondary insiders. Such parties obtain inside information not as a result of such a special relationship with the company but from other sources. The following subsection attempts to define this group of insiders.

3.5.2 Secondary insider

Secondary insiders, or so-called ‘tippees,’ directly or indirectly receive inside information from a primary source. Secondary insiders have a similar status as primary insiders in being restricted from exploiting inside information. In this regard, it is assumed that a person who is regarded as an insider in this category obtains relevant and unpublished price-sensitive information even though he or she does not have direct access to the issuer.

According to UK laws, the definition of secondary insider is found under both the CJA 1993 and the FSMA 2000. Section 57(2)(b) of the CJA 1993 stipulates that ‘…a person has information from an inside source if and only if (b) the direct or indirect source of his/her information is a person within paragraph (a).’ (as covered above) within

paragraph (a) The CJA 1993 reference to ‘direct or indirect’ means it has extended coverage to catch illegal behaviour by persons who are not connected with an issuer, but, on the other hand, have obtained price-sensitive information from another source regarding issuers’ securities.

According to Section 57(2)(b) of the CJA 1993, then, secondary insiders might be held responsible if they received inside information directly or indirectly from a director, an employee, a shareholder or other insider of the issuer. However, it is difficult to know the extent to which the receiver would know the true identity of the source and the degree to which he or she must purely be conscious of the announcement approached from a primary source. In fact, two circumstances worth noting usually occur. First, the inside information is disclosed by the primary insider through illegitimate behaviour; second, the secondary insider keenly requires the inside information. There are two conditions under which an individual becomes responsible for committing a secondary insider. It must be proven that the person was aware that the information came from an inside source and that this information came from primary insiders or someone who had access to non-public, price-sensitive information. Yet, the CJA 1993 clearly stated that secondary insider responsibility may be imposed even though the receiver of the information accessed it passively and did not act actively possess it.550 Thus, legal responsibility is widened to protect information accessed from both insiders and those who have a connection with the company. Accordingly, an individual who passes material information as a ‘tip’ and has no relationship with the theme of the tip, such as an analyst, will now also commit an offence.551

551 White, pp. 163-171.
In the case of *R v McQuoid*,\(^{552}\) the defendant was a lawyer, who fell into the primary insider category, because he had access to an inside source by the services that he provided as a lawyer. He was formerly the General Counsellor for TTP Communications Plc (TTP). In May, 2006, he became aware of sensitive non-public information of a proposed takeover of TTP by Motorola Plc. He was found guilty for having passed that information to James Melbourne, his father-in-law. Melbourne bought 153,824 shares of the company at 13 pence per share on 30 May 2006. On the 1\(^{st}\) June, the takeover offer bid was disclosed to the market with an approved price of 45 pence per share. Melbourne profited by approximately £48,919.20 from the shares that he bought. On the 1\(^{st}\) September, 2006, Melbourne gave the defendant a cheque for 50 per cent of the profit made from trading in TTP shares. Both men were afterward taken into custody and accused of insider dealing in violation of s 52(1) of the CJA 1993. However, this issue could be partially criticized as the defendant was a lawyer involved in a takeover, who passed inside information on to his father-in-law. Based on this, it can be argued that the defendant could have been charged as a tippee, subject to the disclosure offence as well, and that, therefore, he would be subject to Section 52(2) of CJA 1993. Instead, he was charged with the insider dealing offence in violation of Section 52(1).

Section 118B(e) of the FSMA 2000 states that ‘…an insider is any person who has inside information- (e) which he has obtained by other means and which he knows, or could reasonably be expected to know, is inside information’. This shows the similar outcome as the Market Abuse Directive terms, in view of the fact that both primary and

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\(^{552}\) *R v McQuoid* - [2009] All ER (D) 100 (Jun).
secondary insiders are bound by the same proscriptions in Articles 2 and 3 Market Abuse Directive whether dealing, disclosing or recommending.\(^{553}\)

In the DIFC market, the definition of secondary insider is derived from Section (45) of DIFC law No. 12 of 2004. The secondary insider is described ‘(d) a person that learned of the material information with respect to the Reporting Entity while the person came within Article 45(2)(a), (b) or (c); or (e) a person that learned of material information with respect to the Reporting Entity from any other person described in Article 45(2)(a), (b), (c) or (d) and knows or ought reasonably to have known that the other person is in such a relationship’. It is clear that any person is a secondary insider if he or she learned of such material information regarding the Reporting Entity through any other person described under the law in question, such as a director, an officer, an employee, or a person engaged in or who proposes to engage in any business or professional activity with or on behalf of the Reporting Entity.

The DIFC Market law and the UK under FSMA 2000 use different terms regarding who is considered to be a secondary insider. The DIFC Market law uses the word ‘learned,’ stating that ‘a person that learned of the material information,’ whereas the FSMA 2000 employed the term ‘obtained,’ stating that ‘she/he has obtained by others.’ However, it is not clear whether these two terms have different meanings. Does the use of the term learned or obtained embrace passive or active acquisition of such information?

The definition of ‘obtained’ came into the central issue surrounding the acquittal in the R v Fisher\(^{554}\) case. The debate was on the basis of actus reus by raising an issue that an

\(^{553}\) Welch et al., p. 25. See also United States v. Carpenter, 791 F2d 1024, aff’d by an equally divided Court, 484 US 19 (1987). Compare Dirks v. SEC, 463 US 646 (1983) (discussing in dictum the scope of tippee liability). This was noted in Hazen, pp. 231-239.
action could only be committed by a person who obtained the information which resulted in the securities transaction by his own ‘effort or action’. The Court of Appeal concluded that the groups of individuals classified as secondary insiders or tippees have been broadened not because of the way in which they reached the price-sensitive information (the issue of obtaining) but because of the way in which such information was employed, regardless of how it was received, even though there was no method to keep that information from being disclosed. 555

Using the term ‘learned’ in the DIFC law No.12 of 2004 is better than using ‘obtained’, which is still used in the UK under the FSMA 2000. 556 It could be argued that there is no distinction in the sense of the meaning between the legal interpretations of the terms ‘learned’ or ‘obtained.’ This concept is based on the above decision of the Court of Appeal, 557 which held that how such information is received does not matter and that what matters most is the way in which that information is used.

There is also a different requirement of the type of knowledge in relation to inside information under both jurisdictions in question, even though the definition of insiders, whether primary or secondary, is slightly comparable. Under the FSMA 2000, the knowledge required relates to the status of the information, while, under the DIFC law No.12 of 2004, the knowledge required relates to the status of the tipper. On the other hand, there is no requirement under the CJA 1993 in terms of a relationship between the tippee and the insider source. 558

555 Christopher Stanley, ‘Directions as to the meaning of "obtain,"’ (1989) 7 International Banking Law 8, pp. 116-117.
556 Albelooshi, p. 229.
558 Albelooshi, p. 226.
3.6 Lack of insider definition in the ESCA Law 2000

Article 39(1) of the ESCA Law 2000 defines an insider as ‘any person’ and states that ‘It shall not be permitted for any person to deal in securities on the basis of unpublicised or undisclosed information s/he acquired by virtue of his/her position.’ Under this Article, several issues could be raised based upon the comparative study discussed above. The Article mentions ‘any person,’ but which types of persons are covered? As mentioned earlier, is it a legal or a natural person. Does it include primary and secondary insiders? Could a taxi driver or a waiter in a restaurant who obtained inside information from a fragment of overheard dialogue be considered an insider? In the UAE law, it is difficult to categorise the taxi driver or a waiter in a restaurant, who overheard a conversation, under an insider classification. Moreover, even an insider’s friend or neighbour, whom he or she talks to about inside information, will not be responsible. There is still a shortage in the UAE law. This is contrary to the UK law, which provides that, to raise the responsibility against them, they must know that such information is inside information.

Furthermore, using the phrase ‘by virtue of his/her position,’ it is meant that a requirement exists that unpublicised information must be obtained as a result of ‘his/her position’ in order to be considered as an insider. Therefore, he or she is not an insider if he or she gains the inside information not by virtue of his or her position. Still, who falls

559 Farghaly added that, in the French insider’s case, the actors, such as the friend, neighbour and/or the taxi driver, were not criminalized in insider dealing. They were prosecuted but acquitted, since the law did not criminalize such people. However, in 1997, the Appeal Court made the legislator criminalize them. The chief executive of the company and his girlfriend, to whom he leaked the inside information and who sold and traded the company’s shares accordingly, were both prosecuted but then acquitted. This was basically because the girlfriend was not judged an insider (primary or secondary) under the law at the time, and the chief executive of the company had not taken advantage of any information. When the legislator updated the law, it became possible to prosecute and convict those who received indirect inside information and benefitted from it, and even those who were not primary insiders could be convicted. The French insider case is an example of a deficiency that existed in the French law, but this deficiency is still in the UAE law. See Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.

560 Ibid.
within the term of ‘position’? The question may therefore be raised as to what the regulator meant by the term ‘his/her position.’ Does it include all employees as issuers?
The following is an attempt to examine these issues more clearly.

There is a vital need to define the term ‘insider’. The Legal Consultant at SCA makes clear that ‘no definition [of insider] exist[s] in current legislation.’ There are various other opinions as well about the term insider. One interviewee made the comment that the UAE legislator has done well in not defining insider dealing, because, if the legislator provided the definition, this would narrow the scope and ties the responsibility to the insider for the action that he or she commits. Another interviewee added that usually definitions are used in the law to avoid the repetition of the word or the term and thus there is no need for a definition of insider. A different interviewee said that the ESCA Law 2000 provisions confirm that the insider is the person who has access to inside information.

However, as mentioned above, the ESCA Law 2000 defines an insider by using the term ‘any person.’ At first glance, this appears to cover either a legal or natural person. In addition, it can refer to any director, employee or shareholder of an issuer or those engaged in professional activities, such as professional advisers, lawyers, auditors and financial advisers. In other words, it generally prohibits all individuals possessing inside information from trading on such information. That encompasses primary and secondary insiders, although secondary insiders might be caught under the exploitation of inside information offence under this law in question.

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561 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.
562 Sammer Ja’afar, Legal Consultant, Ja’afar Alwan, Al Jaziri & Associates; Advocates & Legal Consultants, Interview conducted, June 2010, Dubai, United Arab Emirates.
563 Hussein Ghanaim (PhD in Law), Former lecturer in law faculty in the UAE University, he was a member of the legislative committee that drafted ESCA Law 2000, Currently, he is a legal counsellor, Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.
Nevertheless, the ESCA Law 2000 limited the scope of Article 39(1)\textsuperscript{564} by providing that ‘any person’ must obtain the inside information by virtue of his or her position. The Article states: ‘It shall not be permitted for any person to deal in Securities on the basis of unpublicized or undisclosed information he acquired by virtue of his position.’ Accordingly, does a cleaner, who is emptying confidential papers in an office and acquires inside information by virtue of his or her service, or a printer, who is printing documents bearing the terms of a tender, offers documents which are being prepared for takeover bidders, acquire the undisclosed information in violation of this Article?

It is important to note that the term ‘position’ has a special meaning in the UAE culture as referring to one who is usually on the top of the hierarchy in entities. It is difficult to say, for example, that the office boy is in Mans’ab\textsuperscript{565} (he is in the position). This term of position has a different meaning in Arabic than it has in English. It could be argued that this is a complex issue. In light of this, all employees and staff of the entities who do not enjoy a leadership position cannot be held under this Article. Farghaly agrees that the expression ‘by virtue of his/her position’ does not include everyone who is aware of information through his or her job and not just ‘by virtue of his/her position’\textsuperscript{566}

Therefore, the previous examples of a cleaner and a printer do not fall within the Article and thus can be excluded from criminal liability. They may however be guilty with regard to exploitation of undisclosed information, under Article 37 of the ESCA Law 2000, if proven. Neither the ESCA Law 2000 nor any judicial decision clarifies what constitutes the term ‘his/her position.’ This creates a loophole in the legislation which may reflect the impracticality of successful prosecution. Simply put, the UAE regulator

\textsuperscript{564} Article 39 (1) of ESCA Law 2000 states that ‘It shall not be permitted for any person to deal in Securities on the basis of unpublicized or undisclosed information he acquired by virtue of his position.’

\textsuperscript{565} Arabic language (منصب)

\textsuperscript{566} Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.
has not provided an adequate and comprehensive definition of ‘insider.’ In contrast, the UK laws and DIFC Market law defined an insider clearly as seen above.

3. 7 Criminal Offences of Insider Dealing

The aforementioned sections have attempted to identify individuals who are considered insiders. Individuals who have inside information are either primary or secondary insiders and thus are subject to criminal punishment under all comparative legislations (in the UK law and the DIFC Law). Consequently, a primary insider, a secondary insider or both could engage in the activities which amount to insider dealing provided that they have intentionally acquired such information (directly or indirectly).\(^{567}\) Therefore, highlighting this issue under counterpart jurisdictions might be useful in approaching the purpose of the current study. However, the forms of criminal offence involves insiders who are dealing by selling or buying securities based upon inside information or encouraging another to deal and disclose inside information to another party while performing their duties or functions, or both, as discussed below.

\[\text{(a) The Dealing Offence}\]

It is an offence if a person deals in securities, the price of which has been effected by insider information.\(^{568}\) If an insider has inside information, he or she is required not to deal in the securities to which that information is relevant. The definition of dealing includes ‘acquisition’ or ‘disposals’ and whether they are constructed by an individual as principal or as agent.\(^{569}\) In the UK case of Neil Rollins,\(^{570}\) who had inside information relating to PM Group plc, the defendant was charged at the City of Westminster.

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\(^{568}\) See: Section 52(1) of the CJA 1993.
\(^{569}\) Section 55 of the CJA 1993. See also Rider and Ashe). p. 48.
Magistrates’ Court with four counts of insider dealing. One of them was related to discussing the dealing offence, in which he disposed of 83,989 shares during 2006. The dealing offence was the disposal of shares in violation of Section 52(1) of the CJA 1993.

However, the CJA 1993 defines the dealing offence in securities more widely.\textsuperscript{571} Transactions in shares, debentures, options and contracts for differences are all covered by the dealing offence.\textsuperscript{572} Every transaction of securities should take place on a regulated market or by means of a professional intermediary.\textsuperscript{573} The transaction will be caught by the CJA 1993 whether it includes an Over-the-Counter (OTC) trade directed by or through a professional intermediary or not. Regulated Markets are places where exchanges occur among those who legitimately list or permit dealing in the pertinent securities upon their securities or derivatives. The meaning of ‘professional intermediaries’ is most likely to be broad enough to capture legal practitioners and accountants instructing securities dealings as a representative of their customers.

However, Section 59(3) showed that there is a significant qualification which eliminates the application of the dealing offence to those who act as professional intermediaries if they take action ‘incidentally’ or ‘occasionally’.\textsuperscript{574}

\textsuperscript{571} BRider and Ashe, p. 48.
\textsuperscript{572} Wotherspoon, pp. 419-433.
\textsuperscript{573} CJA 1993, Section 59 defines professional intermediary as follows:
‘(1) . . . a professional intermediary is a person –
(a) who carries on a business consisting of an activity mentioned in subsection (2) and who holds himself out to the public or any section of the public (including a section of the public constituted by persons such as himself) as willing to engage in any such business; or
(b) who is employed by a person falling within paragraph (a) to carry out any such activity.
(2) The activities referred to in subsection (1) are –
(a) acquiring or disposing of securities (whether as principal or agent); or
(b) acting as an intermediary between persons taking part in any dealing in securities.’

\textsuperscript{574} Wotherspoon, pp. 419-433.
The relevant time is important, as it takes into account whether or not an act has been perpetuated at the time of the agreement to obtain or dispose of the security. An offence, positively, would be committed by the person if he had inside information about these securities at that time. Nevertheless, liability will not be raised if a person received inside information merely after setting up an agreement, because he or she will probably not have violated the provision on condition that he or she completes the deal and really obtains or disposes of the securities. In contrast, if the person had the inside information at the time when he or she decided to obtain or dispose of the securities, it would appear that he or she will have committed an offence, even if he or she did not make the bargain. Therefore, it can be argued that making the bargain or benefit is not the main component in the structure of the dealing offence. This is different from the UAE law, which stipulates that accomplishing the benefit is an element of the dealing offence. This issue will be discussed below.

Dealing also includes ‘procuring’ another person to deal in such securities. The procuring offence is found in Section 55 of the CJA 1993, which states that a person may procure someone else to deal with insider information. A violation of this section may occur when the securities are acquired or disposed of by a principal or agent or by his nominee or an individual performing at his direction in relation to the acquisition or disposal. This feature of the definition of dealing in securities is intended to cover all dealing circumstances where an individual learns inside information without personally buying or selling the securities – hence the action of referring to transactions by an agent or a nominee. On the other hand, the liability does not arise if an insider who acts as a principal gets an innocent agent, whether he or she is an expert trader or basically a friend or a relative, to trade for the principal. In this case, the innocent agent

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575 Rider and Ashe, p. 48.
576 Ibid.
is not responsible if he or she does not have any inside information. However, the
principal continues to be responsible, because he or she has procured the acquisition or
disposal regardless of not dealing personally. In the case of R v Goodman, the insider
was a company chairman, who gave his girlfriend inside information of important
losses, after which she disposed of her shares. In this way, he was considered to have
procured the dealing by another individual performing under his direction. If this
case had taken place in the UAE, there are no provisions under the ESCA law 2000 that
would have been able to deal with it. Thus, both the chairman and his girlfriends would
have had impunity. While under DIFC law No.12 of 2004, the two individuals would
have committed an illegal act and would have been punished under Article 43 of DIFC
law No.12 of 2004.

(b) The Encouragement Offence

Encouragement is an offence under the CJA 1993, which prohibits any individual with
inside information from encouraging another person to deal in securities. Section
52(2)(a) of the CJA 1993 provides that a person who has information as an insider is
guilty if he or she ‘encourages another person to deal in securities that are (whether or
not that other knows it) price-affected securities in relation to the information, knowing
or having reasonable cause to believe that the dealing would take place in the
circumstances mentioned in subsection (3)’. This clause, then prohibits any person who has inside information, which, if it were
disclosed in the marketplace, would be likely to have a significant effect on the price of

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578 Hannigan, Insider Dealing, pp. 92-93.
579 Section 52(2)(a) of the CJA 1993: ‘The meaning of subsection here is that ‘the circumstances referred
to above are that the acquisition or disposal in question occurs on a regulated market, or that the person
dealing relies on a professional intermediary or is himself acting as a professional intermediary.’ Section
52(3).
securities, and would to encourage another party to deal in such securities in circumstances covered by the dealing offence.\textsuperscript{580} An example of the encouragement offence was when the FSA accused Neil Rollins\textsuperscript{581} of encouraging Louisa Rollins to deal in shares of PM Group plc on or before 4th September 2006. Neil Rollins had inside information related to PM Group plc, and he gave a tip to Louisa Rollins, which violated Section 52(2) of the CJA 1993. Nevertheless, it is important to point out the difference between the action of procuring and that of encouraging another person to deal. Procuring someone to deal is for the sake of the insider’s personal gain, whereas encouraging someone is done to achieve a profit for the person who is encouraged to deal. The DIFC law No.12 of 2004 uses two terms to define these types of actions, inducing or encouraging. However, in the UAE, the ESCA law 2000 has omitted criminalising inducing or encouraging as an offence.

In the DIFC law No.12 of 2004, there are two principal types of offences that prohibit insider behaviours: (1) dealing in investment,\textsuperscript{582} and (2) providing inside information.\textsuperscript{583} The former prohibits the insider from dealing either by buying or selling securities (acquisition or disposals) on the basis of inside information. The latter encompasses two types of offences: informing\textsuperscript{584} another person of material information that is not generally available in the market and procuring\textsuperscript{585} another person to deal. However, the procurement offence\textsuperscript{586} takes place illegally when a person induces or encourages another, whether directly or indirectly, by all means. Therefore, it could be deduced that the prohibited activities in question, broadly defined under the DIFC law No.12 of 2004, could be identified as illegal behaviours that may amount to insider dealing. The

\begin{itemize}
  \item \textsuperscript{580} See: subsection (3) of Section 52 the CJA 1993.
  \item \textsuperscript{582} Article 42(1) of the DIFC Law No.12 of 2004.
  \item \textsuperscript{583} Article 43 of the DIFC Law No.12 of 2004.
  \item \textsuperscript{584} Article 43(1) of the DIFC Law No.12 of 2004.
  \item \textsuperscript{585} Article 43(2) of the DIFC Law No.12 of 2004.
  \item \textsuperscript{586} Article 43(3) of the DIFC Law No.12 of 2004.
\end{itemize}
FSMA 2000 and the CJA 1993 use ‘disclose,’\(^{587}\) while the DIFC law No.12 of 2004 uses ‘inform’ to refer to illegal behaviours. Whether an insider discloses or informs inside information to another person, the result will be similar. Thus, the law has fulfilled its aim by using any of the aforementioned terms.

However, the encouraging offence is not simply applied to the person who has information as an insider and who passes the information to another party. It requires a party to know that the securities which the party is encouraged to purchase are price-affected securities. The unlawful act concerns the classic circumstances in which a tip is given by another to sell\(^{588}\) or buy. As Clare Bennett\(^{589}\) pointed out, ‘advice on buying and selling could refer to advice encouraging others to buy and sell.’ The encouragement offence may occur whether or not the person encouraged to deal does determine to deal at all.\(^{590}\) Furthermore, primary insiders or tippees could commit the offence of encouragement, and it applies to encouraging any party. Thus, a violator will include any official, possessor, or manager leading a company to insider deal.\(^{591}\)

(c) The Disclosure Offence

The last offence is disclosing the inside information to another party. This is prohibited by Section 52(2)(b) of the CJA 1993, which specifies that any person with inside information who discloses that information to another person is guilty, because this does not comply with the proper performance of the functions of his or her employment, office or profession.

\(^{587}\) See; Section 118(3) of the FSMA 2000 and Section 52(2)(b) of the CJA 1993.
\(^{588}\) Alexander, p. 10.
It is clear that the way that the offence is framed makes it possible that there will be instances of disclosing inside information, when it is completely correct in the performance of an employment, office or profession to disclose inside information. It is important to understand that disclosing by itself and without meeting regulatory rules is an offence, if it is not made in the right performance of the roles of employment, office or profession, such as the case of a regulatory body or the company's bankers or stockbrokers. Specifically, committing a disclosure offence can occur whether the receiver trades or not.

The case of *R v Titheridge* in the UK is an example of committing a disclosure offence. The information was subject to a takeover bid, which had been obtained by the defendant, who was in the position of a secretary to the chairman of the merchant banker. She disclosed that information to her husband in the improper performance of her duties.

The ESCA Law 2000 does not criminalize the leaking of inside information. This is another shortcoming in the UAE law. For example, if an insider leaks inside information to his relative or friends without taking any material advantage himself, it is unclear whether he will be held responsible. In other words, is the leaking of inside information considered exploitation? Answering these two questions, The Legal Consultant at the SCA is of the opinion that the mere leaking of inside information is not exploitation, because the exploitation offence under the ESCA Law 2000 is defined as benefiting from taking advantage of such information. Therefore, the

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592 Rider and Ashe, p. 52.
594 Ibid.
595 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, *Interview conducted in May 2010*, Abu Dhabi, United Arab Emirates.
596 Article 37 of ESCA Law 2000.
leaking of the unpublicised information to friends or others in a way that will not benefit or advantage the person leaking the information does not give rise to an exploitation offence. Therefore, this text suffers from a shortcoming by not criminalizing the act of leaking insider information. This shortcoming in legislation must be modified, because the penalty must be imposed upon both the person who leaked the information and those who exploited it.

3.8 Looking at the ‘exploitation’ offence under ESCA Law 2000

Exploitation of information is comparable to the term ‘misuse of information’ in the UK law under the FSMA 2000. The term ‘exploitation’ refers in fact to the act of taking advantage of something or taking unjust advantage of another for one’s own benefit. Arguably, without achieving this point, it is difficult to allege that the action is ‘exploitation.’ Article 37 of the ESCA Law 2000 prohibits the exploitation of inside information by stating: ‘The exploitation of undisclosed information which could affect prices of Securities in order to achieve personal benefits shall not be permitted.’ Thus, the exploitation of inside information is defined as benefiting from such confidential information by the insider or the person that has the information in his or her possession, profiting personal benefit, or gaining self-advantage.

The ESCA Law 2000 prohibits the exploitation of undisclosed information by a company’s directors and officers, usually referred to as insiders. They are in a good position to use superior information for their trading and to assess their firm’s affairs. According to a study by a Domestic Financial Market in the National Bank of Abu Dhabi, the gains achieved by insiders who are exploiting inside information in the

598 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, *Interview conducted in May 2010*, Abu Dhabi, United Arab Emirates.
The exploitation conduct under Article 37 of the ESCA Law 2000 is related to undisclosed information, likely to affect prices of securities if it is made public. To be an exploited information offence, three conditions must be met:

(1) The information must be ‘inside information.’

(2) The information could affect prices of securities if made public (sensitive information).

(3) The perpetrator must achieve personal benefits.
The first and second conditions are definitions of inside information that can be exploited. The criticism that may be raised against the third condition is narrowed by the capacity of the Article by providing that the ‘actor’ must achieve personal benefits to be considered as having committed a criminal offence. Otherwise, such conduct will not be under this Article. For instance, assume that X as an employee purchased shares of company Z based upon inside information that is not generally available, intending to achieve personal benefits. Company Z made an official announcement regarding such information on which X based his exploitation. The shares of company Z dropped down because of unforeseen events, and X did not get any benefit. Is X liable under the Article in question? It can be argued that X is not liable, because the requirement of achieving personal benefits was not fulfilled. With regard to this issue, the Legal Consultant at the SCA has said the following:

*I see that a person shall be held responsible whether he or she has benefited or not, but the legal text [ESCA law 2000] suffers from a shortage and does not include that, because it is against the concept of equality. The French legislation penalises the person even if the benefits are not being executed in full. The Egyptian legislation, similar to the legislation of the UAE, requires the benefit to be fully executed as a matter of fact, so I tend to accuse the person even if he or she has not achieved any benefit.*

Under Article 39(2) of the ESCA Law 2000, the chairman and members of any company’s management or its employees are prohibited from exploiting inside information regarding the company in the purchase or sale of shares. This provision limits the transaction in scope of the company’s shares whether for sale or purchase in terms of inside information. If it is found that an employee exploits inside information regarding a target company that accepted a takeover offer from the company for which he or she works, it is difficult to claim that the provision in question prohibits his or her

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599 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, *Interview conducted in May 2010*, Abu Dhabi, United Arab Emirates.
transaction, because the shares of the target company do not relate to his or her company. Therefore, the provision does not apply.

Article 38 of the ESCA Law 2000 provides a restriction for any transactions conducted by employees of companies whose securities are listed in the market. The employees of a company under this Article encompass the chairman, the members of the board of directors, its general manager, and any of its employees. Nevertheless, this transaction is subject to disclosure through the market and specific information must be disclosed as to the purchase or sale transaction, the quantities and prices therein, and any other information required by the market. The question remains whether an employee who deals on the basis of inside information and meets the entire requirements outlined above will be legally responsible. The vagueness of the legislation allows the perpetrator to disclaim responsibility or to blame the regulator for not providing sufficient clarification.

3.9 Conclusion

This chapter has endeavoured to examine the regulation of insider dealing under the ESCA Law 2000. It provides an argument over the issue of regulation of insider dealing which is between two camps; those in favour of prohibiting insiders and those against it. The discussion, of course, has been a valuable tool in aiding the understanding of the foundations for its regulation.

The chapter looked at the regulation of insider dealing. The ESCA Law 2000 has been studied by comparing the counterpart laws that apply to the regulation of insider dealing in the UK and the DIFC market to find out the deficiency of the ESCA Law. The comparison, certainly, has showed that the regulatory system may be deficient in some
areas. The definition of inside information, for example, under the ESCA Law is not clear. There is an absence of a requirement that inside information should be precise or relevant to particular securities or to an issuer of securities. In contrast, these requirements are provided by the UK laws and the DIFC law.

In addition, the ESCA law 2000 did not provide a clear definition of the actor of insider dealing. It limited the scope of insider by providing that ‘any person’ must obtain the inside information by virtue of his or her position. The ‘position’ as a term made for a shortage of the law by not including secondary insiders and because it is based on the meaning of Arabic rather than it in English.

Finally, this chapter showed that the ESCA Law 2000 suffers from a deficiency for not making illegal improper activities such as ‘leaking of inside information’ and ‘procuring’ or ‘encouraging’ another person to deal, which is dissimilar to the UK law and the DIFC law which have criminalised these behaviours. The ESCA Law 2000 prohibits only the exploitation of inside information, although it does not clarify what amounts to the exploitation of inside information.
CHAPTER FOUR
REGULATION OF MARKET MANIPULATION

4.1 Introduction

Market manipulation\textsuperscript{600} is a type of financial crime that is covered by the term ‘market abuse.’ Following the insider dealing chapter, the issue of market manipulation is the second main topic of this thesis. Market manipulation is different from insider dealing. The practice of insider dealing is based on taking advantage of inside information, while market manipulation involves conduct which creates a misleading impression about the market. There is no doubt that both insider dealing and manipulative behaviour are damaging the efficiency and integrity of the marketplace and are eroding investor confidence.

A body of laws worldwide seeks to protect the financial market and control the injurious effects of manipulation. Many countries have adopted regulations to protect against market manipulation. Even though legislation fails to provide a definition of manipulation, scholars have debated extensively in order to put forward a definition of market manipulation. Market manipulation refers to various forms of practices and techniques that a manipulator uses to perpetrate his/her manipulative schemes. For this reason, legislators have long endeavoured to promulgate laws in order to prevent and limit such practices.

This chapter aims to examine the regulation of market manipulation in the law of the UAE. This will be explored by means of a comparative study with the Financial

\textsuperscript{600} The phrase ‘market manipulation’ is also known as price manipulation. Market manipulation is preferred by the European Commission and used in Nordic and German law. See Hanson, , pp.256-257
Services and Markets Act 2000 (FSMA 2000), in the UK, and the Dubai International Financial Centre Law No.12 of 2004. The opinions and attitudes of legal experts toward the Emirates Securities & Commodities Authority and Market Law 2000 (ESCA Law 2000), will also be presented and analysed. Thus, the main questions that will be raised in this chapter are to what extent the regulation of market manipulation under the UAE jurisdiction is efficient, and how has it been implemented and enforced in order to prevent damaging market integrity, to protect investors from manipulative schemes and to safeguard investors’ confidence.

In order to understand these questions and the aforementioned issues, this chapter will be divided into several main sections. These sections will look at the issue of market manipulation. The section on the definition of market manipulation will discuss whether market manipulation is a type of fraud or not, and forms of market manipulation under ESCA Law 2000. The discussion illustrates inadequacies in areas where they arise. The last two sections look at market power manipulation with the case of the Dubai Islamic Bank as an example of market manipulation practices.

4.2 Market manipulation

As an illegal activity, market manipulation has been regulated for a long time due to its negative impact on market efficiency and investors' confidence in the market. However, manipulations in modern financial markets are often carried out in concealed ways that are not easily detectable. Manipulation practices are still inadequately controlled, particularly in most emerging markets where market regulations are not

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The UAE stock market is considered to be one such emerging market seeking to prevent manipulation. The draft of the ESCA Law 2000 provides evidence that the legislators believed there was a direct link between excessive speculation and the stock market crash of 1998.

Examining the status quo of diversified regulatory regimes in many jurisdictions shows that it has been very challenging to adequately control the whole range of market manipulation. In spite of the fact that this is a longstanding issue as well as an influential factor in the early years of financial markets, it cannot be said that market manipulation is no longer important.

Generally, the term 'market manipulation' is used to refer to a number of practices deemed damaging to the capital markets. Market manipulation may refer to conduct in active trading or perhaps simply to circulating information about a particular security or company. Any discussion about the topic of manipulating securities must first deal with the problem of defining market manipulation. Finding a definition of market manipulation is an extremely difficult issue, particularly in a legal context.

Market manipulation has been defined in various ways. First, in the case of *Ernst & Ernst v. Hochfelder* in the USA defined manipulation as ‘virtually a term of art when used in connection with securities markets.’ Second, Goldwasser admitted that

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603 Huang, p. 8.


‘manipulation is difficult to define, but manipulative practices and schemes are usually readily identifiable’. Moreover, the Court of Appeal in the US defined market manipulation as ‘the creation of an artificial price by planned action’. An artificial price means that prices do not ‘reflect basic forces of supply and demand’. In addition, Cox makes clear that market manipulation refers to ‘classic forms of manipulation [which] are behaviour that have the effect of artificially distorting the market price of the stock in question, typically by appeals to the speculative impulses of other investors’. According to Thel, manipulative practices are ‘those that undermine the proper functioning of securities markets’. They relate to the dishonest means of conduct that persuade people to trade in securities or forcefully push their price to the point of artificiality. In the same context, Wright alleged that market manipulation is a form of fraud by stating that ‘market manipulation is just one aspect of commercial fraud. Many cases of market manipulation are criminal only in the most technical sense’.

There is a large degree of consensus that the definition of market manipulation should be suitable for and capable of encapsulating all intelligent offences which feature ‘ingenious and innovative schemes’ that might yet take place in the market. Therefore, the definition of manipulation must be very flexible. In fact, there are two...

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608 Goldwasser, p. 154.
609 *General Foods Corp. v. Brannan*, 17 F.2d 220 (7th Cir., 1048), p 231
613 S. Thel, ‘The Original Conception of Section 10(b) of the Securities Exchange Act’ (1990) 42 *Stan LR* 385, p. 393. (hereinafter S. Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*)
major attempts to solve the problem of defining manipulation, as Lomnicka observes;\(^{616}\) firstly identifying and classifying the known cases of manipulation in the market, and secondly, attempting to extract the basic features of market manipulation with the intention of capturing all possible forms of manipulation within an all-purpose definition. The same author considers that the majority of legal authorities have chosen the first approach, as it tries to meet two ‘opposing imperatives of flexibility’ in two ways. The first one does so by catching all forms of market manipulation and the second one clearly provides the most common forms of manipulation in the market. The difficulty in finding a precise and flexible definition is not new, but there are particular difficulties in defining the term in such a way that it will give equal weight to both. Therefore, the following section attempts to define market manipulation.

4.3 Market Manipulation Defined

Defining market manipulation is, as has been stated, a very complicated issue. Nevertheless, a workable definition of market manipulation that can describe exactly which practices are illegal is required, before it can be effectively regulated.

In fact, manipulation refers to activities that intentionally ‘mislead investors’ by means of creating artificial market activities, through ‘wash sales, matched orders, or rigged prices,’\(^{617}\) and other practices that constitute market manipulation. These practices interfere with the operation of the normal market forces of supply and demand. As

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Lomnicka\textsuperscript{618} points out, the problem lies in differentiating between legitimate market activities, which are ‘commercially motivated’ activities, and illegitimate activities that are often referred to as ‘manipulative’ conduct. Thus, it is not always easy to distinguish between practices that are acceptable and those which are not.\textsuperscript{619}

On the other hand, the US Securities Exchange Act 1934 (SEA 1934) which prohibits market manipulation failed to define the term ‘market manipulation’ precisely.\textsuperscript{620} It is obvious that the purpose of securities legislation is ‘to give a greater degree of definiteness to the concept of manipulation and to supply an enforcement and preventive mechanism.’\textsuperscript{621} Indeed, neither the Federal Law No. 4 of 2000 concerning the ESCA Law 2000, nor FSMA 2000 mentioned the practice of market manipulation by name, whereas the DIFC law No.12 of 2004 introduced this term by addressing ‘fraud and market manipulation,’ followed by the phrase ‘prohibits manipulation practices’ in section 36.\textsuperscript{622} Again, the ESCA Law 2000 has failed to define market abuse precisely by name, as the Legal Consultant at the Securities and Commodities Authority (SCA) makes clear:

\begin{quote}
\textit{The current legislation does not identify market abuse by name, instead it included rules and provisions included the incrimination of base actions, thus these actions can be extracted from the original incrimination texts, the incrimination provisions number 40, 41, 42, 43 [ of ESCA Law 2000] are all punitive provisions, and everything incriminated in these four provisions are considered market abuse, and therefore, all of the legislations do not define the market abuse... and maybe there is a shortage in some provisions, or lack of precisions in the }
\end{quote}

\textsuperscript{619} Ibid.
\textsuperscript{621} Loss and Seligman, p. 1125.
\textsuperscript{622} Section 36 of DIFC law No.12 of 2004.
picture of every crime, giving an impression that there is no provisions covering market abuse actions.\textsuperscript{623}

In addition, EC Market Abuse Directive also introduced market manipulation by name.\textsuperscript{624} However, in general it is rare for legislative language to define or even refer to manipulation practices by name.\textsuperscript{625} Nevertheless, the primary objective of all legislation in question is to prohibit the practice of manipulation in the marketplace. It is therefore alleged that due to this failure to explicitly define manipulation in legislation, the task of defining this term is effectively left entirely to the law courts and governing regulatory agencies.\textsuperscript{626} As Judge Ayssor, who was interviewed, noted:

\textit{Definitions are important, but being heavily involved in giving definitions will deviate the Law from the good legislative formulae. For example, I cannot define the crime of illegal manipulation due to its flexible nature that changes to take new forms. In other words, I might give an incomplete definition that does not cover all the manipulation market}

\textsuperscript{623} Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, \textit{Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.}


\textsuperscript{625} Article 1 (2) states that:

\begin{itemize}
\item “Market manipulation” shall mean:
\item (a) transactions or orders to trade:
\textsuperscript{626} Avgouleas, \textit{The Mechanics and Regulation of Market Abuse.}, p. 105.
\item which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or
\item which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned;
\item (b) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance;
\item (c) dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.” See also Article 4 and 5, Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC on the definition and public disclosure of inside information and the definition of market manipulation [2003] OJ L339/70.
\end{itemize}

behaviours as illegal actions. Therefore, I think that this issue should be left to the judicial interpretation.\textsuperscript{627}

Nevertheless, various judicial authorities rely on different systems. This dispute leads to different approaches to essential concepts, such as providing definitions of market manipulation and the types of sanctions imposed.\textsuperscript{628} Alternatively, the report of the International Organization of Securities Commissions (IOSCO) motivates governments individually to formulate laws that ‘proscribe manipulation with sufficient clarity and flexibility to allow prosecution of novel manipulative schemes’.\textsuperscript{629}

However, before turning to the discussion of market of manipulation practices below, it is necessary to provide elements or characteristics of constituting market manipulation. These characteristics have been used by courts, regulatory statutes and commentators\textsuperscript{630} in an attempt to define market manipulation. This will be addressed in the following section in more detail.

\textbf{4.4 Elements constituting market manipulation}

The difficulty surrounding the issue of whether particular behaviour is manipulation or not has created an academic debate. A number of legal academics have sought to define

\begin{small}
\begin{itemize}
\item \textsuperscript{627} Judge Ayssor is a Chief of the Appeals panel in the Dubai Court of Appeal, \textit{Interview conducted}, May 2010, Dubai court, United Arab Emirates.
\item \textsuperscript{629} Technical Committee of the International Organization of Securities Commissions, ‘Investigating and Prosecuting Market manipulation’ (May 2005), p. 4, (hereinafter IOSCO, \textit{Market Manipulation}) this report stated in the footnote number (1) that this report has been undertaken by providing ‘... [an] information on manipulation that takes into account enforcement issues raised by cross-border and cross-market conduct. Work on this report was undertaken following substantial work in this area at the Tokyo Conference of Commodity Futures Market Regulators which issued guidance on Standards of Best Practice for the Design and/or Review of Commodity Contracts and on Components of Market Surveillance and Information Sharing. See also the Report of the IOSCO Technical Committee on the Application of the Tokyo Communiqué to Exchange Traded Financial Derivatives Contracts, dated September 1998.’
\end{itemize}
\end{small}
the essential elements of market manipulation and have suggested various solutions to this problem. For example, Fischel and Ross provided a vital element in the definition of market manipulation. They argue that manipulative conduct tries to: ‘(i) interfere with the free play of supply and demand; (ii) induce people to trade; or (iii) force a security price to an artificial level.’631 However, having discussed these characteristics in detail, they concluded that none of them is directly related to a practical definition of what constitutes market manipulation. As illustrated by Fischel and Ross, defining market manipulation is a subjective process and not an objective one. In other words, they allege that it is impracticable to obtain objective evidence to distinguish conclusively between manipulative and non-manipulative transactions.632 This distinction rests on whether the manipulator has a dishonest intent to effect a change in prices of securities. Consequently, market manipulation could be defined as profitable transactions which include ‘bad’ intent.633 Thus, if behaviour satisfies the following three conditions, it should count as manipulative conduct: ‘(1) the trading is intended to move prices in a certain direction; (2) the trader has no belief that the prices would move in this direction but for the trade; and (3) the resulting profit comes solely from the trader’s ability to move prices’.634 However, after providing a discussion of the regulation of market manipulation, Fischel and Ross concluded that market manipulation is ‘[r]elated to the field of fraud - but not altogether a part of it as a matter of legal analysis’.635

There are elements and requirements for defining market manipulation. These help to identify behaviour which constitutes market manipulation. Accordingly, Avgouleas636

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631 Ibid.
632 Ibid.
633 Ibid.
634 Ibid.
635 Loss and Seligman , p. 1119.
defined market manipulation on the basis of economic theory and analysed the
definition of market manipulation, dividing it into four elements. The first element is an
effects-based approach which pays attention to the creation of artificial prices or false
and/or misleading impressions. This approach identifies activities that amount to market
manipulation. The second is the intent–based approach which focuses upon the
manipulator’s intent. The requisite intent for market manipulation is subjective rather
than objective. The third element combines the first two, thus requiring analysis of
the effects of price artificiality or/and misleading impressions, as well as the
manipulator’s intent. This third approach has been followed by the SEA of 1934 and US
decisional law and also requires proof that others have been induced to trade. The last
approach is the manipulating market power approach, which refers to the exercise of
an individual’s or group's ability to control the market, which is categorized as a
‘corner’ or ‘squeeze’. This section will focus on the first two elements, due to the
belief that these are consistent with the actus reus and mens rea, respectively, of the
offence of market manipulation, which are considered to be the necessary constituents
of a crime under the UAE law system. For further explanation on this subject see
Chapter Two.

(1) An effect-based approach

The effect-based approach is assumed to refer to the creation of artificial prices or false
and/or misleading impressions. These activities prohibited under section 118 of FSMA
2000. It is also adopted by the DIFC law No.12 of 2004, as prohibitive behaviour which

637 Fischel and Ross, , p.503-547.
639 B.E. Kozinn, ‘Note: The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake
The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo
Debacle?’).
leads to price artificiality or/and misleading appearance. Therefore, creating an artificial price and creating a misleading impression will be examined in turn.

(i) Creating an artificial price

An artificial price plays a vital role in any case of market manipulation since it is considered that market manipulation is involved in creating an artificial price in a securities market. The conception of an artificial price refers to a price that is not obtained by reasonable forces of supply and demand. It is therefore a ‘non-equilibrium price’ in the terminology of economics. In the US case of Great Western Distributors, Inc v Brannan, it was held that an artificial price is ‘a price which would be different if the price-influencing efforts were absent’. An artificial price does not mirror the forces of supply and demand in the market place.

The FSMA 2000 does not explicitly mention artificial prices, but instead refers to any conduct leading to misleading, false or deceptive investors in the market place. The DIFC law No.12 of 2004, on the other hand, cites the term ‘an artificial price’ in

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640 See: Section 36 under Chapter 1 of DIFC law No.12 of 2004
643 Kozinn, ‘Note: The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo Debacle?’, p. 265. However, Perdue argued that the concept of an artificial price is unhelpful for determining that a manipulation existed. As she points out, ‘[d]espite numerous attempts to define and then apply the concept of an artificial price, none has proven satisfactory. All suffer from serious defects that make the concept of artificial price either inappropriate to, or unhelpful in, the determination of what constitutes manipulation. Defining manipulation as the creation of an artificial price simply substitutes one unhelpful term for another.’ Perdue, Manipulation of Futures Markets: Redefining the Offense, p.348.
644 Re Indiana Farm Bureau Cooperative Association [1982-84 Transfer Binder] CCH Commodity Futures Law Reporter (CFTC, 1982) an artificial price was defined that it ‘does not reflect the market or economic forces of supply and demand operating upon the price of the particular contract under scrutiny. It is, in economic language, a nonequilibrium price.’
645 Great Western Distributors, Inc v Brannan 201 F 2d 476 (7th Cir 1953) see also; the General Foods Corporation v. Brannan, 170 F.2d 220, 231 (7th Cir. 1948) in the US case, providing that manipulation is as 'the creation of an artificial price by planned action, whether by one man or a group of men’.
646 See in general section 397 of FSMA 2000.
section 36, when discussing prohibited behaviour which leads to price artificiality by a
person’s conduct that ‘results in or contributes to, or may result in or contribute to an
artificial price’. The ESCA Law 2000 does not explicitly refer to an artificial price as
a term, but mentions fictitious transactions instead. However, using the term
‘artificial price’ is not in itself significant, as long as behaviour which causes artificial
prices is prohibited.

The IOSCO provides clarity for the definition of price artificiality by highlighting ‘the
divergence of price from the legitimate forces of supply and demand’. In order to
show beyond reasonable doubt that an artificial price has been created, evidence should
be gathered to show that ‘prices did not follow legitimate economic forces’. The
IOSCO text states:

One way to do this is to establish what the level of price or price relationships would have been, or should have been, had
the suspected manipulator not illegitimately interfered with the normal process of price formation. In establishing
normative levels or price relationships, it is important to identify as many relevant market forces as possible and to
ascertain their effect.

In reality, distinguishing between artificial and non-artificial prices is still a difficult
issue and neither literature nor case law has brought forth a satisfactory solution.
Fischel and Ross argue that the concept of artificial price ‘does not distinguish
manipulative trades from legitimate trades’. Easterbrook also strongly criticises the
definition of manipulation and argues that artificial price is impossible to distinguish.

647 See; Section 36 under Chapter 1 of DIFC law No.12 of 2004.
648 Article 26/2 of ESCA law 2000, it is directly addressing to intermediaries and their representatives by
abstain them from any conducts which lead to ‘…any fictitious transactions not conducive to a true
transfer of the Securities or funds which are the subject of the dealing.’
650 IOSCO, Market Manipulation, p. 13 ; this has been pointed by Avgouleas, The Mechanics and
Regulation of Market Abuse, p. 109.
651 Ibid.
652 Fischel and Ross, Should the Law Prohibit Manipulation, p.507.
the Journal of Business, pp. S103-S127
(ii) Misleading Impressions

Misleading impressions are formed when a course of conduct creates false appearances in respect of demand for, or the supply of, the investment in question. For example, if a person purchases a company's share and then he/she disseminates false information which pushes up the price of the relevant shares, his/her act produced a misleading impression by disseminating false information. Afterwards, he/she is able to sell the shares at a profit. This course of conduct is known as ‘pump and dump’. Proving that a misleading impression has been created is easier than proving that an artificial price has been created. The test for whether this offence has been committed or not is the so-called reasonable person or regular user test. In order to test whether any person’s course of conduct has created a misleading impression, a certain condition must apply. If the person’s conduct has not met acceptable standards of behaviour which are likely to be expected from a regular user of the market, then this represents market abuse.

The issue of ‘regular user’ was analysed more extensively in section 2.5.2 (c) in Chapter two, where market abuse in the UK jurisdiction was discussed.

A real example of a false or misleading impression in the UK occurred in a case involving the Shell, the oil company. On August 24, 2004 in the UK, a Final Notice was issued by Financial Services Authority (FSA), against Shell. Shell had produced false and misleading information about its hydrocarbon reserves from 1998 to 2000. When it was eventually admitted that the information was misleading, Shell’s share price

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656 A definition of regular user is under Section 118 (10) of FSMA 2000, a regular user is as ‘in relation to a particular market, a reasonable person who regularly deals on that market in investments of the kind in question’.
collapsed by 7.5%. Shell’s market capitalisation decreased by approximately £2.9 billion. Shell’s conduct was caught by section 118(2)(b) of FSMA 2000 because it was likely to have given a regular market user a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question. Therefore, the FSA imposed a £17 million financial penalty on Shell for market abuse.

As mentioned earlier, DIFC Law No.12 of 2004 prohibits behaviour which produces a ‘misleading appearance’. This corresponds, to some degree, to section 118(2)(b) of FSMA 2000, particularly in terms of creating a false or misleading impression in order to induce others to trade. ESCA Law 2000 includes a provision in relation to misleading information or statements. Misleading information must affect a security’s price and an investor’s decision to invest; otherwise the perpetrator would not be considered to have violated the provision. This issue will be examined further in the subsection headed information based manipulation, below.

(2) The intent-based approach

Intent is undeniably an important condition for criminal courts to impose penalties for market manipulation. If a ‘manipulator’ did not show any intention to manipulate

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659 Bennett, pp.180-185.
661 Section 36 under Chapter 1 of DIFC Law No.12 of 2004 states ‘A person shall not, in the DIFC or elsewhere, directly or indirectly, engage or participate in any act, practice or course of conduct relating to Investments that the person knows or reasonably ought to know:
(a) results in or contributes to, or may result in or contribute to, a misleading appearance of trading activity in, or an artificial price for, Investments; or
(b) ………’
662 Section 118 (2) (b) of FSMA 2000 states ‘...(b) the behaviour is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question; …’
663 See Article 36 of ESCA law 2000 which states that ‘The furnishing of false information, statements or data such as to affect the market value of Securities and an investor’s decision to invest or otherwise shall not be permitted.’
securities markets, he/she will be acquitted due to the absence of any intention to commit market manipulation.\textsuperscript{664} It is not easy, however, to establish any direct evidence of intent to manipulate a certain transaction unless the manipulator admits to this, which is of course unlikely. Such evidence might be inferred from a succession of circumstances that have been established prima facie\textsuperscript{665} whereby it may be assumed that the individuals accused of market abuse must have acted ‘with the intent that their combined acquisitions would cause an artificial price increase and enable them by pressure to unjustly liquidate their holdings at a profit’.\textsuperscript{666} Most legal definitions of market manipulation require strong proof which shows that manipulators either had the intention to cause changes in the price of securities, or to persuade market users to trade in the securities affected by the manipulative scheme. Many attempts have been made by academic researchers to provide a clear definition of market control manipulation that focuses on the traders’ conduct or intent more than the impact on prices of securities.\textsuperscript{667}

There is broad agreement that the defendant must not only have known that the price of the relevant securities would be affected as a result of his/her actions, but also that the defendant acted with the intention of creating an artificial price.\textsuperscript{668} However, it is not always feasible to show intent to create a misleading impression, despite proving intent to create an artificial price.

\textsuperscript{664} See in this sense at Avgouleas, \textit{The Mechanics and Regulation of Market Abuse.}, p. 111- 112.
\textsuperscript{665} Jerry W Markham, ‘Manipulation of Commodity Futures Prices—The Unprosecutable Crime’, (1991) 8 Yale Journal on Regulation 2, pp. 281-390.
\textsuperscript{666} This is quoted by Markham, pp 281-390. Markham referred to the case of \textit{G.H. Miller & Co. v. United States}, 260 F.2d 286 (7th Cir. 1958).
\textsuperscript{667} Avgouleas, \textit{The Mechanics and Regulation of Market Abuse.}, p. 111- 112.
\textsuperscript{668} Perdue, ‘Manipulation of Futures Markets: Redefining the Offence’, p. 375.
4.5 Market manipulation: Is it a type of fraud?

The nature of the relationship between market manipulation and fraud must now be examined. Both of these offences involve conduct which induces another party into believing something that is false. In other words, the link between fraud and manipulation is that they have similar techniques and purposes. This similarity can be seen by considering an example of a person who opens a number of accounts with several brokers and then effects transactions in which he/she simultaneously plays the role of a buyer and a seller of the same securities. He/she artificially causes the price of the securities to increase by this series of trades, thus inducing other investors to believe that there has been an increase in activity related to the securities, contrary to the truth. This behaviour therefore involves dishonest methods and could be considered to be both a form of fraud and manipulation simultaneously. In fact, both fraud and manipulation lead to the same consequence of creating a misleading impression so as to induce others to trade.

According to Fischel and Ross, the difference/similarity between manipulation and fraud is not clear, though other commentators have insisted that manipulation comes under the scope of fraud, but it is ’not altogether a part of it as a matter of legal analysis’. In *R v De Berenger*, in the UK, practices of market abuse were found to refer to fraudulent schemes, as Lord Ellenborough C.J noted:

> The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.

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669 Fischel and Ross, , pp. 503-547.
670 Loss and Seligman, p. 1119.
671 *R v De Berenger* (1814) 3 M&S 67 (KB)1105 Eng Rep 536.
In the context of fraud as a crime, the UK imposed the Prevention of Fraud (Investment) Act of 1939, which was replaced and to some extent amended by the Prevention of Fraud (Investment) Act of 1958. This law regarded a false statement offence to induce an investment trade as a serious crime, regardless of whether it was committed dishonestly or recklessly, or by dishonestly concealing a material fact. The Financial Services Act 1986 re-enacted this provision to a certain extent under section 47(1). FSMA 2000, which replaced it, largely reformulates the same principles in section 397, although section 397 distinguishes between misleading statements and practices and misleading conduct. The purpose of this distinction clarifies the intention of the British Parliament to extend the scope of responsibility, so that the offence is wide enough to catch conduct which would be classed as market abuse but might not otherwise attract legal responsibility under the wider fraud framework. FSMA 2000 thus gives a wide interpretation to the fraudulent nature of market manipulation. This tendency contrasts with the DIFC law as well as the ESCA Law 2000.

In the UAE, fraud as a crime refers to the use of fraudulent means. The criminal offence of fraud can be found under Article 339/1 of Federal Criminal Law No 3 of 1987. It is committed by using fraudulent means which would defraud the victim and lead him/her to consent. This provision against general fraud covers practices such as fraudulent acts. Nevertheless, the UAE’s regulator has limited the definition of fraudulent means. Therefore, if the action does not fall into one of these fraudulent means, no crime of fraud will be committed. Furthermore, the intention to commit fraud is required. It can

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675 The technique of fraud, under Article 339/1 of Federal Criminal Law No 3 of 1987, is considered an element in crime, and fraudulent processes can include such activities as disposing of the money of others and taking a false name or a non-valid identity. These methods of fraud are, as a whole, fraud against an aggrieved party. In exercising these techniques, the offender has the very specific aim of obtaining money. While the criminal law has identified methods of fraud, the provisions of the Federal Criminal Law are inadequate in countering all fraudulent techniques.
therefore be argued that this law is limited in its ambit and will not cover some offences concerning securities transactions in the marketplace.

The ESCA Law 2000 does not explicitly refer to fraud. This may perhaps indicate that the UAE’s regulator does not consider that any offence committed in the securities market reaches the degree of fraud. The regulator did, however prohibit any practices leading to artificial transactions or creation of misleading information. In contrast, the DIFC law No.12 of 2004 used ‘fraud and market manipulation’ as a title in section 36 and prohibited fraud in clause (b). This might lead to the conclusion that the DIFC law No.12 of 2004 can distinguish between fraud and market manipulation. However, the problem here is the lack of an explicit standard as there is no guidance as to what kind of activities are considered to be fraudulent under the DIFC law No.12 of 2004. In spite of this problem, nonetheless, broadening the limit of liability for abusive market practices such as fraudulent behaviour and other forms of misconduct does mean that the DIFC’s regulator is more restrictive than the ESCA regulator.

4.6 The Forms of Market Manipulation

Market manipulation, as mentioned earlier, refers to the ‘illegal practice of raising or lowering a security's price by creating the appearance of active trading’. The purpose of manipulators involved in market manipulation is to change the price of securities and then take advantage from these changes, in a manner which involves creating a misleading impression at the expense of others. Increasing the shares price is the purpose of most manipulation practices, rather than decreasing it. This is because

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676 See: Garner, Black’s Law Dictionary.
restrictions on short-selling make it hard to benefit from a decrease in price. The various forms of manipulation will be considered in the following sections, in order to determine how relevant laws deal with these illegal practices and where there are shortcomings. This will assist our understanding of how these manipulation practices work and how they are committed. In reality, market manipulation practices take numerous forms and it is therefore difficult to list them all. Legislators cannot define all these illegal practices because they are diverse and innovative.

To achieve the aims of the current study, the three categories of market manipulation practices identified by academics will be examined: information-based manipulation, artificial transactions and price manipulations.

4.6.1 Information-based manipulation

Information-based manipulation practices are known to have two forms: pump and dump, and trash and cash. The former consists of disseminating misleading positive information, whereas the latter consists of disseminating misleading negative information. Allen & Gale defined information–based manipulation as ‘releasing false information or spreading false rumours’. The different forms of information-based manipulation practices include the provision of misleading statements in the form of advice or recommendations. Thus, information–based manipulation could primarily be committed by financial advisers, brokers, and those who instruct others to release false information about their companies which misleads the marketplace. According to

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679 Swan, Market Abuse Regulation, p 98.
this view, information-based manipulation is divided into two categories; disseminating incorrect statements of material facts and spreading false rumours. They are discussed in turn.

(i) *Disseminating false statements of material facts*

The first category of information-based manipulation is the dissemination of false statements which include misleading information relating to a legal entity (issuers). Financial analysts or other market professionals, such as brokers, may give out misleading recommendations and guidance in order to increase the value of their own investment profits, or fail to disclose various conflicts of interests.\textsuperscript{682} The UAE case, An interviewee who is a specialist broker said:

\begin{quote}
What are the broker’s responsibilities, roles and rules that he/she should follow? In other words, what kind of information does he/she have to provide and retain? This does not exist as you will find people who give information based on his/her mind’s work seeking nothing but his/her personal benefits...30% of Mediation companies in the marketplace do this by providing misleading pieces of information and advice to the client. He/she might be either telling lies, giving incorrect pieces of information for a personal interest or pretends to be omniscient. In doing so, one has been told an incorrect piece of information which might conflict with the regulating bodies that call for disclosure and transparency.\textsuperscript{683}
\end{quote}

Another anonymous interviewee, who works as a specialist in the Dubai Financial Market said that it is illegal for a broker to give any tips. He stated:

\begin{quote}
A broker should not give advice to the investor and if it is revealed that the broker gave the investor incorrect tips or information, he/she will be legally responsible and punished. This may be detected by a complaint from the investor.\textsuperscript{684}
\end{quote}

\textsuperscript{682} Ibid.


False statements or information can be provided verbally, in writing or by any other means. The perpetrators also often resort to the media for publicity. The legislator in the UAE has not determined any specific person who may provide such information. As a result, any person who provides such information or statements may be held legally responsible under the criminal offence of market abuse. However, UAE financial advisers and analysts often take advantage of media coverage of their pronouncements and financial analyses. The problem here is that these people are in a sensitive place where it is easy to influence investors by passing on misleading recommendations or suggesting investment strategies. Such conduct, of course, involves manipulating the prices of securities. For example, in the UAE, TV companies often invite financial advisers to analyse and comment on the securities market, and this could include a discussion of a company’s shares and the (positive) trend of securities. It is possible that they own that company’s securities or avoid reference to conflicting interests. If the financial analyst makes untrue statements or gives out information that affects the market value of securities and an investor’s decision to invest, this is considered a criminal offence, which constitutes market manipulation in accordance with Article 36 of the ESCA law 2000. This Article states that ‘the furnishing of false information, statements or data ...to affect the market value of Securities and an investor's decision to invest’ is not permitted. Such action also violates Article 14 of SCA Decision No (48/R) of 2008 concerning the Financial Consultation and Financial Analysis.685 This Article sets out 14 obligations regarding financial analysis that should be followed. Clause 11 of this Article forbids financial analysts ‘to publish or promote any false statements or information in connection with the position of the companies whose securities are listed in the market’.

685 See Article 16 (2) of ESCA Decision No (48/R) of 2008 concerning the Financial Consultation and Financial Analysis, prohibits any financial consultation and financial analysis “to do an act intended, whether directly or indirectly, to mislead the traders, or disseminate or promote any false statements or information on the conditions of the market or the traders therein issued”.

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A flaw in this Article is crucial. If a financial analyst fails to take proper care over the information or statement he/she provides, or he/she does not know to what extent that information or statement is true, it is not clear whether he/she will be considered to be criminally responsible. Moreover, if a director or issuer recklessly makes a misleading statement to the marketplace in relation to his/her profits market, it is clear that is he/she is not liable under ESCA Law 2000, because the ESCA Law 2000 requires the intention (i.e dishonesty) to induce investors. If there is no intention, he/she will not be guilty. Farghaly\textsuperscript{686} uses the argument that he/she can be held responsible managerially if the disclosure violated professional disclosure regulations. Nevertheless, he admits that the ESCA Law 2000 does not criminalise such reckless misleading statements. This issue is not regulated in the ESCA Law 2000. The fact that the ESCA Law 2000 does not criminalise reckless action contrasts with FSMA 2000 in the UK. Judge Al Hammadi commented in an interview:

\begin{quote}
As a general rule, the Federal criminal law penalises any person who commits a recklessness or deliberate action. Even if deliberate action has not been explicitly stated in any of the law article, perpetrator has legal responsibility towards his/her actions, be they intentional or reckless. In the ESCA Law 2000, however, it is different because crimes and offences must be committed intentionally so if he/she discloses information as a result of his/her neglect and recklessness, he/she will not be punished criminally as long as the legislator does not mention it in the law because he/she did not commit it intentionally.\textsuperscript{587}
\end{quote}

In the UK law, the criminal offence of making a misleading and reckless statement concerning the stock market is found under section 397(1)(c) of FSMA 2000, when a person carries out a reckless act in the form of a misleading, false or deceptive statement

\textsuperscript{686} Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.

\textsuperscript{687} Judge Hassan Al Hammadi,(PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, Interview conducted, June 2010, Abu Dhabi, United Arab Emirates.
(dishonestly or otherwise) or a promise or a forecast. Section 397(1) of FSMA 2000 deals with three offences of making misleading statements which will be committed if a person does one of the following: first, if he makes a statement, promise or forecast, knowing it to be misleading, false or deceptive to a material extent; second, when a person conceals any material facts in a dishonest manner, whether or not in connection with a statement, promise or forecast made by him or her; and finally, when a person makes a misleading, false or deceptive statement to a material extent as a result of a reckless action.688

The DIFC law No.12 of 2004 follows UK law to a certain extent, in relation to criminalising reckless conduct. Section 41(1) (a) of DIFC law No.12 of 2004 states that a ‘person shall not in the DIFC or elsewhere, induce another person to deal in Investments: (a) by making or publishing a statement, promise or forecast if this person knows, or is reckless as to whether the statement is misleading, false or deceptive’. This is therefore similar to FSMA 2000, as in both cases, a person may be liable for reckless action dishonestly or otherwise.

An example of recklessness in the UK is the case of R v Rigby and Bailey,689 in 2005, where two directors were prosecuted for making reckless statements to the marketplace that misled investors. Rigby & Bailey were directors of the AIT Group plc (AIT), a

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688 397(1) of the FSMA 2000 prohibits a person to ‘(a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular; (b) dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise; or (c) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular’. 

company whose shares were listed on the AIM\footnote{The Alternative Investment Market (AIM) is a sub-market of the London Stock Exchange, allowing smaller companies to float shares with a more flexible regulatory system than is applicable to the main market. Available at http://www.businessdictionary.com/definition/alternative-investment-market-AIM.html Accessed (20/09/2010).} of the London Stock Exchange. Rigby and Bailey, as directors, made an announcement on 2\textsuperscript{nd} May 2002 by means of a Regulatory News Service of the London Stock Exchange. The announcement stated that AIT’s turnover and profits were in line with market expectations. This statement increased confidence in the marketplace and therefore a number of investors bought AIT shares. This caused the share price to rise from 472.5 to 492.5 pence.\footnote{R v. Rigby and Bailey, FSA/PN/091/2005 18 August 2005. Available at http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/091.shtml Accessed (20/09/2010).}

The announcement of profits included the expected revenue from three contracts. At the end of the same month as this announcement was made, a statement was issued to update the marketplace. This stated that the previous announcement of 2\textsuperscript{nd} May 2002 regarding the expectation of profits was no longer considered to be accurate information. One of the contracts could not be confirmed and nor, therefore, could the projected revenue be confirmed. This caused revenue and profits to fall to £1.1m, and the share price fell from 492.5p to 96.5p. In August 2005, after four months of trial by jury, the directors were found guilty of recklessly making a statement, promise or forecast which was misleading, false or deceptive to a material extent, in violation of section 397(1)(c) of FSMA 2000. Therefore, Rigby and Bailey were sentenced to 42 months’ and 18 months’ imprisonment respectively. The sentence was reduced by the Court of Appeal to 18 and 9 months’ imprisonment respectively.\footnote{S. Hatt & R. Burger, ‘“If in doubt count it out!”: a review of the AIT criminal trial’ (2007) 15 Journal of Financial Regulation and Compliance 1, pp 108-115.}
(ii) Spreading false rumours

A rumour plays a major role in influencing securities prices traded in the market by creating a false impression. Consequently, this may affect the integrity of the market and harm investors’ funds. Most legislation relating to financial markets attempts to prevent this by criminalising such acts and imposing punishments. Spreading a false rumour is another form of information-based manipulation of the market place. It is a criminal offence under both FSMA 2000 and the DIFC law No.12 of 2004. Despite this, these laws do not refer to this offence as spreading false ‘rumours’. This is different from the ESCA Law 2000, which explicitly does so.

As Avgouleas points out, the dissemination of false rumours takes the form of market rigging. Market rigging includes spreading false information which is a ‘rumour’ and artificial transactions behaviour. Both of these behaviours intend to create a false impression with regard to supply and/or demand of the relevant financial instrument. The oldest and best known example of dissemination of false information as rumours in the UK was in the case of R v De Berenger. The manipulative scheme in this case was based on spreading false information by a group of individuals during the Napoleonic Wars. The rumour was about the death of Napoleon and peace between England and France. It was a conspiracy which aimed to affect the price of public funds and securities. This case well supports the argument in favour of prohibiting rumours.

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693 Section 397 (3) of the FSMA 2000.
694 Section 36 (a) of DIFC law No.12 of 2004.
695 See Avgouleas, The Mechanics and Regulation of Market Abuse, pp. 121, 122. Avgouleas states that ‘Market rigging is a very old form of market manipulation. The dissemination of false information (‘rumours’) might refer to political or economic affairs in general, or to the status of an issuer, and aims to manipulate the market price of the relevant security.’
696 R v De Berenger (1814) 3 M&S 67 (KB)1105 Eng Rep 536.
697 Nathan Rothschild and De Berenger conspired in dividing their role, the former disseminated false news while he knew that the England was losing and the latter who was spreading rumours about death’s Napoleon. see R v De Berenger (1814) 105 ER 536.
that are based on false information. As a result, spreading a rumour might consist of either disseminating false information, or creating a rumour from nothing.

In the UAE, the ESCA law 2000 distinguishes between false information and rumour. It prohibits spreading rumour and false information in different provisions.\textsuperscript{698} This begs the question as to whether there any difference between spreading a rumour and disseminating false information. A legal expert in the UAE argued in an interview that these two concepts are in fact different. He said:

\begin{quote}
The difference [between the rumour and false information] has its own justifications because text laws differ from each other. It is known that data and information have a limited scope,... whereas the rumour is marked by being general and unrelated to a specific person. In Article 36 [of ESCA law 2000] the information is limited by its effect on the market value... while a rumour is more or less general in nature; a general state that can erode the confidence in market... Therefore, the legislator addresses two different issues which he imagines may occur in practice: first, if the information given is not valuable and doesn’t affect the market value or the investor’s decision, there is no crime; second, a rumour in itself constitutes a different reality to which the market could be exposed. Therefore, the legislator addressed it strictly because it could make the market lose its confidence among its investors.\textsuperscript{699}
\end{quote}

Similarly, the spreading of false information involves rumours and vice versa. However, most interviewees distinguish between false information and rumour. For example, Farghaly defines a rumour as follows:

\begin{quote}
A rumour is known to involve an incorrect piece of information, but not every piece of incorrect information is a rumour. There is a similarity between them. In the reviewed literature of Law, there is a large consensus that says that a rumour is to make up an incorrect piece of news/information and spread it to the public. This does not mean that you have created the information totally, but rather the information exists and you have changed its content.\textsuperscript{700}
\end{quote}

\textsuperscript{698} See the Articles 36 and 39/2 of ESCA law 2000.
\textsuperscript{699} Sammer Ja’afar, Legal Consultant, Ja’afar Alwan, Al Jaziri & Associates; Advocates & Legal Consultants. \textit{Interview conducted}, June 2010, Dubai, United Arab Emirates.
\textsuperscript{700} Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, \textit{Interview conducted in May 2010}, Abu Dhabi, United Arab Emirates.
A rumour is usually circulated amongst a group of people, but it is difficult to allege that spreading true information is a rumour because it is just circulating this among others. False information should be distinguished from the circulation of true information and it is usually spread by insiders relating to a specific subject. 701

As mentioned earlier, an act that creates a false impression in the UK is a criminal offence under section 397(3) of FSMA 2000, which states that an offence is committed by ‘any course of conduct which creates a false or misleading impression as to the market, price or value of any investment’. This practice is also prohibited by section 36 of the DIFC law No.12 of 2004. It states that any person ‘shall not, in the DIFC or elsewhere, directly or indirectly, engage or participate in any act, practice or course of conduct [that]... (a) results in or contributes to... a misleading appearance of trading activity ...’. 702 Both aforementioned laws prohibit such activity without explicitly mentioning rumours, making the actions illegal in another way by forbidding any conduct which creates a false or misleading impression. This therefore may include rumours or any conduct which leads to a similar result.

Article 39(2) of the ESCA Law 2000 prohibits spreading false rumours by stating that ‘it shall not be permitted for any person to spread rumours regarding the selling or buying of shares’. In order to reflect this provision, the Securities & Commodities Authority (SCA) issued Decision No. (3/R) of 2000 that includes Article 37/C which prohibits any behaviour which ‘spreads tendentious

701 Hussein Ghanaim (PhD in Law). Former lecturer in law faculty in the UAE University, he was a member of the legislative committee that drafted ESCA Law 2000. Currently, he is a legal counsellor, Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.

702 section 36 of the DIFC law No.12 of 2004 states that ‘A person shall not, in the DIFC or elsewhere, directly or indirectly, engage or participate in any act, practice or course of conduct relating to Investments that the person knows or reasonably ought to know: (a) results in or contributes to, or may result in or contribute to, a misleading appearance of trading activity in, or an artificial price for, Investments’.

703 This decision is concerning the Regulation as to Disclosure and Transparency.
rumours regarding the selling or buying of shares’.

Therefore, it prohibits any person engaging in spreading rumours tendentiously – that is, with a definite purpose. However, precisely why Article 37/C of SCA Decision No 3 of 2000 should ban behaviour already caught by Article 39(2) of ESCA Law 2000 is not completely understandable. The repetition of some articles of the ESCA Law 2000, as one interviewee said, is confusing the investors in the market. The ESCA Law 2000 is nonetheless designed in general to catch all types of rumours related to selling or purchasing shares, regardless of its shortcomings.

The limitation of the scope that legislators provide in Article 39(2) of ESCA law 2000 creates another problem. Spreading false information (rumours) does not always have to be about selling or buying securities, but might instead refer to an economic crisis or political problem, which will certainly affect the market place and then negatively influence investors’ decisions in relation to their investments. There might be rumours concerning financial matters related to an issuer intending to manipulate the market price of relevant securities. This raises a question: if a person spreads false rumours about a fictitious impending financial crisis or economic and political problems in the securities market, is this provision sufficient to establish his/her liability? In fact, the legislature limits this provision’s scope as it applies solely to rumours relating to the purchase or sale of shares. Thus, it is difficult to convict a manipulator who spreads rumours of a wider nature. The Article, therefore, appears flawed and needs reform. An

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704 Article 37/C of Decision No (3/R) of 2000 concerning the Regulation as to Disclosure and Transparency promulgated that: ‘Pursuant to Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority and Market, any person shall be liable to imprisonment for a period of not less than three months and not more than three years and a fine of not less than one hundred thousand (100,000) Dirhams and not more than one million (1,000,000) Dirhams, or either of these penalties, if he: … Spreads tendentious rumours regarding the selling or buying of shares.’

705 Shafiey Ahmed, Legal Consultant, Ja’afar Alwan, Al Jaziri & Associates; Advocates & Legal Consultants. Interview conducted, June 2010, Dubai, United Arab Emirates.
interviewee who practices as a legal consultant at SCA supported this allegation. When asked whether this Article had any shortcomings, he stated:

Yes, I see that there is a flaw in the legislation. There is what is called commitment to sale and purchase which is another crime of manipulation. Influencing the price or the rumour is also considered manipulation. This legal text is flawed as everything that changes or affects the value, the securities market or the investor’s investment plan should be criminalised. In other words, limiting the crime to the process of sales and purchase is incomplete which signifies a flawed law.  

Article 34 of the ESCA Law 2000 obliges companies whose securities have been listed in the market to inform it (the market) of and publish any information which affects the value of securities. It may be argued that this is a measure designed to prevent market rumours. This Article puts the burden on issuers to disclose explanatory information. For example, if there is any information underlying a market rumour relating to an issuer, then the issuer will have to notify the market. In other words, if there are any ambiguous circumstances or activities relating to the issuer’s operation, then the issuer is responsible for publishing explanatory information when required. Farghaly states that companies which have been listed in the market are required by disclosure rules to respond to rumours in a limited time, either to deny or to confirm the information that is being circulated in the marketplace. However, Abdullah Alnimay, who is a specialist and occupies the position of manager of market surveillance in market operations, argues that companies have the right to delay disclosure of sensitive information for a considerable period of time. He points out that ‘the law is flawed as it gives the

706 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.
707 Article 34 of ESCA law 2000 states that ‘Companies whose Securities have been listed in the Market shall promptly furnish it with any information which affects the prices of these Securities, upon the same becoming available to them. The Market's board of directors shall have the right to publish such information in the local press and other media it deems appropriate.’
708 Mazhar Farghaly Ali (PhD in law) Legal Consultant at the Securities & Commodities Authority, Interview conducted in May 2010, Abu Dhabi, United Arab Emirates.
company the right to respond in 10 or 18 days’. 710 This constitutes a problem. The interviewee raised the question as to ‘why the company does not tell us that there is a circulated piece of information [in the market]’. He added that ‘legally, we cannot compel the company to disclose this’. 711 He provided an example of a practice which often takes place in the UAE financial market: There was a rumour relating to Arabatec Holding and Aabar Investment. This rumour about a possible takeover bid by Arabatec for Aabar circulated in the market for a long time. He added that ‘today Arabtec has confirmed that there is a rumour in the market stating that Arabtec has taken over Aabar’. 712

The UAE market actually depends on rumours. As Al Jarkass points out, 713 ‘...investors in the UAE generally rely on rumours rather than on educated investment advice, which cause the wild gyrations in local stock markets...’. Therefore, if there is any rumour disseminated in the securities marketplace in relation to a company’s activities or circumstances, the company should be obliged to respond to these rumours by giving explanatory details to the marketplace and to investors. For example, the value of Amlak Finance and Real Estate Company’s shares had risen due to rumours about an intended rights issue. Even though the company formally denied that it had plans to increase its capital, a week later the market rumours were proved to be true by an official announcement. Huge sums of money were made by those who possessed the advantageous information and pursued the market rumours. Neither SCA nor the company took action against the source of the information. The Company denied the

710 ibid.
711 ibid
rumours at first, then went ahead with the issue. What is needed to combat this problem is to reverse this trend; the SCA must take definite action on this issue by obliging companies to disclose proper information which is relevant to any rumours which occur. A free flow of information through disclosure and transparency rules would prevent such rumours, which amount to market manipulation.

In the modern era, the Internet has many features of a tool that facilitates market manipulation, particularly by spreading rumours through e-mails, chat rooms and bulletin boards. The ESCA Law 2000 and the Regulations market (SCA decisions) do not specify any method for spreading a rumour. Therefore it may occur by any means, including via the Internet, as long as it relates to selling or buying shares.

The ESCA Law 2000 does not require that rumours must influence the market value of securities, an investor’s decision or for the achievement of personal benefits. This is contrary to Articles 36 and 37 which state that making false statements or exploiting inside information should create personal benefit and therefore will raise liability against the actor. This creates another problem as it raises the question as to whether anyone who has heard the rumour and then conveyed it to others will be held criminally responsible, or whether criminal liability will be limited to the person who started the rumour. In addition, it is often difficult to follow a rumour back to its source.

Information-based manipulation must involve false information or spreading rumours. These forms of information-based manipulation depend on information relating to issuers, either false information or rumour. These practices create a

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false impression toward investors as well as harming market integrity and its value. However, the following form of manipulation is quite different, because it is based on a fictitious transaction. This sends an incorrect signal to investors.

4.6.2 A fictitious transaction

This is another main type of market manipulation. It also creates a false and misleading impression. According to Avgouleas, this form of manipulation is similar to information-based manipulation as both convey false information regarding the state of supply and demand for a particular security. However, the difference is that manipulation by creating a fictitious transaction involves the creation of a specific action which creates false signs of a transaction. Thus, it is not the same as disseminating false information or rumours as in the case of information based manipulation.\footnote{Avgouleas, \textit{The Mechanics and Regulation of Market Abuse.}, pp. 125-126.} The fictitious transaction intends to mislead investors in the market by making them believe that there is supply or demand in specific securities, due to evidence of transactions in those securities, whilst in fact no transactions have been taking place.\footnote{Fischel and Ross, pp. 503-547.} Section 118 (6) of FSMA 2000 defines fictitious transactions as ‘effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance’.\footnote{Section 118 (6) of the FSMA 2000, see also the Market Abuse Directive states artificial transactions as ‘transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance’. See Directive 2003/6/EC of the European Parliament and of the Council. (2003, January 28), \textit{Official Journal of the European Union}.} The DIFC law No.12 of 2004 states that a ‘person shall not, in the DIFC or elsewhere, directly or indirectly, engage or participate in any act, practice or course of conduct [which]... (a) results in or contributes to, or may result in or contribute to... an artificial price for Investments’.\footnote{See section 36 (a) of DIFC law No.12 of 2004.} The DIFC law No.12 of 2004, then, does not prohibit artificial transactions explicitly in a particular provision, but
includes this in the same provision that prohibits any act or course of conduct which results in artificial prices, even if the artificial price is not its direct effect.

The ESCA Law 2000 prohibits brokers and their representatives from engaging in two activities, firstly engaging in any fictitious transaction that does not intend the genuine transfer of securities or funds which are the subject of the dealing, and secondly taking any action that may bring harm to the reputation of the market, its members or investors in the market. It should be noted that this prohibition applies only to licensed brokers and their representatives because the law requires that trading in securities should be carried out exclusively through brokers. However, if it is supposed that the investor is the one who is creating a fictitious transaction by placing his/her order to a broker, and a broker executes the transaction with bona fide intent, this raises the question as to who would be responsible under 26(2) of ESCA Law 2000 – the broker, investors or both. In an interview, questions were raised concerning this issue, specifically relating to an Article 26(2) of ESCA Law 2000. The interviewee (Judge Ayssor) argues that the regulator should provide us with a clear provision, thus avoiding these difficult questions of interpretation:

My opinion is that there should have been a precise and comprehensive article in Law [ESCA law 2000] in relation to illegal manipulation to include everything so as not to make the interpretation difficult for us and interpret the law text in different ways.

This left unclear as to whether the provision applies to brokers only or to both investors and brokers. This is means that Article 26(2) of ESCA Law 2000 has a flaw as it only raises the criminal responsibility against a broker whereas other investors would have impunity. Another problem is that it is unclear how to distinguish between fictitious

720 Article 26(2) of ESCA Law 2000.
722 Judge Ayssor is a Chief of the Appeals panel in the Dubai Court of Appeal, Interview conducted, May 2010, Dubai court, United Arab Emirates.
transactions and transactions which have been executed in a proper manner. In fact, it is
difficult to determine which transactions are legitimate or not and academics have
c concerned themselves with this issue. If prices move in according with proper trading of
shares, it is hard to say that the shares' price is the result of an artificial transaction,
unless the trading has been proved somehow to be illegitimate. However, market
manipulation that is based on a fictitious transaction may take many forms, particularly
for the purpose of conveying a false impression and misleading investors in the
marketplace. There are various examples of fictitious transaction practices including,
but not limited to, wash trading, matched orders, painting the ticker tape and spoofing.
Each of these will be defined in turn, below.

(1) Wash trading

Wash trading is a form of artificial transactions. This form of manipulation occurs
when a person plays the role of a buyer and a seller of the same securities
simultaneously or within a short period of time. The manipulator does not intend to
 transfer ownership of the securities by means of this act, which is merely used to create
 a misleading appearance of active trading in that security. The manipulator will cause
 the price of the securities in question to rise artificially by a series of transactions that
 are shown on public display, in order to give the impression of activity or price
 movement. This will usually be done in order to convince other investors that there is
 increased activity in these securities, perhaps making them a more attractive
 investment.

723 Fischel and Ross, pp.503-547.
725 This information is largely taken from IOSCO, Market Manipulation. .
(2) Matched orders

This kind of practice takes place when two parties conspire\(^2\) to create an untrue appearance of renewed interest in shares, in order to induce investors in the marketplace to purchase the shares. This occurs when a person places a sale or purchase order at a specific price and the other party who is aware of that order places an identical sale or purchase order, relating to the same number of shares for the same price.\(^7\) As a result, the manipulators will be able to sell the shares and make a large profit. A matched order practice took place in the Dubai Islamic Bank shares case. The orders were matching between two parties. This will be discussed under the section ‘the case of the Dubai Islamic Bank as an example of market manipulation practices’, below.

There are both similarities and differences between matched orders and wash trades. Both wash trades and matched orders are intended to generate a false impression of interest in and trading of a particular security, when in fact there is no desire to sell or purchase the security.\(^8\) Wash trades and matched orders are also used to maintain or even create a price for securities in the market and therefore ensure market activity.\(^9\) The difference between these two is that in wash trading, the beneficial ownership of the securities does not change whereas in a matched order, it does.\(^10\)

\(^{27}\) Swan, Market Abuse Regulation, p. 46.
\(^{30}\) Ibid., pp. 509-513.

(3) Painting the ticker tape

This practice was defined in the US case SEC v Choset, which identified activities that engage in entering large orders just before the close of the market in an attempt to alter the closing price as so-called ‘painting the ticker tape’. The transaction shown on the ticker tape is entirely false since it does not represent any change of beneficial ownership of the securities, by either the purchase or sale of securities. This practice seems similar to marking the close behaviour, which is defined in the price manipulation subsection below.

(4) Spoofing

Another technique used to manipulate the securities market, is when a manipulator puts trades on share order books (bid or asks) for a large number of shares at a lower or higher price than their current market price, through an electronic system. This practice is called either layering or spoofing. The manipulator places orders without any intention to trade and then withdraws his or her orders before they are executed, thus creating a misleading impression. This action would immediately influence the price of shares either positively or negatively, depending on the price in the order, giving a false impression of high demand and attracting others to buy the shares in question. This

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732 S.E.C. Docket 172 (S.D.N.Y. June 15, 1983) mentioned by Lawrence, Puppet Masters or Marionettes, p S226.
733 Ibid.
734 Poser, Stock Market Manipulation and Corporate Control Transactions, p 695.
735 Robert G. DeLaMater, ‘Target Defensive Tactics as Manipulative under Section 14(e)’, (Jan., 1984), 84 Columbia Law Review1, pp. 228-262. It is noteworthy that the synonym of paint the ticker tape is a fictitious trade, see Deepa Nayani , ‘The Toxic Convertible : Establishing Manipulation in the Wake of Short sales’ (2005) 54 Emory Law Journal 721 , p. 743.
736 FSA warns speculators for committing spoofing by saying: ‘it will fine or suspend market operators involved in manipulation practices known as “spoofing” and “layering.” The warning follows a 35,000 pound fine imposed last year by the London Stock Exchange on an unidentified firm.’ A spokeswoman for the FSA told Reuters: ‘we are not just saying: ‘We are watching you.' We are warning to stop and if they do not, we will take action’. See Cecilia Valente, FSA Warns on Stock “spoofing” LONDON (Reuters) On Tue Sep 1, 2009. Available at http://uk.reuters.com/article/idUKTRE58067820090901 Accessed (20/09/2010).
737 MAR 1.6.2E
behaviour is prohibited under section 118(5) and (8) of FSMA 2000. In the UAE, the law relating to entering a purchase or sale order or orders for a particular security, before amending or even cancelling the order was not prohibited under ESCA law 2000. To fill this gap, however, Article 16(2) of SCA decision No (2/R) of 2001 concerning the Regulation as to Trading, Clearing, Settlement, Transfer of Ownership and Custody of Securities was amended according to Decision No 69/R of 2007. This decision prohibits any person amending or withdrawing his/her order. These practices often take place in the UAE securities market. In the case of Methaq Takaful Insurance Company’s Shares for example, the SCA observed, that during the period 12/6/2008 – 14/8/2008 that the price of Methaq Takaful Insurance Company’s shares on the Abu Dhabi Securities Exchange increased in a short period of time from 3.92 Dirham (£0.69) to 8 Dirham, (£1.40) without any justifying cause. A manipulator was accused of five charges by a bill of indictment. One of the charges was that he was manipulating the price of the shares in question by placing orders for them, and later amending or even cancelling the orders. The defendant confessed that he had taken these actions with the intent to create an artificial transaction, in order to induce others to trade.

739 Article 16(2) of decision No (2/R) of 2001 concerning the Regulation as to Trading, Clearing, Settlement, Transfer of Ownership and Custody of Securities states that ‘Entering, amending and/or cancelling a purchase or sale order or orders for a particular security with the aim of deluding the investing public as to the existence of an active market in such security or with the aim of affecting its price or the volume of trading in the market, or with the aim of affecting investors’ decisions to invest or not to invest’.
740 See Administrative Case No 486/2008 at Federal Administrative court, Abu Dhabi, unpublished case. In the 2/11/2008, the SCA took action against defendant by imposing a fine 100,000 Dirham and suspended him from trading for one year, and suspending decision was just for purchasing shares. However, the defendant appealed against SCA decision to the Federal Administrative court.
741 Takaful in Arabic means "togetherness". It is an alternative mode of insurance, based on the principles of cooperation and support to other members of the society. Takaful respects the rules and regulations of the Shariah Law. The word "takaful" actually originated from the Arabic word "Kafalah" which means "pledge". See; www.methaq.ae (20/09/2010).


4.6.3 Price manipulation

This form of manipulation is classified under the Code of Market Conduct, issued by the Financial Services Authority (FSA), as an example of market manipulation.\textsuperscript{742} Price manipulation is caught by sections 118(2),(b) and (c),\textsuperscript{743} and section 397(3)\textsuperscript{744} of FSMA 2000. It covers all practices that run in parallel with activities that are likely to give a regular user of the market a false or misleading impression concerning the supply or demand for the price or value of investments, or distort the investment market are illegal.\textsuperscript{745}

Price manipulation is also proscribed under section 36(a) and 38 of the DIFC law No.12 of 2004. Laws in the UAE initially omitted to forbid such practices but the SCA realised that such behaviour was detrimental to investors and the market in general and therefore prohibited it in Article (16) of decision No (2/R) of 2001.\textsuperscript{746}

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\textsuperscript{742} Financial Services Authority's (FSA) provided examples of the forms of market manipulation, under the Code of Market Conduct, which are fall into three classifications; (1) artificial transactions (2) price manipulation (including abusive squeezes) , and (3) the dissemination of misleading information. See Financial Services Authority FSA Consultation Paper 10 (CP10), Market Abuse Part 1: Consultation on a Draft Code of Market Conduct, (London; FSA, (1998), p 8, para. 26.

\textsuperscript{743} This is harmonious with definition of market manipulation under Article 1 (2) of Directive 2003/6/EC

\textsuperscript{744} Section 397(3) of FSMA 2000 states ‘Any person who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments is guilty of an offence if he does so for the purpose of creating that impression and of thereby inducing another person to acquire, dispose of, subscribe for or underwrite those investments or to refrain from doing so or to exercise, or refrain from exercising, any rights conferred by those investments.’

\textsuperscript{745} Section 118(2) of FSMA 2000 under (b) and (c) states that ‘the behaviour is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question;’ and ‘a regular user of the market would, or would be likely to, regard the behaviour as behaviour which would, or would be likely to, distort the market in investments of the kind in question.’

\textsuperscript{746} Article 16(2) of decision No (2/R) of 2001 concerning the Regulation as to Trading, Clearing, Settlement, Transfer of Ownership and Custody of Securities states that ‘No person, whether alone or in collusion with others, shall be permitted to effect any disposition or dealing such as to deceive or mislead of investors, including:

1-Executing a transaction or transactions in a particular security with the aim of deluding the investing public as to the existence of an active market for such security, or with the aim of affecting its price (by way of rise, fall or stabilising of the price) or the volume of trading therein in the market, or with the aim of affecting investors' decisions to invest or not to invest.

2- Entering, amending and/or cancelling a purchase or sale order or orders for a particular security with the aim of deluding the investing public as to the existence of an active market in such security or with the aim of affecting its price or the volume of trading in the market, or with the aim of affecting investors' decisions to invest or not to invest.’ This Article (16) has been amended according to Decision No. (69/R) of 2007.

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Hammadi indicated in the interview conducted in the UAE, the ESCA Law 2000 refers to rules and regulations which are promulgated by the Chairman of the Board of the SCA, that will cover the deficiencies which existed in the ESCA Law 2000.

Price manipulation is behaviour that intends to mislead investors regarding the value or trading volume of securities. As Avgouleas noted, price manipulation is behaviour that is directly harmful to the integrity and value of the market. This practice, as well as other manipulative behaviour discussed above, aims to drive the price of shares up or down through illegal practices. There are many forms and methods of market manipulation which have led to various terminologies being employed to describe them. Therefore, this section will consider two examples of price manipulation, which are known as ‘pool operations’ and ‘marking the close’. However, these are not the only forms of price manipulation that exist.

(i) Pool Operations

This practice takes place when ‘a group of persons combine their resources and co-ordinate the trading of the securities among themselves in order to manipulate the price of a security’. Therefore, pool operations involve both real and fabricated trades in order to show market activity and to generate increases in the price of securities that would stimulate public trading. The manipulator achieves his/her purpose by either offloading his/her position at high or decreasing prices at a profit. There are several reasons why those who invest in the market react to vigorous trading and price hikes.

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747 Judge Hassan Al Hammadi, (PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, Interview conducted, June 2010, Abu Dhabi, United Arab Emirates.


One reason is that the public may assume that those individuals who engage in trading have important information relating to the shares, or they assume that bull pools have been created and wish to share in the profit from these bull pools, just as the organisers of the bull pools do, before share prices fall. At the time of the crash of 1929, for example, pool operations and other similar practices were taking place in the bull market. Those who were not market insiders, followed the market closely and acted based on what they saw others doing. They could therefore be viewed as collaborators with the pool operators, as their actions were also significant in changing the prices of securities.\textsuperscript{751} It was even fairly common in the 1930’s to find support and protection for the ‘speculative pools’ from various groups. Whilst observers at the time agreed that the use of the pool operations was not acceptable in an open market, pool operations were deemed acceptable if the markets already had insiders that were trading.\textsuperscript{752} In the UK, this practice is illegal. It is prohibited under the FSMA section of market manipulation and seems to have been outlawed under sections 397(3) and 118(5) of the FSMA 2000.

(ii) \textit{Marking the close}

Marking the close is also known as ‘trading at the end of the day.’ It involves buying or selling a security on the market at the end of the day’s trading. This specifically is done in order to change the securities’ closing price. A typical sign of this is when there is a tiny amount of trading done right before the closing time.\textsuperscript{753}

Marking the close will occur for instance when an abuser of the market can gain a benefit by moving the closing price of securities a little, thus adding to their ostensible


\textsuperscript{752} Avgouleas, \textit{The Mechanics and Regulation of Market Abuse.}, pp. 132-133.

worth by guaranteeing that the final trade of the day is a buy. In some cases this will
attract value to a short position, thus benefitting holders of such a position. A small
change in price can create large and significant returns for someone who is extensively
involved in manipulation schemes. For a market abuser, the trade need not be large,
because even a small amount of trading could be enough to change the value between
the bidding and asking prices. Indeed some brokers could wait until closing to place
their trade and then to get an advantageous price.\(^54\)

This kind of trading may not always be done out of malicious intent, as it may simply
be necessary for the traders and investors to trade at the end of the day, for example if
policy changes or serious trading issues mean that the trader can only trade at the end of
the day. However, there are indicators that market abuse has occurred, for example
when there are signs such as trade contracts, financial sponsorship or cross-market
positions that do indeed influence the price at closing.\(^55\)

The case of Shuaa Capital International Limited\(^756\) gives an example of such activities
taking place in the DIFC market. On 31 March 2008, marking the close activities were
committed by Shuaa Capital International Limited. The Dubai Financial Services
Authority (DFSA)\(^757\) announced that suspicious trading was carried out by Shuaa
Capital. The trading was in shares of DP World Limited\(^758\) on the Dubai International

\(^55\) Avgouleas, The Mechanics and Regulation of Market Abuse., p. 137.
\(^757\) ‘The Dubai Financial Services Authority (DFSA) is the sole independent regulator of all financial and
ancillary services conducted through the Dubai International Financial Centre (DIFC), a purpose-built free zone in Dubai.’ Available at www.dfsa.ae . Accessed (20/09/2010).
\(^758\) Dubai Ports World; ‘DP World is one of the largest marine terminal operators in the world, with 49
terminals and 12 new developments across 31 countries. Its dedicated, experienced and professional team
of nearly 30,000 people serves customers in some of the most dynamic economies in the world.’ See
Financial Exchange (DIFX) at the end of March 2008. The DFSA determined that Shuaa Capital intentionally started to push up the closing price of DP World shares on 31 March 2008. The last trade in shares of DP World was at USD 0.87 and occurred exactly 2 minutes and 20 seconds before the close of trading. During this remaining 2 minutes and 20 seconds, twelve separate bids had been entered by Shuaa Capital in order to buy 1,000,000 shares at prices between USD 0.89 and USD 0.98 per share. By the time continuous trading on the DIFX had closed 2 minutes and 20 seconds later, Shuaa Capital had bought, for its proprietary portfolio, 12,000,000 DP World shares, at prices between USD 0.88 and USD 0.97. Before closing on 31 March 2008, Shuaa Capital purchased an additional 3,000,000 DP World shares for its proprietary portfolio. The final price of DP World shares at the close of the market on 31 March 2008 was USD 0.95. The price of USD 0.95 per DP World share represented an increase of 9.2% on the last traded price, so it could raise the worth of the proprietary portfolio for accounting reasons. This occurred during the last few minutes of trading when the bidding prices for DP World shares were higher than earlier in the day. Shuaa Capital was sanctioned for alleged market manipulation and received penalties of USD 950,000 and other remedial action agreed to by Shuaa Capital pursuant to an Enforceable Undertaking made with the DFSA.\footnote{The DFSA in Action, the DFSA news publication, Volume 3, December 2008. DFSA’s Chief Executive Mr David Knott, said: ‘The manipulation of markets for ulterior motives is a classic form of market abuse that is outlawed in all well regulated exchange traded markets. Such practices run contrary to the maintenance of orderly markets and efficient price discovery in traded securities. In this case, Shuaa Capital artificially inflated the price of DP World shares and generated a false market in those shares.’} Shuaa Capital’s behaviour amounted to market manipulation which was contrary to section 36(a) of the DIFC law No.12 of 2004.
4.7 Market power manipulation

Market power manipulation has brought misery and concern to the financial world and is the most important type of manipulation dealt with today.\textsuperscript{760} An understanding of market power manipulation developed with the introduction of anti-trust laws, which looked at the exploitation of a dominant market position.\textsuperscript{761} In addition, terms have been developed to classify forms of market power manipulation according to the outcome of the exploitation; these are ‘corner’ and ‘squeeze’.\textsuperscript{762} Both ‘corner’ and ‘squeeze’ refer to the exercise of market power and the ability to settle contracts in this manner. While these terms have different meanings, they are both categorised as types of market power manipulation. As Kozinn notes, the ‘courts and certain commentators have distinguished between these terms. They are intended to, and do, result in the same outcome of the extrapolation of a high price from shorts in order to settle their contracts with the long’.\textsuperscript{763}

‘Cornering’ is a practice of keeping a commodity for a long time, therefore withholding ‘the deliverable supply’ from the marketplace. On the other hand, ‘squeezing’ is a practice in which the demand created by future contracts is in excess of ‘the deliverable supply’.\textsuperscript{764} Accordingly, a ‘squeeze’ occurs when the holder of a large amount of a particular commodity decides to venture into the futures market. The holder then purchases futures contracts that will necessitate people to deliver the commodity at a particular value. This can prove to be difficult, and it can create a rise in price of the commodity. The holder of the commodity will then disclose a high price for it, and then

\textsuperscript{760} Markham, p. 283.
\textsuperscript{761} Avgouleas, \textit{The Mechanics and Regulation of Market Abuse.}, pp. 147-148.
\textsuperscript{762} Kozinn, ‘Note: The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo Debacle?’, p. 257. See also Avgouleas, \textit{The Mechanics and Regulation of Market Abuse.}, p. 150.
\textsuperscript{763} Kozinn, ‘Note: The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo Debacle?’, p 257.
\textsuperscript{764} See, Fischel and Ross, pp. 503-547.
it will be sold back at a lower price than had been agreed on the futures market earlier.\textsuperscript{765} For the ‘squeeze’ to be successful, due to the higher prices decided by the long positions, the short trades will have to counterbalance at least part of the position in the derivatives market.\textsuperscript{766} The ‘squeeze’ – which developed due to the manipulator covertly gaining control over the market – may allow the manipulator to trade at a much higher price than the original purchase price.\textsuperscript{767}

The FSA makes a distinction between ‘natural squeezes’ and ‘manipulative ones’ in which the trader has actually ‘used his controlling position in the cash market and his exchange positions together to dictate arbitrarily the prices in the market’.\textsuperscript{768} The basic motivation for making this kind of action illegal is that the trader was in a position of power and his actions were not affected by the forces of the market. Therefore, ‘he is able to ensure that he always wins his bets’.\textsuperscript{769} The FSA’s Code of Market Conduct defines how natural and abusive squeezes can be distinguished from one another.\textsuperscript{770}

In the UAE, the SCA prohibits any conduct or course of business, or the use of any device, scheme or artifice to defraud others. This prohibition includes but is not limited to any of acting or attempting to act in a fashion which might bring about or permit a potential ‘corner’ or ‘squeeze,’ for the purpose of manipulation of prices of any commodity or commodity contract traded on the market.\textsuperscript{771} Despite the fact that the SCA prohibits ‘corners’ and ‘squeezes’ in the commodity field, neither the ESCA Law 2000, nor the SCA prohibits ‘corners’ or ‘squeezes’ in the securities market, and thus it

\textsuperscript{766} IOSCO, Market Manipulation., p 17.
\textsuperscript{767} Fischel and Ross, pp. 503-547.
\textsuperscript{768} FSA Consultation Paper 10, Market Abuse, Part I (n 84 above) Para 51.
\textsuperscript{769} Ibid.
\textsuperscript{771} Article 6-11(e) of the decision no (157/r) of 2005 concerning the regulation as to listing and trading of commodities and commodities contracts.
Market power manipulation usually takes place in the commodities market, but it can also occur in the securities market. In the securities market, the manipulator usually turns to specific types of shares in order to have access to and power over a public company’s shares. A simple example of using market power manipulation in the securities market is when a manipulator purchases a huge amount of a particular company’s shares and holds them until the supply of these shares in market is reduced. He/she then slowly leaks the shares by offering them at any price he/she desires. This practice is called a squeeze. Alternatively, a corner might be perpetrated by a member of a company. However, in the UAE this is unlikely as a consequence of the obligation on listed companies, required by the SCA, to disclose information about any member of the board of directors as regards how many shares they and close relatives own, including the names of those whose holdings (in addition to those of their minor children) amount to 5% or more of the shares of the company. The reason for imposing an obligation of disclosure on a person or group who holds 5% or more of the shares of the company is to limit or prevent such practices in the securities market. Even though this provision indirectly prevents such corner practices, it is not enough. The ESCA law 2000 is still inadequate in the prohibition of market power manipulation practices.

772 IOSCO, Market Manipulation., p 14.
773 Article 29 A (6) and (7) of the decision no (3/r) of 2000 concerning the regulation as to disclosure and transparency.
4.8 The case of the Dubai Islamic Bank as an example of market manipulation practices

There is no doubt that the ESCA Law 2000 includes provisions against market manipulation practices, but abiding by these provisions is not yet common practice. Countless cases have been brought before the national courts, but even this has not been enough to reduce the prevalence of these practices and to ensure that the provisions of the ESCA Law 200 are applied. The first such case is the well-known ‘Dubai Islamic Bank case’. This was the straw that broke the camel's back in terms of investor confidence and the trust in the financial market in general. It occurred in 2005 and is the most famous case that has been brought since the ESCA Law was passed in 2000. Despite the small number of cases presented to the courts, the SCA announced that between 2007 and 2009, it detected approximately 721 cases of market manipulation. The SCA ordered administrative and punitive sanctions against those that were found to have engaged in insider dealing, market manipulation and some violations of the terms of the market regime. All of these punishments involved either sending a warning and/or imposing a fine, which did not exceed 100,000 Dirhams.

However, in the case relating to the shares of the Dubai Islamic Bank, in addition to market manipulation, some related broker offences had also been committed. Moreover, there were six people accused of criminal behaviour. Thus, in this example, we shall focus primarily on market manipulation and the two parties (persons A and B) who were initially accused of such wrongdoing.

4.8.1 The facts of the case

On 27th August 2005, the supervisors at the Dubai Financial Market (DFM) observed that trades in shares of the Dubai Islamic Bank (DIB) were occurring at the maximum allowed rate for that particular day. The trades were taking place between two parties (persons A and B), who were colluding in their trading, with the help of a third party, playing the role of facilitator (broker).

The first party (person A) offered 20 million shares for sale, and 17.7 million shares were purchased by the second party (person B), who was originally seeking the purchase of 25.2 million shares. This caused the share price to rise from Dh 28 (£4.91) to Dh 33.40 (£5.85).

On the next day, 28th August 2005, trading of the DIB’s shares was repeated in the same fashion, with absolutely no justifying cause. This time, the first party (person A) offered 15 million shares, and 13.3 million shares were sold to person B. Again, these exchanges took place with the help of the broker. This behaviour raised suspicions because again, the maximum amount of shares allowed were sold, causing the share value to be intentionally manipulated, raising the share value to Dh 37.30 (£6.54) – the maximum allowed value for that particular day.

Thereafter, the second party (person B) conducted a sale of 51.9 million shares to the first party (person A) with the help of the same broker. These shares were sold with an average price of Dh35 (£6.12). To guarantee the continued elevation of the share price, the third defendant (the broker) informed the Information Systems Manager in the DFM that the first defendant is the Seller (person A), and the government is the Buyer (person

775 Criminal case 17373/2005, unpublished.
B). This would make the defendants' transactions to be able to reach a high range of movement in price and shares numbers. Therefore, similar, large transactions occurred in a repetitive fashion for the purpose of maintaining the record high share prices that were achieved by the trading.

The trading reached 90% of the entire market’s transactions, and the two persons, A and B, assumed full control of the trading of these shares. The number of transactions relating to these shares during trading on 28th August 2005 alone reached 7,844 transactions, and related to 268,236,034 shares. Thus, this intentionally caused the value transactions relating to the Bank’s shares to increase, until the trade value reached Dh 9.3 billion. At this time, the third party (broker) claimed that ‘the transactions were occurring in the government’s interest’, 776 which meant that such a high level of trading was initially permitted.

The sale of the shares by the second defendant (person B) caused a decrease in the share price, but the first defendant (person A) was buying in return, so the net effect of the transactions was a rise in share price, allowing the second defendant (person B) to sell the shares at elevated levels. In July 2005 the daily transactions of shares was only 188. While the above mentioned activities took place was only a month later on 27th and 28th August 2005. This illustrates the extent of the unusually high trading activity. In addition the average number of shares traded each day was only 330,598 shares which corresponded to a value of Dh 64,266,063 (£11,237,530).

4.8.2 Market manipulation practices

The fictitious transactions which had been perpetrated by persons A and B were intended to mislead the DFM by making investors believe that there was a high level of

supply and demand in DIB’s shares. Therefore, according to the facts mentioned above, persons A and B committed three types of market manipulation.

The first type of market manipulation was a matched order, in which person A offered twenty millions of DIB’s shares for sale and person B, who was aware of that order, asked for 25.2 million shares of DIB. When person B purchased 17.7 million shares, he therefore matched the order with his associate. They carried out their manipulation by frequently buying and selling shares by means of a successive symmetric matching technique. The impression of massive supply and demand for DIB’s shares created an extensive misleading impression for investors in the market. The practice of this manipulation caused the price of DIB’s shares to increase from Dh28 (£4.91) to Dh33.40 (£5.85).

The second type of market manipulation was a corner action. The same activities were repeated on the second day in relation to 51.9 million DIB shares. In addition to a matched order, they used their power in the market, gained from controlling a large number of DIB shares, to manipulate it. They were involved in 90% of the total number of transactions in the market that day. This caused a sharp increase in the value of DIB shares, which closed at Dh 37.30 (£6.54). This affected the share price by giving a false impression of high demand that therefore attracted others in order to buy the shares in question.

The last practice of market manipulation was providing false information. The third party (broker) informed the Manager of the Information System that the transactions were taking place in the government’s interest. This action misled the Manager of the Information System, who had authorized such a high volume of trading on the basis of this claim. The broker intervened deliberately to influence supply and demand, in order
to induce investors to buy the shares by creating the impression of high demand for the shares in question.

4.8.3 Legal analysis of this behaviour

It should be mentioned here that the ESCA Law 2000 does not prohibit some of the behaviour in question, which was discussed earlier in section ‘The Forms of Market Manipulation’. However, the actions of person A, person B and the broker constituted market manipulation under Articles 36 and 43 of the ESCA Law 2000 and Article 16 of decision No (2/R) of 2001.

Articles 36 and 43 of the ESCA Law 2000 prohibit a person from providing false information, and penalties are prescribed for any person who contravenes the ESCA Law 2000, the regulations or any other provision issued pursuant to these laws or regulations. Article 16 of decision No (2/R) of 2001 was issued pursuant to the ESCA Law 2000, and it has been amended according to Decision No (69/R) of 2007, and thus it also applies to this case. Article 16 was not amended until after the DIB shares case occurred. The amendment remedies the previous version of this Article, and fills the gaps that the ESCA Law 2000 left. Article 16 prohibits any person, whether alone or in collusion with others, from deceiving or misleading investors by executing transactions in relation to a particular security with the aim of deluding the investing public as to the existence of an active market for such security, or with the aim of affecting its price (including increases, decreases and stabilization of the price) or the volume of trading in the market, or with the aim of affecting investors’ investment decisions.
4.8.4 Court of First Instance

The Dubai Court of First Instance considered the case and delivered a verdict against the defendants. They were each sentenced to three years of imprisonment and fined 1,000,000 Dirhams.

The decision depended upon documents which were used to prove the facts of the case. These were inspected by members of a committee, which was formed specifically to examine the trading and transactions executed by the defendants. The Court’s decision was also established by testimonial evidence provided by the Public Prosecution service, obtained by questioning professionals in the Dubai Financial Market. The court concluded that there was sufficient evidence to find the accused guilty of engaging in and concealing manipulation of the price of DIB’s shares by a scheme involving a large number of artificial transactions, aiming to create the false impression that the shares in question were being actively traded in the market on 27th and 28th August 2005. The value of these transactions carried out by the defendants reached Dh9.34 billion.

These practices violated the provisions of Law No. 4 of 2000 and the regulations issued pursuant to this statute. However, the defendants appealed against the Court’s ruling to the Dubai Court of Appeal.

4.8.5 Court of Appeal

The Appeal Court accepted the appeal, before ruling on the subject. They assigned a board of three members, from the department of the Secretary (Diwan) of his Highness the Governor. The board consisted of members who were experienced in the securities

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778 Criminal Case of Appeal No. 5512/2005, unpublished.
779 Court of appeal in the UAE it can hear and/or make a decision in both fact and point of law, while court of cassation deals with legality issue which may be raised.
market, and had the task of checking the documentation and papers put forward as evidence in the case, as well as auditing the transactions that took place in relation to DIB shares between the defendants. They were also asked to confirm whether these transactions complied with legitimate market practice and speculation, and decide whether the defendants had committed any action that could adversely affect the normal performance of the market in relation to supply and demand, or whether they had caused an increase or decrease in prices due to the creation of fictitious transactions, thus taking this action out of the context of legitimate speculation.

On 18th June 2007, the Court of Appeal ruled that the defendants were not guilty of the charges, based on the board’s expert report, ruling that innocence by default is a basic, non-negotiable fundamental in the penal system. The Court stated that the innocence of the defendants was reflected by the facts. They ruled that an allegation should not be regarded as a matter of fact without proving evidence beyond the shadow of a doubt. Anything less than this should not lead to the court finding the defendants guilty.

The Court was satisfied with the overall conclusion of the expert report, which demonstrated that all transactions effected on 27th and 28th August 2005 were in compliance with instructions and rules set forth by the regulatory authorities of the Dubai Financial Market, and there was insufficient evidence to convince the court that the transactions were fictitious or nominal, or were intended to influence the value of DIB shares.

Moreover, the court ruled that the documents and papers did not show any proof or evidence that the defendants offered incorrect data entries to the Dubai Financial Market during the alleged transactions. Also, the expert report proved that the transactions were one-way transactions from the first defendant (the seller) to the second defendant (the
buyer), and that these transactions were not later reversed, which would indicate fictitiousness.

It indicated that all transactions took place via the trading screens in the Dubai Financial Market, under the supervision of monitoring staff in the market, and that the market had allowed the transactions on both the 27th and the 28th August 2005. The report showed that the transactions were suspicious because they took place in a speedy fashion, but the report states that the transactions nevertheless complied with all instructions and rules, and that there was no regulation which either restricted the time period between an investor's order to buy or sell, and the next order initiated by the same investor, or placed any restriction on the maximum number of transactions allowed.

The Court of Appeal also added that, as the subject court involved, it had full freedom to decide upon the weight that should be attached to the expert report. It therefore came to the conclusion that it felt comfortable with the report, and denounced all other evidence. Based on this reasoning, the court ruled to acquit the defendants.

The Public Prosecution service appealed this ruling, claiming that it was based solely on the expert report. They stated that the papers proved that the expert report contradicted the facts established by the documents used as evidence in the case. In addition, the report did not establish whether these transactions were market manipulation and therefore whether they were legally authorized or not.
The Court of Cassation ruled that the right to evaluate the worth of opinions of experts and their reports with the subject court (the Court of Appeal). The subject court has the authority to evaluate expert reports, along with evidence that it may use to prove or deny the existence of fictitious trading, and that the court’s decisions are not supervised, as long as the evidence used is legally accepted, and leads logically to the court’s ruling.

The expert report that the Court of Appeal based its judgement on agreed with the testimonies of witnesses, particularly regarding the fact that the transactions that took place complied with the instructions and rules set down by the Dubai Financial Market. They also agreed that there were no special instructions regarding the time frame between transactions for a given investor, or regarding the maximum number of transactions that an investor could make. Therefore, they ruled that there was insufficient convincing evidence to prove that any of the defendants committed the offences that they had been accused of.

**4.8.7 Observations relating to this case**

The case of the DIB’s shares raises several important issues about the justice system in relation to market manipulation under the ESCA Law 2000.

First, the judgment of the Court of First Instance came to a justified decision which was legally acceptable, even though it was rescinded by the Court of Appeal. The Court of First Instance arrived at this decision after considering the facts and legal issues,

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780 Appeal numbers 270, 274, 275 and 276 of Cassation (Dubai Cassation Court), unpublished.
781 The Court of Cassation is considered the last resort in the UAE. The UAE court legal system is alike to its French counterpart, while different to the UK.
according to the testimony of witnesses who declared their knowledge of the facts along with the commission’s report.

Second, the Court of Appeal commissioned a Board of three members, who were experts in the financial market, in order to investigate and examine documentation relating to the case and review the defendants’ trading operations and transactions, in order to conclude whether market manipulation practices had been committed or not by the defendants. The Board members prepared a report that was submitted to the Court. The Court heavily relied on the experts’ report, which significantly altered the Court's opinion. Therefore, the Court of Appeal acquitted the defendants from the charges of market manipulation on the basis of the expert report alone. The Court heavily relied on the expert report, which raised the important issue of the influence of specialist courts or judges. This supports the opinion that creating specialist judges for crimes relating to the financial market is necessary because regular judges are unable to understand technical matters relating to securities transactions.\(^{782}\) The lack of the judges’ expertise gives a reasonable explanation as to why the Court leaned so heavily upon on the technical expertise of the expert report and why the Court of Appeal acquitted the defendants from the charge of market manipulation.

Third, the judgments of the Court of Appeal raised the issue that criminal prosecution and conviction requires a high burden of proof and thus, if the defendants are to be found guilty, the court must be satisfied beyond reasonable doubt that the defendants are in fact guilty. This was the main reason as to why the prosecution was unsuccessful in this case.

\(^{782}\)Anonymous 2, Dubai Financial Market, Interview conducted, April 2010, Dubai, United Arab Emirates.
Fourth, the authorization from the Dubai Financial Market of the suspicious transactions which had taken place on 27th and 28th August confirmed that the trading and transactions undertaken by the defendants was legitimate. This was given as the main reason for the Court of Appeal finding the defendants not guilty.

Finally, the absence of any provision to limit the maximum frequency of an investor’s trades or to specify a maximum number of transactions in a particular trading day is the main reason why the SCA amended Article 16 of decision No (2/R) of 2001783 to regulate transactions in a particular security, with the aim of affecting its price, and the volume of trading in the market.784 The amendment was issued in the same year as the Court of Appeal’s decision.

In fact, this case showed the deficiencies in the ESAC law 2000 for not encompassing provisions applied to market manipulation such matched order and corner practices. Even though there is an Article 26 in this law which prohibit any fictitious transactions not conducive to a true transfer of the securities and could be applied, this Article is

783 It is amended according to Decision No. (69/R) of 2007. The original provision before amendment was designed to prohibit a person who exercised ‘Any dealing in Securities with the aim of deceiving other transacting parties shall be null and void. Resort to a series of illusory transactions representing essentially fictitious Trading conducive to the deluding of others as to the existence of an active market in the Securities traded shall be deemed a form of deception. Any act aimed at causing a rise or a fall in the price of any Securities with the intention of encouraging other transacting parties to join in, whether as sellers or purchasers of the Securities, as the case may be, shall be null and void.’ This Article after amending see footnote below.

784 Article 16(1) of decision No (2/R) of 2001 concerning the Regulation as to Trading, Clearing, Settlement, Transfer of Ownership and Custody of Securities, states ‘alone or in collusion with others, shall be permitted to effect any disposition or dealing such as to deceive or mislead of investors, including:

1- Executing a transaction or transactions in a particular security with the aim of deluding the investing public as to the existence of an active market for such security, or with the aim of affecting its price (by way of rise, fall or stabilising of the price) or the volume of trading therein in the market, or with the aim of affecting investors’ decisions to invest or not to invest.

2- Entering, amending and/or cancelling a purchase or sale order or orders for a particular security with the aim of deluding the investing public as to the existence of an active market in such security or with the aim of affecting its price or the volume of trading in the market, or with the aim of affecting investors’ decisions to invest or not to invest.
particularly for just licensed brokers and their representatives. Therefore, it will not be applied to investors who not under the term of brokers.

The rules which were issued by SCA may cover some practices of market manipulation or fill any gap left by ESCA law 2000. However, these rules are powerless and will not be considered legally binding. The other flaw this case revealed was the DFM weakness of supervision for watching over market trading and transactions. The question as to why the DFM authorized defendants to trade at the maximum rate of trading, while monitoring staff noticed that the transactions were suspicious is also raised by this case. In fact, the market (DFM) allowed transactions on 27th and 28th August 2005, which involved techniques that were used to artificially move prices by way of fictitious transactions. As the Khaleej Times News showed, the total value of the transactions that took place on 27th and 28th August 2005 was Dh9.34 billion, which is 55% greater than any market turnover in the UAE as well as being one of the maximum daily turnovers in the world market.

4.9 Conclusion

This chapter has considered various definitions of market manipulation in order to gain an understanding of the offence of market manipulation practices. In fact, it is a complex offence, and includes diverse behaviour, making it difficult to comprehend fully. Many judicial authorities rely on different systems, which lead to different approaches towards essential concepts that are used to provide definitions of market manipulation and the types of sanctions imposed. Most existing definitions present market manipulation as an unclear and ambiguous concept. However, manipulation refers to any activities that mislead participants by creating artificial trading and transactions in the marketplace. In other words, it depends on two important factors: the
manipulator’s intent (*mens rea*) and action (*actus reus*) – in other words, manipulation involves dishonest actions that create an artificial price or false and/or misleading impression. Although, the UK and UAE jurisprudence fail to provide a definition of manipulation, the DIFC law No.12 of 2004 pays attention to such illegal practices and provides a definition of market manipulation. This indicates that the DIFC jurisprudence does aim to approach the high standard of regulation which should exist in a global financial hub.

Market manipulation practices take various forms and are often innovative and diverse. Thus, it is difficult for regulators to determine and define all illegal practices of market manipulation in advance. The provisions that prohibit market manipulation in the UAE law have been studied by comparing them with counterpart provisions in the laws of the UK and the DIFC. The comparison, certainly, has shown that the ESCA Law 2000 is deficient in some areas. The UK and the DIFC jurisdictions have used different approaches for prohibiting market manipulation. Both of the laws use specific wording to cover a wide range of illegal practices of market manipulation. They prohibit any course of conduct that leads to deception of investors or actions that create an artificial impression, or cause the creation of an improper appearance relating to demand or the supply of, or the value of an investment. The UAE laws are obviously lacking in terms of the extent of their prohibitions against some practices related to market manipulation, for example the regulator’s limits on the scope of the provision relating to the spreading of rumours. This limitation provides that only rumours connected to the purchase or the selling of shares are prohibited and the regulator does not prohibit other rumours that could influence the market value of securities. Even if the SCA attempts to remedy these deficiencies by issuing further rules and regulations, the sanctions imposed by the rules, and regulations are not sufficiently severe for deterrence of these crimes.
With regards to fraud and manipulation, as we have seen, these schemes have some similarities as they both intend to mislead people. However, they are different in terms of their legal analysis under the UAE law. The regulator in the UAE requires that every fraudulent act should fall under its particular framework of fraud. Although the FSMA 2000 characterises fraudulent acts as a subcategory of market manipulation, this is in contrast to both the DIFC law No.12 of 2004 and the ESCA Law 2000.

The case of the DIB’s shares showed the deficiencies in the ESAC law 2000 for not encompassing provisions applied to market manipulation such matched order and corner practices. However, there is no effective method to prevent the scandal of market manipulation from taking place in the financial markets. It is also difficult to prove whether transactions and trading in the market are manipulative or not. The main protection for investors and the market from such practices should be provided by the supervisory authority of the SCA. Even if the SCA attempts to remedy these deficiencies by issuing further rules and regulations, the sanctions imposed by the rules, and regulations are not sufficiently severe for deterrence of these crimes.
CHAPTER FIVE
APPLIED STUDY

MARKET ABUSE FROM THE PERSPECTIVES OF LEGAL EXPERTS, OTHER SPECIALISTS AND INVESTORS TOWARDS LEGAL REGULATION OF SECURITIES MARKETS IN THE UAE

5.1 Introduction

The preceding chapters have covered various aspects of market abuse regulation based on a descriptive and comparative legal study, particularly in insider dealing and market manipulation. However, those chapters left unclear some dimensions of practical experiences, and this needs further investigation. The research tools of social science research will be used, employing quantitative and qualitative methods through applied study. The researcher seeks to accomplish the goals set and to provide a new understanding of the issues through presenting the viewpoints of legal experts, other specialists and investors who are frequently in direct contact with the UAE financial markets.

In reference to the data collection instruments, a questionnaire and a semi-structured interview were designed by the researcher. The first part of this chapter sheds light on the research methodology and research methods used. The second part presents the statistical results of the questionnaire and the analysis of interview findings. Finally, the third part draws conclusions from the applied study.

5.2 The research methodology

Methodology is defined as ‘the strategy, plan of action, process or design lying behind the choice and use of particular methods, linking the choice and use of the methods to
the desired outcomes. The methodology therefore, determines the methods and the techniques to gather information connected to the research question or hypothesis. In this thesis, legal and social theory informs the research initiative.

In academic legal research, most researchers explore legislation in order to digest ‘what’ the law is and ‘how’ it applies to a particular area. For instance, this study has investigated market abuse as an illegal practice. As a result, the researcher in the legal field often focuses on analysing and reading relevant primary sources such as legislation and legal cases. This is followed by gathering data from secondary materials such as journal articles, textbooks, case digests and other commentaries which have been written on the legislation. The main purpose in this thesis has been to examine the problems and shortcomings of market abuse regulations under Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority and Market (ESCA Law 2000) and how the law in question deals with such illegal practices. This has required an analysis of the law to show how it has developed vis-à-vis judicial reasoning and legislative enactment. Surprisingly, none of the available texts of law research discuss how empirical research could contribute to legal studies.

In spite of that, many legal researchers have strongly recommended lawyers to use social sciences research techniques as an instrument to develop the legal system and its administration; and to guide law reform.  

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787 Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ *Research Methods for Law* by Mike McConville and Wing. Hong Chui (eds), ( Edinburgh University press : 2007) p 18, 19  
Combining social methodology with legal methodology means that the researcher identifies a legal problem and then uses social science methodology in studying individuals’ opinions and attitudes towards a particular area of law such as the one in question. Epstein & King argue that applying quantitative and qualitative research in legal studies could enhance the legal field, observing that:

A methodologist is an academic in the field of law, a law professor who focuses on, contributes to the field of, and applies quantitative and qualitative legal methodology. Because statistics and research design are not "merely technical," as is, say, plumbing, "staff statistician" positions generally do not work in this context. Law schools need creativity in methods, not a technician who merely applies existing techniques by rote to legal scholarship – a path that generally leads to the use of methods that do not comport with the needs of researchers. Just as in any other field, methodology is a creative endeavour and cannot be delegated to anyone other than another scholar.  

Generally, the methodologies employed in social science research can be classified into quantitative and qualitative. Quantitative and qualitative research are methods to interpret the mechanism of social, cultural, and legal operations. These methodologies have different objectives; qualitative research seeks to find answer to questions of ‘why’ and ‘how’ while quantitative research examines hypotheses in order to investigate the ‘what’, ‘where’ and ‘when’ of the research issue.

The methodology of this chapter is of an exploratory nature where the researcher thoroughly probes the phenomenon under investigation. This provides insights into and

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comprehension of market abuse practices in the UAE securities markets and the interpretive methodology attempts to justify why the participants hold different views.

Questionnaire and interview methodology were based on random and purposive sampling respectively, and adapted on the basis of a pilot study. Following the latter, six questionnaire items were removed and one open-ended question was added to give more space to the participants to express their views. All these changes have informed the questions and reshaped them. Questionnaire participants were randomly selected from the two markets: Abu Dhabi Securities Exchange (ADX) and Dubai Financial Market (DFM). Interviewees selection was based on a purposive technique. These processes have been laid out in more detail in sections 5.3.1 and 5.3.2 below.

5.3 Research Methods

This chapter employs a mixed methods approach to collect and analyse data. Combining mixed methods research ‘is becoming increasingly articulated and recognized as the third major research approach or research paradigm, along with qualitative research and quantitative research’.

Mixing methods is known in social science as data triangulation, as discussed by Olsen. Olsen adds that mixing methods such as using ‘survey data and interview’ is a deep type of triangulation.

The researcher believes that combining questionnaires and interviews in collecting data will enable him to interpret the complex issues of the topic under investigation, creating a picture of institutional behaviours of market abuse. Research methods are defined as ‘the techniques or procedures used to gather and collect data related to some research

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question or hypothesis”. Accordingly, to examine the market abuse regime and to answer the research questions, two data collection methods were used; a questionnaire and a semi-structured interview. The questionnaire was administered to 125 investors to explore their views and attitudes towards market abuse regulation, while the interview was conducted with 13 legal experts to investigate their views and perceptions about the UAE securities markets.

5.3.1 Questionnaire Considerations

The questionnaire is one of the most widely used and useful instruments for collecting data. It is easy to construct, versatile and uniquely capable of gathering large information quickly in a processable form. The questionnaire was the quantitative data collection instrument; whereas the interview represented the qualitative data collection instrument used in the applied study chapter. A draft of the questionnaire was mainly based on questions originating from the pertinent literature. The questions needed to be related to the study objectives. The researcher also picked up important questions from previous chapters, which constitute the main argument in the current study. In short, the questions targeted investors who experienced the securities market on a daily basis. It aimed at probing into the UAE financial markets regulation for measuring investors’ opinions and beliefs, and collecting data about the extent that ESCA law 2000 is sufficient for combating market abuse in the UAE securities market. In addition, it seeks to investigate how properly and efficiently this law has been implemented. For this, applying a questionnaire was considered a research tool consistent and suitable with the aims of the study. As Brace points out “[t]he role of the questionnaire is to elicit the information that is required to enable the researcher to

answer the objectives of the survey’. Most questionnaires aim to measure individual’s attitude towards a particular issue, defined as a ‘state of readiness, a tendency to act or react in a certain manner when confronted with certain stimuli’. 

On the other hand, the open-ended questions are designed to obtain qualitative data through the respondents’ written responses. These open-ended items can offer illustrative quotes that can lead to the identification of some issues not previously expected. In open-ended questions no response options were offered, but rather a blank space to be filled in by the respondents. One example of an open-ended question asked of the respondents was ‘Do you have any other views in relation to the legal protection of investors? If so, please write them below.’

All the sections and sub-sections of the questionnaire have been logically sequenced according to the research constructs, questions and aims. The sequence started with the legal protection of investors in financial markets, moving smoothly to consider the operational problems in the UAE financial markets and finally, criminal punishments and another alternative solution instrument as a determent of market abuse activities in the UAE financial markets.

At the end of the questionnaire, the researcher asked the respondents to provide some personal data such as name, e-mail address, and mobile number. This personal data was not placed at the beginning of the questionnaire because the researcher did not want the

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participants to feel that their privacy is violated which could affect their responses to the questionnaire as suggested by Dornyei. However, the participants who filled in the entire questionnaire, and were willing to be interviewed have been asked to fill in their personal data voluntarily. The purpose of this demographic data was to contact only those participants, who met the pre-set criteria as the basis for the sampling strategy, and to set a convenient date, time and place for the interview.

The questionnaire consisted of 33 closed-ended items and no open-ended question. After that, six closed-ended items have been removed and one ended question has been asked. It was divided into three sections. The first section consists of 11 statements asking the respondents’ opinions and views about legal protection, and the extent to which the financial market regulations and law are provided to protect the market from any abusive practices. The second section includes 12 statements asking the respondents’ views about the operational problems in the UAE financial market. The final section asked the respondents four questions relating to their views on deterring market abuse activities in the financial market. In other words, it wanted to explore how far they agree to the adequacy of punishment in terms of offences committed as market abuse.

The participants’ responses to the close-ended questions of the questionnaire were coded using numbers 1-5. An Excel file was established on the computer to carry out the data entry process. This file was created to facilitate the access to the numerical data and to keep a safe copy. After that, an SPSS file was set up to perform the different statistical treatments of data. Then, all numerical data was copied from the Excel file and was pasted into the SPSS file. Frequencies and percentages were calculated for each

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category in the questionnaire and the data was presented visually with tables, as shown in the data analysis section. Responses to the open-ended questions placed at the end of each section in the questionnaire were analysed qualitatively. This made it easy for the researcher to fit participants’ responses into the different themes and sub-themes as illuminated by the interview analysis.

Before conducting the questionnaire, some steps were taken. Practically, most questionnaire inquiries can be prepared under the subject of the pilot study\textsuperscript{802} to assess reliability and validity. A questionnaire is viewed as valid or not when it measures what it is supposed to measure.\textsuperscript{803} Therefore, the pilot study is an important aspect of the design of any research study. It does not guarantee success in the main study, but it helps increase the probability of success.\textsuperscript{804}

As an important process, the questionnaire was piloted by following an academic process. All the items of the questionnaire were clearly and simply worded. Content validity was checked by giving the questionnaire to five legal consultants to check the content of the questionnaire items. Following comments from the latter, the following modifications were made. First, the open-ended questions were added as they were not included in the preliminary form of the questionnaire. Second, the Arabic version of the questionnaire was modified to be easily understood by the respondents.

Having modified the questionnaire according to the consultants’ views, the researcher went to the trading floor of the Abu Dhabi Securities Exchange to test how long it takes to answer the questionnaire. The draft of the questionnaire was attached with a brief and

\textsuperscript{802} Oppenheim, A. N. Questionnaire Design and Attitude Measurement. (London, Heinemann :1966) p 24-25

\textsuperscript{803} Bace, Ian, Questionnaire Design: How to Plan, Structure and Write Survey Material for Effective Market Research (2\textsuperscript{nd} edition). (Kogan Page, London & Philadelphia: 2008) p174

comprehensive overview of the main points of study. Second it was checked for clarity of questionnaire context and items. Finally, the researcher listened to the participants’ questions and general comments.\footnote{G, Bill, Developing a Questionnaire (London: Continuum, 2000), P42} According to the results of the piloting, the researcher modified the questionnaire and started administering it to the main sample of the study. In reference to the reliability, the researcher used Cronbach Alpha’s reliability scale in SPSS to measure the questionnaire reliability. The result proved that the questionnaire was reliable at (0.689).

In reference to the completion rate, 62.5\% of respondents completed the questionnaire. The reason behind this is that administering the questionnaire to the main management offices and following it up was a lengthy and complicated process. In other words, the researcher did not see the questionnaire respondents face to face.

Sampling is an essential step in any research. Therefore, selection of an appropriate sampling strategy is very important. The probability sampling strategy was used while collecting the questionnaire data from 125 investors. These participants were randomly selected from the two markets: Abu Dhabi Securities Exchange (ADX) and Dubai Financial Market (DFM).

The population of the current study are in two markets: the ADX, whose number of registered investors is 887,787\footnote{Reported by CSD & Registry Services Department, Abu Dhabi Securities Exchange.}, and the DFM with 552,069.\footnote{Reported by Research & Publications Department, Dubai Financial Market (DFM).} Thus, the total numbers of investors in both markets as a target population is 1,439,856. There would have been no way of contacting a cross-section of investors so the researcher proceeded by approaching the two markets’ administrations. He asked them to help distribute the
questionnaire because they had a database of registered investors in each securities market. Both markets were willing to help the researcher in questionnaire distribution on the trading floor and in any other appropriate way. Therefore, the researcher relied on administrative staff assistance in both markets. The researcher asked the administrative staff to give out the questionnaire to the respondents. Two hundred questionnaires were distributed and one hundred twenty five were given back to the researcher.

5.3.2 Interview Considerations

Interviews and questionnaires are essential types of survey methods. Conducting an interview; however, offers a larger amount of knowledge and information than a questionnaire might offer. An interview is defined as ‘a conversation that has a structure and a purpose. It goes beyond the spontaneous exchange of views in everyday conversations, and involves a careful questioning and listening approach with the purpose of obtaining thoroughly tested knowledge’. Thus, the interview method is regarded as an essential method employed in case study research.

Interviews can provide important, even vital information. Interviewing has been considered the most extensively used research method. While conducting an interview, the interviewer should be able to read the nonverbal messages and understand

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808 The researcher would like to thank Abdullah Salem Al Naimi, Manager of Market Surveillance, Market Operations and Surveillance. Abu Dhabi Securities Exchange, and Khalifa Ara’aba, Manager, Manager of Market control Department for their assistance.


811 Kvale, S., & Brinkmann, S. Interviews: Learning the craft of Qualitative Research Interviewing (2nd ed.). (London: Sage Publication;2009), p3


how the setting for the interview can affect the interview. The interviewer must also become attuned to the way he/she communicates with the interviewee.  

Interviews can sharpen the outcomes of questionnaires, where interviewees present deeper opinions regarding the issues. Gathering in-depth information, opinions and attitudes regarding the subject via questions in face-to-face interviews is appropriate in order to probe into the issues of market abuse, the alleged explanations behind the promulgation of law and the regulations of financial markets. If the researcher were to just use a solitary questionnaire, this could prove to be of limited value. The use of the interview method has been of an additional insight and benefits in the current study.

The aims of the current study are to probe into (1) the problems and shortcomings of the ESCA law 2000, (2) the legal protection of investors, and (3) the operational problems in the UAE financial markets. Legal experts and specialists’ perspectives are considered crucial as they provided the current study with important insights and implications. The experts and specialists were found among a group of people who are in academic positions, and have knowledge and expertise, so-called ‘elite’ people. As Gillham states, an ‘elite’ person is someone ‘who is in a privileged position as far as knowledge is concerned. These are often people in positions of authority, with considerable personal power... they are just particularly expert or authoritative and so they are members of an ‘elite’ in that sense’. In this regard, interviewing such people plays a vital role in the development of research, and the selection of interviewees is a serious matter. This may mean that the researcher may arrange for interviews with influential people who are in authority and in sensitive positions such as judges, legal consultants.

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and as well as other officials. The selection of interviewees in this research was done on this basis.

For the interview process, as Robson argues, ‘there are three main types of interviews; the fully structured interview, the semi-structured interview and the unstructured interview’. The similarity between the structured and semi-structured interviews is that they both have pre-determined questions. However, they are different in other aspects. For example, the semi-structured interview is more flexible as it allows the order of questions to be modified according to the researcher’s views of what is most important, wording to be changed, particular questions to be omitted because of their inappropriateness, or additional ones included. The semi-structured interview was deemed suitable for this study because the interviewer wanted to ask the same important questions to each interviewee, but also to be free to adapt the order and follow-up of questions in order to investigate further for additional information.

The interviewer made sure that the interviewees could cover the questions at their pace so that they could answer the questions appropriately. The procedure of the semi-structured interview was based on the main ideas of the research. The questions were related to the market abuse regulations, including issues related to market manipulation and insider dealing. In short, the semi-structured interview aimed to investigate the problems and shortages of the ESCA law 2000 which, have already been raised in this study.

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In terms of interviewing elite interviewees, it is suitable to use non-probability sampling techniques. In this study, selecting interviewees was based on a purposive technique. The purposive sampling technique focuses on what the researcher needs to understand and what useful, credible information he can gather from the subject, as well as what information can be gathered depending on the available time and resources. In this case, the interviewees were limited to a small amount of essential people whom the researcher thought would be necessary to interview. There were only a small number of experts available to be interviewed.

Thus, the researcher purposively selected thirteen participants to be interviewed at the time when the study was being conducted and he interviewed three legal experts in the SCA. One of them is a legal consultant to the SCA and is considered as the key amongst these legal experts, because he had the greatest knowledge of the regulations governing the securities market and the manipulative practices. He provides consultations for the Authority of the SCA and deals with the ESCA law 2000 on a daily basis. In addition, three other interviewees had been interviewed. Two of them are judges and one is a legal consultant to Abu Dhabi’s Executive Council. The latter was a member of the Commission which framed ESCA law 2000. In the Abu Dhabi Securities Exchange and the Dubai Financial Market, four specialists and officials were interviewed. Interviews were also conducted with some legal experts and specialists from outside the SCA and Abu Dhabi and Dubai securities markets. Thus, the researcher arranged interviews with two lawyers and one broker. All of them provided valuable information and raised critical issues relating to market abuse and ESCA law 2000.

Prior to conducting the interview, the researcher first met or phoned the interviewees to agree a specific date and time that was convenient for them. The interview time ranged from 25-60 minutes. The interviews were recorded using a digital voice recorder that facilitated keeping the recorded files on the computer. Ten interviews were recorded with permission from the interviewees while three did not agree to be recorded. The interviews were carried out in Arabic so the interviewees could best convey their message clearly and fluently. All the interview questions and their responses had been translated into English. To carry out member checking for credibility purposes, three translation specialists reviewed them and the researcher agreed that the translation is accurate.

The interview questions were designed using the main sections of the questionnaire. They covered, for example, the following the topics: lack of definition of market abuse such as insider dealing, inside information, market manipulation practices and the deficiencies contained in ESCA law 2000 relating to market abuse issues such as spreading rumours. They also raised several issues such as establishing a specialist court for financial market in the UAE, concepts of criminal reconciliation, the feasibility of criminal punishment contained in the ESCA law 2000 in deterring illegal practices, proposals of imposing proportional fines and accused names releases in the media. The interviews provided information and raised issues that is used here to support the argumentation of the findings, and results and of the thesis.

5.6 Results and analysis of the applied study
5.6.1 The questionnaire
The questionnaire of the current study is a mixed survey instrument containing both close and open-ended items. The closed-ended questions are easily coded and tabulated quantitatively, leaving no room for rater subjectivity. The closed-ended items used in
the first two sections of the questionnaire required the respondents to put a tick (√) in one of five responses in a Likert scale that best suits their views. The third/last section asked the respondents to rank the items from (1) to (5) according to their views.

Three response scales to the close-ended questionnaire were used: a scale of frequency, a scale of agreement and a scale of ranking. The scale of agreement was designed to know how far the respondents agreed with the items in the legal protection of investors in financial markets. The scale of agreement was designed in the form of a 5 point Likert scale. Each of the five response options was assigned a number from 1 to 5 for scoring purposes. The response options and their assigned numbers are as follows: strongly agree (5), agree (4), unsure (3), disagree (2) and strongly disagree (1). The scale of frequency was designed to discover how frequently operational problems in the UAE financial market occurred. The response options and their assigned numbers are as follows: always (5), usually (4), sometimes (3), rarely (2) and never (1). The final scale asked the respondents to insert only one number from (1) to (5) opposite each of five statements according to their agreement. Number (1) stands for the strongest agreement, and number (5) refers to the weakest agreement.

The questionnaire started with an introduction informing the respondents about the aims of the study and how data will be handled privately and confidentially. The following twenty eighth questions covered in the questionnaire related to: legal protection of investors, the operational problems and criminal punishments and another alternative solution instrument as a determent of market abuse activities in the UAE financial markets.
5.6.1.1 Legal protection of investors in the UAE financial markets

In the questionnaire, the sample was asked for their views on the importance of establishing a specialist court for the financial market. The main objective of this question was to measure attitudes of investors towards establishing a specialist criminal court in UAE financial markets, and whether it is useful or not. Table (1) and Figure (1) show the result of the analysis. The analysis reveals that the greater part of the respondents (56.8 %) ‘strongly agreed’ that there is a need for establishing a specialist court. Thus, the majority of investors believe that a specialist criminal court is useful for the financial market. This was followed by 32.8% of the respondents who ‘agreed’ with this proposal. 2.4% & 1.6% of the respondents ‘disagreed’ and ‘strongly disagreed’, respectively. Figure (1) below shows that investors believed that establishing a court for financial market is indeed essential.

This trend is similar to what the experts and specialists who were consulted advised. In the interviews the view was expressed that if there is specialization, there will be more power given to the verdicts issued by specialist court.820 Some interviewees argued that some judges in the general court do not realise or comprehend the role of the SCA in the securities markets.821

820 Anonymous1, Securities & Commodities Authority, Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.
The need for professional judges to deal with the financial market is seen as the right means to combat existing market abuse. One investor said: ‘I think it is appropriate now to think of establishing a specialized court for the financial markets’. It is clearly revealed that investors’ do believe that practices of market abuse exist in the UAE financial markets. The results showed that (40.8%) respondents ‘agreed’ that the abuse practices exist in UAE financial market, followed by (39.2%) of the respondents who ‘strongly agreed’. However, 17.6% of the respondents were ‘unsure’. Insignificant percentages of the respondents ‘disagreed’ (1.6%) and ‘strongly disagreed’ (0.8 %). Figure (2) shows the frequency distribution of the respondents’ perceptions.
It should be recalled that these practices may be committed whether by companies’ directors or financial analysts, advisors or the brokers, whether intentionally or negligently. Any action or behaviour coming from, for example, companies’ directors, financial analysts, advisors or brokers is important to investors due to the influence of their financial decision. These people are indeed in a position which allows them to be trusted by investors. In this context, the statement was raised to investors ‘The legal responsibility should be based on negligence in case of committing any mislead the investor in the financial market.’ The objective behind this question was to investigate the perception of the sample respondents about the figures who were considered responsible for the abuse practices and whether this legal responsibility should be due to negligence that leads to committing market abuse offences against the financial market rules and the financial profession ethics or not.
Responsibility based on the concept of failure to take reasonable care about providing information is the extent to which the disclosed information is true or not. ‘Standard care’ is measured in terms of that relevant to a ‘reasonable person’ who is in that situation. Laws or regulations can impose a higher standard care than ordinary negligence, and failure to adhere to a law or regulation is typically deemed to be negligence.

However, the ESCA law 2000 does not criminalise such negligent practices. The participants agreed that the responsibility should follow up some important figures such as the directors of companies or financial analysts or advisors or the brokers. The analysis illustrates that the majority of the respondents (45.6 %) ‘strongly agreed’ followed by 39.2 % of the respondent who ‘agreed’. 11.2 % of the respondents are ‘unsure’, while only 0.8 and 3.2 % of the respondents ‘strongly disagreed’ & ‘agreed’ respectively. Figure (3) shows the frequency distribution.

Figure 3: The legal responsibility should be based on negligence in case of committing any mislead the investor in the financial market.
It is clear that insider dealing and market manipulations do come under the definition of
market abuse. However, the ESCA law 2000 does not provide a definition of market
abuse whether in relation to insider dealing or market manipulation. In fact, providing a
definition of such practices may help market participants to realise what action
constitutes insider dealing or market manipulation. Definition is needed, for example, to
determine who is the actor? Does it include a person who connects to inside information
only by accident or who is in a position that allows him/her to obtain this sensitive
information? It is still vague under ESCA law 2000. Interviewees, therefore, needed to
be asked if they pay attention to the definition of these practices or not. The analysis of
the question (see figure (4) reveals that the majority of the respondents ‘strongly agreed’
(48.0%) followed by 40.0 % of the respondents who ‘agreed’ to the above opinion. This
perspective was supported by the legal experts. As one interviewee said: to ‘resolve the
issues, the law should set a definition of insider dealing, specifying the identity of the
person accessing inside information which leads him/her to manipulate securities
market’. 822 Another participant answered an open-ended question saying ‘so as to
attaching a legal liability, insider dealing should be defined by law and rules’. 823 There
was consensus over whether market manipulation should be defined due to
encompassing any course of conduct that misleads the market place, while only 11.2%
and 0.8 % of the respondents are ‘unsure’ and ‘strongly disagreed’, respectively. Figure
(4) below illustrates the analysis result.

822 Judge Hassan Al Hammadi, (PhD in Law) Former Chairman of the Appeals panel in the Federal Court
of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, Interview conducted,
June 2010, Abu Dhabi, United Arab Emirates.
823 See Appendix 2.
A rumour is classified under market manipulation practices. Thus, manipulators spread a rumour to influence the value of securities and investor decision. This issue was raised so as to investigate the opinion of the respondents on the effect of rumours as a means of market abuse in the financial marketplace. The analysis reflects that the majority of the respondents ‘agreed’ and ‘strongly agreed’ (33.6% each) that the ESCA law 2000 should consider rumours as means of market abuse used to influence the value of securities. 12% and 4.8% of the respondents ‘disagreed’ and ‘strongly disagreed’ to this statement respectively, and 16% were ‘unsure’. Figure (5) below shows the analysis result.
The difficulty usually facing the regulator is to catch all offences that come under market abuse. This is because market abuse is an ‘intelligent’ offence and it is committed under schemes which are ingenious and innovative. The ESCA law 2000 specifies limited and enumerated offences that constitute market abuse. The research assumes that this means that the ESCA law 2000 has a deficiency, and thus the legislator should prohibit any conduct that leads to creating a false or misleading impression, or any practices that mislead investors in the marketplace in the UAE.

This issue was raised with the respondents. A total of 44.8% investors strongly agreed that the regulator should criminalise any action which creates a false and misleading impression, while 38.4% ‘agreed’. An insignificant percentage of the respondents disagreed and strongly disagreed (5.6% and 1.6%) respectively. Figure (6) shows the respondents’ opinion in this regard.
The ESCA law 2000 prohibits insider dealing that is carried out with the intention of achieving personal benefit. The condition of achieving personal benefit is criticised by the researcher, as discussed earlier in the insider dealing chapter. The analysis of the data shows that the majority of the respondents ‘strongly agreed’ (40.3 %) and ‘agreed’ (37.1%) to ‘The regulator should prohibit insider dealing acts regardless of requirements for personal benefits’. This means that the regulator should prohibit the act of insider dealing, while not making the legal requirement of achieving personal benefit as the indicator of guilt. The exploitation of inside information at the expense of others should in itself be violating the principles of equality and justice. In support of this view, an advocator and a legal consultant said:

The legislation [the ESCA law 2000] falls short on this matter. It should have criminalised the act of insider dealing without requiring personal benefit to have been achieved.  

Sammer Ja’afar, Legal Consultant, Ja’afar Alwan, Al Jaziri & Associates; Advocates & Legal Consultants.  

Interview conducted, June 2010, Dubai, United Arab Emirates.
However, an anonymous interviewee from the DFM agreed with the text of the existing ESCA law 2000. He added: “I agree with the text of the law in its requirement that there must be a personal benefit from the crime in order to accuse the offender. There is no point in raising criminal responsibility against the offender if s/he does not gain benefit from the crime.” This opinion was shared by only a minority of respondents: (0.8 %) ‘strongly disagree’ and (4.8 %) ‘disagree’. Figure (7) shows the result of the frequency analysis.

The researcher then raised a statement to the investors about specializing individuals who investigate for market abuse practices in financial market. The statement was ‘For market abuse practices to be adequately investigated on the SCA, legal experts should be appointed, who possess high financial, economic and legal skills and knowledge.’

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825 Anonymous 2, Dubai Financial Market, Interview conducted, April 2010, Dubai, United Arab Emirates.
The analysis shows that the vast majority of the respondents (64.0 %) strongly agreed with the above statement followed by 29.6% of the respondents who ‘agreed’. The total of those who ‘strongly agreed’ and ‘agreed’ was 93.6%. This question aims at the importance of having specialized individuals who possess high financial, economic and legal skills and knowledge in order to investigate the abuse practices in the financial market. One participant commented ‘[SCA] should have experts specialised in the financial market who specialise in detecting manipulators…’.

No respondents ‘disagreed’ or ‘strongly disagreed’ with the statement and only a small percentage (6.4 %) of the respondents were ‘unsure’. Figure (8) shows the frequency of the respondents’ opinion.

Figure 8 : For market abuse practices to be adequately investigated on the SCA, legal experts should be appointed, who possess high financial, economic and legal skills and knowledge.

Failure to define insider dealing under ESCA law 2000 has been discussed earlier. The researcher believes that achieving protection for investors from insider dealing can be approached by prohibiting insider dealing generally. The survey investigated whether

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826 See Appendix 3.
the respondents agreed or disagreed to restrict the definition of insider only to natural persons. Investors were asked ‘The definition of insider should be restricted to natural persons as actors’ The analysis reveals that only 42.4% of respondents ‘agreed’ that the definition of the insider should be restricted to natural persons while 23.4% of the respondents were ‘unsure’. This may mean that some respondents do not have enough knowledge as to the laws and regulations in financial markets. Thus, it is not odd that some respondents were uncertain regarding the issue of defining insider dealing. This is justified. One investor responded saying ‘lectures and sessions should be held to help the investors achieve comprehensive understanding of the financial markets’. Another one commented ‘enlightenment sessions for the investors should be given even on their own expenses to support his/her comprehensive understanding to the right way of investment in the stock market…’. Those who ‘strongly agreed’ with the statement represent 20.0% of respondents. The lowest percentage of the respondents (5.6%) ‘strongly disagreed’ and 9.6% ‘disagreed’. Figure (9) shows the frequency distribution of the respondents’ opinion.

Figure 9: The definition of insider should be restricted to ‘natural persons’ as actors.

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827 See Appendix 4.
828 See Appendix 5.
Another statement followed from the last one. The price of shares is affected by the disclosure of information, so the timing of disclosure is important. Interviewees were asked to respond to the statement: ‘Company insiders should be prevented from trading until a reasonable dissemination period has passed’. They naturally enjoy a privileged status from other participants in the financial market regarding possessing sensitive information which is not available to the public. Their situation enables them to manipulate company’s shares. Therefore, investors’ attitude is important regarding this issue. The results of the analysis revealed that the majority of respondents (41.6 %) ‘agreed’ to the statement followed by those (36.8%) who ‘strongly agreed’. One of the investors who ‘strongly agreed’ to this statement said ‘These laws [ESCA law 2000 and regulations] should include preventing the company employees from dealing with the period of results’ declaration…’. A small percentage of the respondents’ ‘strongly disagreed’ (1.6%) and 8.8% ‘disagreed’. Figure (10) demonstrates this result.

Figure 10: Company insiders should be prevented from trading until a reasonable dissemination period has passed.

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829 See Appendix 6.
Finally, an important point was raised about the stage when things began to change in the financial market in the UAE. Investors were asked to voice their views about the illegal practices in relation to the summer crisis in 1998 which led to fake and misleading share prices. The purpose of this was to investigate the opinion of the selected sample about the main reason for the 1998 summer crisis in the financial market. The result of the analysis revealed that the majority of the respondents (39.3%) were ‘unsure’ as to whether illegal practices were the main reason behind the summer crisis in 1998 that led to fake and misleading shares prices, 29.6% ‘strongly agreed’, and 28.8% ‘agreed’. No one in the sample strongly disagreed and only an insignificant percentage ‘disagreed’ (2.4%). Figure (1) below demonstrates the analysis result.

Figure 11: Illegal practices were the main reason behind the summer crisis in 1998 which led to fake and misleading shares prices
5.6.1.2 The operational problems in the UAE financial markets

This section starts by investigating to what extent the share prices of listed companies reflect the real situation of companies. The problem is the shares prices often do not reflect the real situation which may indicate that something unusual is occurring such as a manipulative scheme or any illegal activities. The opinion of the respondents about the statement: ‘The share prices of listed companies reflect their real situation’ showed that the large part of the respondents (39.2%) believe that share prices ‘sometimes’ reflect the companies’ real situation. 24.0% of the respondents thought that this was ‘never’ the case, while 19.2% and 12.8% of the respondents believe that was ‘often’ and ‘always’ the case, respectively. A small percentage said ‘rarely’ (4.8%). Figure (1) demonstrates the result of the analysis.

Figure 1: The share prices of listed companies reflect their real situation.

Another problem wondering the operational effectiveness of a financial market is the leaking of inside information from its original source to another party. Leaking inside information is illegal under ESCA law 2000, as was discussed earlier. To investigate
whether this happens in the DFM and ADX, investors were asked a question about this. The majority of the respondents (39.2%) believed that inside information ‘always’ leaks out from its original sources, followed by (32.8%) who thought it ‘often’ happens. The total of the respondents who think ‘always’ and ‘often’ was 72% while a reasonably high percentage (22.4 %) of the respondents replied that they thought it may occur ‘sometimes’. One of the respondents stressed the importance of action on this issue: ‘in order to provide protection for the investors in local markets the protection must be focused on preventing inside information leaking and insider dealing transactions…’.  

An interviewee saw the problem as being wider than that related to UAE markets. An official specialist at Abu Dhabi Securities Exchange stated: ‘Are there any leaks of inside information in market? To be honest with you, yes there are leaks of insider information and this does not just exist in our market, but in the whole world’. 

Insignificant percentages of respondents (1.6% and 4.0%) replied ‘rarely’ and ‘never’. Figure (2) demonstrates this result.

**Figure 12**: There is leaking of inside information from its original source to other investors.

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830 See appendix 5.
Offenders look for legal loopholes to escape from conviction. Therefore, the question arises as to whether the ESCA law 2000 and regulation of financial markets have loopholes or gaps through which offenders of market abuse might escape. The statement put to investors on this was one of the tools that was intended to investigate the deficiencies of the law and regulations through participants’ opinions. The majority of the respondents (37.6 %) thought there are ‘sometimes’ legal loopholes or gaps in the ESCA law 2000 and regulations through which offenders of market abuse might escape, (36.0 %) said ‘often’ and (18.4%) ‘always’. One of the interviewees said ‘The actual practice has shown constantly that the texts of any law stand against the passing of time particularly if we considered the frauds of the manipulators, and the change circumstances. This requires revisions of these texts [the ESCA law 2000] to fill any legislative gaps or loopholes’. Insignificant percentages (2.4 & 5.6%) of the respondents replied ‘never’ or ‘rarely’. Figure (3) demonstrates the result of the analysis.

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832 Hussein Ghanaim (PhD in Law). Former lecturer in law faculty in the UAE University, he was a member of the legislative committee that drafted ESCA Law 2000. Currently, he is a legal counsellor, *Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.*
Financial advisers, brokers or analyst investors should be trusted by investors. These people are proficient to provide recommendations or suggest investment strategies. However, the statement arises as to whether they are making misleading recommendations or suggestions. A statement on this was put to the respondents. The statement was ‘There are misleading recommendations or suggested investment strategies which are issued by financial advisers, brokers or investment analysts.’ 37.6% of respondents believed that misleading recommendations or suggestions ‘often’ take place in the market place, followed by (32.8%) of who said ‘always’. 16.8% of respondents said ‘sometimes’ and 11.2 % and 1.6 % said ‘rarely’ and ‘never’ respectively. The overall percentage of the respondents in the ‘often’ and ‘always’ categories comes to 70.4% which is a significant percentage compared to only 12.8% who believed ‘rarely’ and ‘never’. One participant commented on the need for protection: ‘Investors should be protected [by the SCA and financial markets] from
manipulators in the financial market whether from brokers, financial advisors or executive managers’. Figure (4) demonstrates the result of the analysis.

Figure 4: There are misleading recommendations or suggested investment strategies which are issued by financial advisers, brokers or investment analysts.

As shown in earlier chapters, share prices can be pumped up artificially, which occurs by means of market abuse activities. It could be one main trigger for a financial market crisis. Therefore, in order to investigate this issue respondents were asked the extent to which they believe that share prices are manipulated in the UAE financial market. The researcher put to them the following statement: ‘Share prices are manipulated in the UAE financial markets’, and asked their reaction. 40.8 % of the respondents thought that ‘sometimes’ share prices were manipulated in the UAE financial markets. 28.8 and 21.6 percentages of respondents said ‘always’ or ‘often’, making together 50.4 % who believed that share prices were generally manipulated in UAE financial markets. One of the interviewees, who is an official specialist at the SCA, was asked by the researcher ‘How many cases have there been of insider dealing and manipulation?’ He answered:

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833 See appendix 8.
Around 1023 cases in the year of 2009, but this is not indicated in our newsletter. Small percentages (5.6 and 3.2%) of participants responded ‘rarely’ and ‘never’, respectively, to the above statement. Figure (5) demonstrates the analysis result.

Figure 5: Shares prices are manipulated in the UAE financial markets.

Share prices should be determined in accordance with the supply and demand in the market. Market abuse practices interfere with the normal process of supply and demand. The statement put to the participants on this was ‘The market abuse behaviour interferes with the normal process of supply and demand in the local securities markets’. The objective of this statement was to probe into investors’ beliefs that market abuse involves behaviours that create a false or misleading impression about the state of supply and demand and the value of relevant instruments securities markets in UAE. The results demonstrate that the majority of respondents (47.2%) believe that the supply and demand of securities in the local financial markets in UAE ‘often’ interferes by market abuse behaviour and 23.2% of the respondents believe that it always

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834 Anonymous 2, Securities & Commodities Authority, Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.
interferes (i.e. with a total of 70.4 percentages). They believe that the supply and demand in securities generally interferes its state. 24.8% of the respondents believe that the supply and demand of securities ‘sometimes’ interfere and 4.0 and 0.8% of the respondents responded ‘rarely’ and ‘never’ respectively to the above statement. Figure (6) demonstrates the results of the analysis.

Figure 6: The market abuse behaviour interferes with the normal process of supply and demand in the local securities markets.

Spreading of rumours in the market is one of the main ways to manipulate the shares prices and influence investors’ decisions. To probe this issue, the researcher put to the respondents the following statement: ‘Rumours are spread in the financial markets in the UAE’. The analysis showed that highly significant percentages of the respondents (42.9 and 25.4%) believed that rumours spread were ‘always’ and ‘often’. This result is supported by one of the official specialists at Abu Dhabi Securities Exchange, who put it also in wider perspective, ‘Yes, there are rumours and this is a problem which
encounters all world markets...\textsuperscript{835} However, only 25.8 \% believed ‘sometimes’ and 4.8\% ‘rarely’. Figure (7) shows the result.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure7.png}
\caption{Rumours are spread in the financial markets in the UAE.}
\end{figure}

The statement, ‘The available financial market legislations and rules are adequate to face such market abuse’, was put to the participants. The core purpose of the above statement was to investigate whether the current legislations and rules applied in the UAE financial markets are adequate to combat the market abuse activities. The analysis revealed that (37.6 and 24.0 \%) of the respondents believed that legislations and rules are ‘rarely’ and ‘never’ adequate to face such market abuse in UAE markets, respectively. Judge Al Hammadi supported this view: ‘the current law [the ESCA law 2000] is deficient’.\textsuperscript{836} Another interviewee said ‘the current law [ESCA law 2000] is not


\textsuperscript{836} Judge Hassan Al Hammadi, (PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, Interview conducted, June 2010, Abu Dhabi, United Arab Emirates.
enough and not sufficient\textsuperscript{837} to compact market abuse practices. However, 28.8\% of the respondents replied ‘sometimes’ and small percentages (6.4\% and 3.2\%) replied as ‘often’ and ‘always’ respectively. Figure (8) shows the result.

\textbf{Figure 8} : The available financial market legislations and rules are adequate to face such market abuse.

![Figure 8](image)

The SCA has been given by ESCA law 2000 supervisory and executive powers necessary to perform its functions for ensuring interaction of the forces of supply and demand in order to determine prices and protect investors.\textsuperscript{838} Local financial markets have also been granted a power to monitor on a daily basis the trading transactions in securities and commodities, so as to ensure justice between transacting parties.\textsuperscript{839} Therefore, the question arises as to whether they play their supervisory role to prevent market abuse practices? The purpose of the aforementioned question was to investigate whether the SCA plays a role in combating and preventing market abuse. The majority of the respondents (37.6\%) believed that the SCA and the local financial markets

\textsuperscript{837} Anonymous1, Securities & Commodities Authority, \textit{Interview conducted}, May 2010, Abu Dhabi, United Arab Emirates.
\textsuperscript{838} Article 2&3 of ESCA law 2000
\textsuperscript{839} Article 22 (2) of ESCA law 2000
‘rarely’ play their roles in preventing market abuse, 36.8 % of the respondents thought they ‘sometimes’ play their role to prevent market abuse. Only 14.4% of the respondents believed they ‘always’ perform their role. More than one of the respondents gave comments regarding this issue. One of them commented ‘The SCA should exercise its legal role in taking action to ensure necessary protection procedures against any person or institution’.  

Another one also stated ‘The SCA should be monitoring decision makers [in the companies] and their comments on television as these mislead investors’. Only small percentages of the respondents responded ‘often’ and ‘never’ (4.8 and 6.4%). Figure 9 shows the result of the analysis.

**Figure 9:** The SCA and local financial markets play their supervisory role to prevent market abuse practices.

As was discussed earlier, Article 39 (2) of ESCA law 2000 has got a deficiency for limitation of its scope as it applies solely to rumours relating to the purchase or sale of shares. Accordingly, respondents were asked to respond to the following statement: ‘A rumour is not usually about selling or buying securities, but it might refer to an

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840 See appendix 9.
841 See appendix 10.
economic crisis or issuers’ activities which impact the financial market negatively’. The aim of this statement is to investigate the respondents’ opinion about a shortage of this article. The analysis of the respondents’ opinion revealed that the majority (36.8%) reported that they believed that a rumour is not ‘often’ about selling or buying securities and 24.0% is not ‘always’. An equal and significant percentage of the respondents reported that they are ‘sometimes (36.8%). Small percentages (1.6 and 0.8%) of respondents reported that they believed a rumour is ‘never’ about selling or buying securities and ‘rarely’. Figure (10) illustrates the result.

Figure 10: A rumour is not usually about selling or buying securities, but it might refer to economic crisis or issuer’s activities which impact financial market negatively.

The next statement was related to listed companies. The respondents were asked to respond to the statement: ‘Listed companies always take action against a rumour which relates to their activities or securities by disclosing explanatory information.’

The analysis of the respondents’ opinion reveals that the majority believed that companies ‘sometimes’ (36.8%) take action against a rumour which relates to their
activities or securities by disclosing explanatory information. It is clear that the percentage of those who thought that companies ‘rarely’ and ‘never’ disclose explanatory information (24.8 and 9.6 = 34.4%) exceeds the percentage of those who ‘often’ and ‘always’ believed companies do (21.6 and 7.2) respectively. It could be concluded that the respondents believed most companies did not take actions against a rumour which relates to their activities or securities. This claim is supported by one of the participants: ‘The SCA should punish the administrations of companies that issues statements or news which negatively or positively influences the value of a share and then deny this news or information’. Figure (11) below illustrates the analysis result.

Figure 11: Listed companies always take action against a rumour which relates to their activities or securities by disclosing explanatory information.

The following statement was presented to the respondents: ‘There is a multiplicity and overlapping of jurisdiction between the SCA and local financial markets.’ The analysis of the respondents’ opinion showed that the majority of the respondents (52.0%) thought there is ‘sometimes’ multiplicity and overlapping of jurisdiction between the

842 See appendix 11.
SCA and local financial markets. Only (22.4% and 12.0%) of the respondents believed this happens ‘often’ and ‘always’, respectively. While (10.4 and 3.2%) of the respondents thought a multiplicity and overlapping of jurisdiction ‘rarely’ and ‘never’ takes place between the SCA and local financial markets, respectively. Figure (12) demonstrates the result.

This statement was raised as a question in the interview conducted by researcher as follows: ‘Is there any multiplicity and overlapping of jurisdiction between the SCA and local financial markets?’ An anonymous answer at the SCA, said ‘there is no conflict or overlap, there is integration’. An anonymous response at DFM, ‘both [SCA and financial markets] are complementary to each other’. However, another interviewee at Abu Dhabi Securities Exchange, said ‘the problem between the SCA and markets lies in what are the powers of the market and what are the power of the SCA in the issue of surveillance.’

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843 Anonymous 2, Securities & Commodities Authority, Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.
844 Anonymous1, Dubai Financial Market, Interview conducted, May 2010, Abu Dhabi, United Arab Emirates.
5.6.1.3 Criminal punishments and another alternative instrument solution.

This section started the investigation into the participants’ opinions about whether the criminal punishments in the ESCA law 2000 are sufficient for deterring market abuse activities or not in the UAE financial markets. As was discussed earlier, the ESCA law 2000 has provisions of criminal punishments. Articles 41-43 concern the issue of punishment and other disciplinary penalties for market abuse practices. Therefore, the following statements focused on the punishment of those who committed market abuse and the concept of criminal reconciliation as an alternative to criminal prosecution. Criminal reconciliation is an appropriate suggestion for the market abuse problem.

The analysis of the respondents’ opinion revealed that the majority of the respondents (37.1%) were ‘undecided’ in terms of believing that criminal punishments in the ESCA law 2000 discourage market abuse activities in the UAE financial markets. However, those who think that criminal punishments in the ESCA law 2000 were ‘strong’ and ‘the
strongest’ to the above statement \((18.5 + 21.0 = 39.5\%)\) exceeded those who believed that they are ‘weak’ and ‘the weakest’ \((9.7 \text{ and } 13.7 = 32.4\%)\). Figure (1) shows the result. One of the participants stated that ‘There should be a severe punishment for disclosing inside information and then disclosing them promptly or after a short period of raising their shares’. \(^{846}\)

**Figure 1:** The criminal punishments in the ESCA law 2000 are not sufficient for deterring market abuse activities in the UAE financial market.

Publishing offenders’ names, his/her punishment and the kind of offence which s/he has committed in media are not common in the UAE legal system. Thus, to measure respondents’ attitudes regarding this concept, the researcher offered this statement ‘To discourage market abuse from not taking place in financial market are offenders name, his/her punishment and the kind of offence which he/she has committed should be published in media’. The analysis revealed that the majority of the respondents \((43.2\%)\) believed the statement ‘the strongest’ while \(21.0\%\) responded ‘undecided’. This is

\(^{846}\) See appendix 7.
supported by the specialist and legal experts who had been interviewed, such as Judge Al Hammadi who said:

> yes, [to publish offenders names] I see that whoever violates the rights of the investors and commits crimes that shake the trust of the investors and shake the national economy deserves to be defamed by publishing his/her name in the media or in the stock market. This doesn't represent a violation of his privacy and his person because he violated the rights of the whole community.  

Those who responded ‘the weakest’ and ‘weak’ constituted 22% (12.1 + 9.7) as illustrated in Figure (2) shows below.

Figure 2: To discourage market abuse from not taking place in financial market an offender name, his/her punishment and the kind of offence which he/she has committed should be published in media

Another suggestion for an alternative punishment is the so-called proportional fine. Judge Ayssor argued that proportional fine is the recent trend which imposes a fine according to the profit (gain) of the offender, and he added:

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847 Judge Hassan Al Hammadi, (PhD in Law) Former Chairman of the Appeals panel in the Federal Court of Appeal. Currently he is a Head of Technical office in the Federal Supreme Court, Interview conducted, June 2010, Abu Dhabi, United Arab Emirates.

848 Judge Ayssor is a Chief of the Appeals panel in the Dubai Court of Appeal, Interview conducted, May 2010, Dubai court, United Arab Emirates.
Putting a maximum limit on the crimes originating as a result of the securities markets crimes is not a praiseworthy trend because the offender can gain a huge amount of money by violating and manipulating the securities market. It is better that the legislator puts a minimum limit for the fine and that it should not be less than what she/he already gained or what he/she planned to earn as a profit. I think this is one of the important points that should be covered by the legislative amendments.  

Judge Al Hammadi said:

Yes, I agree with this punishment [proportional fine]...... when you punish him/her with one million Dirham. He/she may have already avoided the loss of ten million Dirham or he/she gained ten million or more. If you punish him/her with the proportional fine, in this lawsuit you punish them with what they avoided as a loss or gained as a profit.

Therefore, the statement had been raised to the participants ‘The estimated fine imposed on the offender should not be less than the expected profits to be obtained or the loss to be avoided’. The analysis of the respondents’ opinion shows that the majority of the respondents (46.0%) were the ‘strongest’ in agreement. Followed by those who ‘strongly’ agreed (22.6%) Those who responded ‘the weakest’ and ‘weak’ constituted 14.6%. While, those who responded ‘the strongest’ and ‘strong’ constituted 68.6 % (46.0 and 22.6% respectively). Only 16.9% of the respondents were ‘undecided’. Figure (3) shows this result.

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849 Judge Ayssor is a Chief of the Appeals panel in the Dubai Court of Appeal, Interview conducted, May 2010, Dubai court, United Arab Emirates.
As it was discussed earlier in chapter two, the concept of reconciliation as a system in the securities markets is useful and provided that it takes place prior to issuing a final decision in the case. Criminal reconciliation is an alternative solution. Raising this claim amongst investors measures their opinion regarding the concept of the reconciliation system. One of the specialist experts said:

In principle, this is good, but we have to apply it according to the type of misdemeanour. It is good if it is left to be voluntary and not obligatory. I see it is good because a majority of the investors do have not enough knowledge of the laws and regulations. They [investors] commit unintentional errors.\(^{851}\)

The respondents were given the following statement: ‘Acknowledge the reconciliation scheme in the securities markets provided that it takes place prior to issuing a final decision in the case’. The analysis showed that 28.2% of the respondents reported

\(^{851}\) Anonymous 3, Dubai Financial Market, Interview conducted, April 2010, Dubai, United Arab Emirates.
‘undecided’. The results illustrate that 50.8% of the respondents chose ‘the strongest’ and ‘strong’ (25.8 & 25.0 respectively) in comparison with 21% of the respondents who chose ‘weak’ and ‘the weakest’ (10.5% each). Figure (4) shows the result.

**Figure 4**: Acknowledge the reconciliation scheme in the securities markets provided that it takes place prior to issuing a final decision in the case.

![Figure 4](image)

### 5.6.2 The interview

The researcher purposively selected thirteen participants to be interviewed at the time when the study was being conducted. The researcher interviewed three legal experts in the SCA. One of them is a legal consultant to the SCA. He is considered as the key figure amongst these legal experts, because of his full awareness of the regulations governing the securities market and manipulative practices. He also provides consultations to the Authority of the SCA and deals with the ESCA law 2000 on a daily basis. In addition, there were also three other important interviewees who had been interviewed. Two of them are judges; one of whom is a legal consultant to Abu Dhabi’s Executive Council. He was also one of the Commission Legislation for making ESCA
law 2000. In the Abu Dhabi Securities Exchange and the Dubai Financial Market, there were four specialists and officials who have been interviewed. The researcher believed that it is better if the interview is conducted with someone such as a legal expert and a specialist from outside the scope that the SCA and Abu Dhabi and Dubai securities markets. Thus, the researcher arranged an interview with two advocators and one broker. In fact these were the elite interviews, as all of them provided information and critical issues relating to the market abuse and ESCA law 2000.

Meeting first or phone the interviewees had been arranged to agree a specific date and time that was convenient for conducting the interview. The interview time ranged from 25-60 minutes. The interviews were recorded using a digital voice recorder that facilitated keeping the recorded files on the computer, ten of them were sound recorded while three did not agree to be recorded. The interviews were done in Arabic, as they felt that they were better able to convey the message clearly and fluently in Arabic. All the interview questions and their responses had been translated to English. To carry out member checking, three translation specialists reviewed them and the researcher agreed that the translation is accurate.

The interview questions were designed using the main sections of the questionnaire. These interview questions covered for example following the topics; lack of definition of market abuse such as insider dealing, inside information, market manipulation practices and the deficiencies contained in ESCA law 2000 relating to market abuse issues such as spreading rumours. It raised also several issues such as establishing specialist court for financial market in the UAE, concept of criminal reconciliation, the feasibility of criminal punishment contained in the ESCA law 2000 in deterring illegal practices, as well as the concept of imposing proportional fines and the accused name
release in the media. However, the interview provided information and issues that would be used as an evidence for supporting the argumentation of the study along with the results of the questionnaire

5.6 Conclusion

The applied methodology has been an essential part of this thesis. Various questions arose throughout this thesis. This chapter tried to find answers to these questions using the rationale of choosing a mixed-method (quantitative and qualitative) design. The quantitative and qualitative results are consistent, to some extent. The two approaches were used to investigate market abuse practices from the perspectives of legal experts, other specialists and investors towards legal regulation of the securities markets in the UAE.

The results of the applied study gives a clear image of the views of legal experts, other specialists and investors’ attitudes and ideas towards legal protection of investors and operational problems in financial markets in the UAE or towards alternative suggestions. Both interviewees and participants’ attitudes cohere with the overall thesis proposition. They confronted the idea that the ESCA law 2000 and the markets regulations are deficient and supporting the thesis arguments. This was explored in the previous chapters.

The applied study highlighted the fact that there is a widespread agreement about the weaknesses of legal protection of investors in the UAE financial markets. Participants agreed that the ESCA law 2000 has deficiencies for not criminalising some practices of market abuse or defining such practices, such as who is an insider dealing actor. This
makes ESCA law 2000 inadequate in catching all offences that come under market abuse.

The operational problems existing in financial markets have been revealed in this study. It has shown that there are offences committed such as the leaking of inside information, misleading recommendations from financial advisers or brokers and the spreading of rumours. There has also been a lack of response against a rumour from listed companies. In other words, market abuses are indeed carried out in the markets. All of these practices interfere with the state of supply and demand in the markets.

The SCA and the local financial markets rarely play their roles in preventing market abuse and there is a multiplicity and overlapping of jurisdiction between the SCA and local financial markets. The proposals that have been raised include: establishing a specialist court in the financial market, introducing the concept of criminal reconciliation, publishing offenders’ names and proportional fines. A majority of the interviewees and participants agreed to these propositions.
CHAPTER SIX
CONCLUSION AND RECOMMENDATIONS

Market abuse as a phenomenon takes place in the form of insider dealing and market manipulation. These have appeared in the UAE financial markets. This thesis attempted to investigate financial market abuse regulation in the UAE through an examination of the Federal Law No. 4 of 2000 concerning the Emirates Securities and Commodities Authority and Market (ESCA law 2000) and rules which promulgated pursuant thereto. The issue was also pursued by means of a comparative study between the UK and the DIFC laws directed at the market abuse regime. The comparison and analysis was conducted in a similar manner in each of the main chapters. This method of study highlights the flaws in the market abuse regime in the UAE. To provide further evidence of these shortcomings, an applied study was carried out. This used a questionnaire and interviews to obtain the perspectives of legal experts, other specialists and investors towards shortcomings in the regulation of the securities markets in the UAE. The study is divided into six chapters. The following will provide in brief the findings of each chapter.

Chapter One started with an introduction to the UAE securities markets by starting from the absence of a formal securities market, which was the main reason for the summer crisis in 1998. The chapter tracked the UAE financial sectors development from the UAE’s foundation on December 2, 1971 until 2000. In the year 2000 a formal securities market was launched by the promulgation of ESCA law 2000 and establishing the Securities and Commodities Authority (SCA). The chapter also provided a legal framework for understanding the legislative and administrative regulation of the capital markets: the Abu Dhabi Securities Exchange (ADX) and the Dubai Financial Market
(DFM) as well as the Dubai International Financial Centre (DIFC). Financial markets were regulated by ESCA law 2000, and regulations which were promulgated pursuant thereto, came to prevent and combat market abuse practices. However, the law and regulations were not efficient enough to fulfil the task, due to the existence of deficiencies. The chapters which follow were aimed at addressing these dimensions.

**Chapter Two** gave an overview of the regulation of market abuse in the three jurisdictions of the UAE, the UK and the DIFC. First, the chapter began with a general view of regulation of securities markets in the UAE and showed how the financial market is subjected to different legislation at the federal and local levels. There are also two separate financial frameworks, and each is regulated under a separate regulatory system: The UAE legal system which regulates all of the UAE financial markets and the Dubai International Financial Centre (DIFC), which is a financial free zone inside the UAE. This chapter also shed light on the fact that there are several entities regulating the marketplace: The Ministry of Economy (MOE), Central Bank of the UAE (CBU) and the SCA which is responsible in the securities markets for the three stock exchanges, the Abu Dhabi Securities Exchange (ADX), the Dubai Financial Market (DFM) and the Dubai Gold and Commodities Exchange (DGCE). These different regulatory systems can lead to confusion and there is some duplication of the responsibilities of the MOE and CBU authorities and the SCA. Accordingly, the research recommended that the SCA should regulate and supervise any companies that operate in the securities markets such as investment funds and other financial institutions which invest of their funds in securities markets. *To avoid any duplication, all these aforementioned bodies, such as MOE and CBU and markets bodies, should work alongside the SCA.*
The chapter also covered the reason that regulatory intervention is a main challenge for governmental intervention in the market, which can take place mainly to ensure that the market operates fairly and efficiently. It also provided theories of regulation of economic activities, the public interest theory and the public choice theory, which are the most significant theories in regulating financial activities. The public interest theory is the basis of UAE legislative policy.

The chapter highlighted inadequacies that existed under both the Federal Criminal Law No. 3 of 1987 and the Federal Company Law No.8 of 1984 for dealing with market abuse practices. The Federal Criminal Law does not encompass cases of financial crimes such as market abuse. In fact, it only involves particular types of fraudulent procedure. The Federal Company Law provisions represent an insufficient method for checking up on all the acts of market abuse, particularly in the securities markets. It also showed that the UAE financial markets need to develop a highly structured and efficient financial system. *This was a significant observation made by Squalli* who contends *that there is an important link between the regulatory obligation to disclose information to the market and market efficiency.*

The SCA Decision No 3 of 2000 obliges all issuers whose securities have been listed in the markets to inform the SCA and each of the markets of ‘any significant developments affecting the prices of such securities’. But the problem is that it is not clear whether ‘affecting’ is likely or definite, which left a grey area without a definite decision from the SCA. Significant matters must affect the prices of securities. Otherwise, there is no obligation on the issuer to disclose the information. *Accordingly,*

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853 The Chairman of the Board of Directors of the SCA’s Decision No. 3 of 2000 concerning of Regulations as to Disclosure and Transparency (SCA Decision No. 3 of 2000).
854 Article 33 of the SCA Decision No. 3 of 2000.
it should be amended to be ‘any significant developments which are likely to affect the prices of such securities’.

The last part of this chapter attempted to shed light generally on how market abuse is defined under three jurisdictions: the UK, the DIFC and the UAE. In the UAE, the ESCA law 2000 and SCA’s regulations do not define market abuse but they refer to some courses of conduct that amount to market abuse practices. The DIFC law defines market abuse under the term ‘market misconduct’ instead of market abuse. While the UK law did not define the term ‘market abuse’, it provides more details of prohibited market abuse practices instead. This chapter also suggested establishing a specialist court and criminal reconciliation system under the UAE judicial system. It demonstrated how these two concepts are important and workable for the UAE financial market. At the end of the chapter, it provided ideas for criminal responsibility and punishments of market abuse as well as the idea of publishing the offender’s name and imposing a proportional fine. All of these propositions are supported by the applied study in Chapter Five.

Chapter Three was devoted mainly to examining the regulation of insider dealing under the UAE legal framework. It provided the argument for regulating insider dealing between those who believed that insider dealing should be prohibited and others who believed it should not be. It also covered the definition of inside information as it is a subject of insider dealing, and followed by focusing on who is the actor of insider dealing and his/her offences. It showed how his/her offences may be caught by ESCA law 2000. This revealed that the ESCA law 2000 suffers from deficiencies. These deficiencies are in the following:
• Article 37 and Article 39(1) of ESCA law 2000 have prohibited exploiting inside information but did not characterise this information. There is no particular requirement that inside information should be specific or precise. The ESCA Law 2000 also did not require that inside information should to be relevant to particular securities or to an issuer of securities. Both of these requirements (precise and relevant to) are omitted by the UAE law, which contrast to the UK laws and DIFC law. Hence, it is strongly recommended by the research to amend this Article to add the requirement that inside information should be specific or precise and relevant to particular securities or to an issuer of securities.

• The ESCA law 2000 did not define who is an insider. Although, Article 39(1) of the ESCA Law 2000 defines an insider as ‘any person’, the ESCA Law 2000 limited the scope of this Article by providing that ‘any person’ must obtain the inside information by virtue of his or her position. In this sense the ESCA Law 2000 did not include secondary insiders under this Article. The term ‘position’ has a special meaning in the UAE culture as referring to one who is usually on the top of the hierarchy in entities. In fact, it is a different meaning in Arabic than it is in English. This creates a loophole in the legislation which may reflect the impracticality of successful prosecution. The UAE regulator has not provided an adequate and comprehensive definition of ‘insider’. In contrast, the UK laws and DIFC Market law defined an insider clearly, as seen in Chapter Three. The UAE legislature should define who is an insider and include the category of those who have access to the inside information by virtue of their employment, profession or activities.

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855 Article 39 (1) of ESCA Law 2000 states that ‘It shall not be permitted for any person to deal in Securities on the basis of unpublicized or undisclosed information he acquired by virtue of his position’.
• The ESCA Law 2000 also did not criminalise three behaviours: ‘leaking of inside information’ to friends or others, ‘procuring’ or ‘encouraging’ another person to deal. Therefore, the ESCA Law 2000 suffers from an inadequacy by not criminalising these behaviours. *The legislation of ESCA law 2000 must be modified, because the penalty must be imposed upon both the person who is ‘procuring’ or ‘encouraging’ others to deal and who has been procured or encouraged by insiders, and also who leaks inside information and who has received it if s/he used the information.*

• The ESCA law 2000 must criminalise the action of using inside information without requiring that the person should benefit from his/her action. As soon as the action is executed a crime has occurred and it is against the rule of equality and fairness between the investors with regard to access to inside information. It is opposed to the UK legislation which has criminalised the action without requiring the benefit. *Accordingly, the UAE legislature should criminalise the use of inside information without requiring ‘personal benefit’.*

**Chapter Four** was focused on market manipulation regulation in the UAE. Market manipulation in the UAE law has been studied by comparing it with its counterpart laws in the UK and the DIFC. The chapter began with various definitions of market manipulation in order to comprehend its complexity. Many judicial authorities rely on different legal systems, which lead to different approaches towards essential concepts that are used to provide definitions of market manipulation and the types of sanctions imposed. The UK jurisprudence, for example, failed to provide a market manipulation definition but it focused on behaviours which may amount to market manipulation practices. The DIFC law provides a definition of market manipulation and prohibiting practices that constitute market manipulation, while ESCA law 2000 has a lack of
definition of such an offence and failed to wholly pay attention to its illegal practices. Obviously, the ESCA law 2000 has shortcomings in terms of prohibiting some practices related to market manipulation. These shortcomings can be provided in the following:

- The ESCA Law 2000 did not criminalise market manipulation such as matched order, wash trading and such practices that lead to misleading investors. It criminalises actions with fictitious transactions under Article 26(2) of ESCA Law 2000 only if it is committed by brokers. This has raised a flaw for making the criminal responsibility only against a broker whereas other market participants would be dealt with without punishment. *This deficiency should be remedied by criminalising any course of conduct that may constitute or create an artificial price through a false or misleading impression.*

- The UAE legislature also limits the scope of the Article 39(2) of ESCA law 2000 which just relates to the spreading of rumours. The limitation prohibits only rumours that relate to the purchase or the selling of shares. If the rumour is not about the purchase or selling of shares, it would not be prohibited. This creates another problem because the spreading rumour does not always have to be about selling or buying securities. It may instead, for example, relate to an economic crisis, company financial matters or political problem, which will certainly affect the market place and then negatively influence investors’ decisions. Another problem in regard to rumours is that the ESCA Law 2000 did not require that rumours may likely influence the market value of securities which is important as rumours can influence investors’ decisions. *Hence, the legislature should amend this Article by making a prohibition that any rumour would likely effect financial markets or investors’ decisions.*

- The ESCA law 2000 did not criminalise reckless action. So if a financial analyst fails to take proper care over the information or statement s/he provides, or s/he
does not know to what extent that information or statement is true, s/he is not liable under ESCA Law 2000, because the law requires the intention (i.e. dishonesty) to induce investors. If there is no intention, he or she will not be guilty. However, the UAE legislature should prohibit any persons who ‘induce another person to deal in investments by making or publishing a statement, promise or forecast if this person knows, or is reckless as to whether the statement is misleading, false or deceptive’. 856

- The SCA has issued some decisions that may cover some practices of market abuse or fill any gap left by ESCA law 2000. All of these decisions though are powerless in comparison with legal decisions and will not reach the level and severity of punishments as the legal prohibitions would. For example, Article 37/C of SCA Decision No. 3 of 2000 bans behaviour already prohibited by Article 39(2) of ESCA Law 2000. The reason for the SCA decision is not completely understandable. The repetition of the law’s provisions is not entirely reasonable, and it has led to confusion for investors in the market. Therefore, the SCA needs to reconsider and readapt these decisions so as to eliminate this repetition.

Chapter Five was an applied study in the UAE aimed at exploring the legal experts and investors’ opinions regarding ESCA law 2000 and the markets’ regulations as well as the markets operational problems. The researcher used the tool of social science research of quantitative and qualitative methods through the statistical results of the questionnaire and the analysis of interview findings. It revealed shortcomings that the ESCA law 2000 and the marketplace are suffering from. The shortcomings revealed by the applied study are as follows:

856 Article 41(1) (a) of The DIFC law No. 12 of 2004.
• The prices of shares often do not reflect the real situation of the activities of companies. It may indicate that something unusual is occurring such as a manipulative scheme or any illegal activities.

• Leaking of inside information from its original source to another party, which makes one question the operational effectiveness of a financial market.

• The ESCA law 2000 and regulation of financial markets have loopholes or gaps through which offenders of market abuse might escape. This supports the idea that there are deficiencies in the law and regulations.

• Financial advisers, brokers or investment analysts are proficient to provide recommendations or suggest investment strategies. However, participants believe that those people often issue misleading recommendations or suggested investment strategies.

• The market abuse behaviour interferes with the normal process of supply and demand in the local securities markets. This claim is supported by the majority of respondents who believe that market abuse behaviour ‘often’ interferes with the supply and demand of securities markets in the UAE.

• Spreading rumours in the markets often happens, which is the main way to manipulate the shares prices. The result showed that highly significant percentages of the respondents believed that rumours ‘always’ spread in the financial markets.

• Lack of disclosing explanatory information from the listed companies against any rumours.

• The SCA and the local financial markets rarely play their roles in preventing market abuse practices and there is a multiplicity and overlapping of jurisdiction between the SCA and local financial markets.
This study also raised some alternative solutions concerning criminal punishments and legal protection from market abuse practices. *It suggested establishing a specialist court in the financial market and the concept of reconciliation under the UAE criminal system in the securities markets. Both propositions have been seen by participants as useful and as the right means to combat existing market abuse and achieve protection of investors.*

*Regarding the punishments, it is suggested that to discourage market abuse in financial markets, the UAE legislature should permit the SCA to publish such statement of offenders’ names, together with his/her punishment and the kind of offence which s/he has committed in the media. Another suggestion for an alternative punishment is the so-called proportional fine.* The majority of the participants agreed to both propositions.

Finally, in light of what the thesis has discussed and presented, it has been shown that the regime of market abuse and other illegal conduct is entirely weak in the financial markets. There are some vague areas that the regime needs to remedy and reconsider and that the UAE legislation needs to reform. *The legislator should pay attention to preventive measures by criminalising all forms of market abuse. It needs to define these illegal practices rather than leave them as vague and in general terms. It needs to cover in detail elements of insider dealing and market manipulation. If this is achieved, reasonable protection for investors will be provided.* The majority of local investors in the financial markets of the UAE are unfamiliar with investing in the securities market. They involve themselves in the securities market without knowledge or understanding of the processes of investments. They just want to maximise their return regardless of how they gain. Investors need real knowledge of sophisticated financial instruments and understanding of electronic commerce. It is the responsibility of the SCA to spread awareness and knowledge amongst investors.
Appendices

Appendix 1: The questionnaire (English)

Questionnaire

Title: Investigation into Market Abuse in the UAE Financial Markets: A Comparative Legal Study (PhD Thesis).

Researcher: Hamad Saif Alshamisi

E-mail: ha222@exeter.ac.uk

Supervisor: Prof. Tim Niblock

University: University of Exeter, the United Kingdom.

Introduction:

The main aim of the current study is to investigate the market abuse practices in the UAE Financial Market. Initially, I would like to thank you for accepting to take part in this study. For research purpose, I would need your true and honest answers to this set of questions. This is an entirely voluntary study. You have the right to withdraw from the study at any time without giving any reasons. I would be grateful if you would answer this questionnaire fully. I will follow this up with some interviews. The questionnaire will be anonymous. All the information you provide will be confidential and for study purposes only.

Thanks very much in advance for your help and collaboration.

Note: ESCA= Emirates Securities and Commodities Authority
### Section (I): Legal Protection of investors in financial markets:

Please put a tick (√) in the box that best suits your opinion.

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<tr>
<th>No.</th>
<th>Statements</th>
<th>Strongly agree</th>
<th>Agree</th>
<th>Unsure</th>
<th>disagree</th>
<th>Strongly disagree</th>
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<tbody>
<tr>
<td>1</td>
<td>Specialising criminal court is useful for financial markets</td>
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<td>2</td>
<td>Market abuse practices exist in UAE financial market</td>
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<td>3</td>
<td>The legal responsibility should be based on negligence in case of committing any mislead the investor in the financial market.</td>
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<td>4</td>
<td>The ESCA law 2000 or regulations of financial market should define market abuse or at least provide an example of such practices.</td>
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<td>5</td>
<td>The ESCA law 2000 should state that a rumour may likely influence the value of the securities and investor decisions</td>
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<td>6</td>
<td>The ESCA law 2000 should criminalise any action which creates a false and misleading impression.</td>
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<td>7</td>
<td>The regulator should prohibit insider dealing acts regardless of requirements for personal benefits.</td>
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<td>8</td>
<td>For market abuse practices to be adequately investigated on the SCA, legal experts should be appointed, who possess high financial, economic and legal skills and knowledge.</td>
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<td>9</td>
<td>The definition of insider should be restricted to ‘natural persons’ as actors.</td>
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<td>10</td>
<td>Company insiders should be prevented from trading</td>
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until a reasonable dissemination period has passed.

11 Illegal practices were the main reason behind the summer crisis in 1998 which led to fake and misleading shares prices

Do you have any other views in relation to the legal protection of investors? If so, please write them below.

……………………………………………………………………………………………
……………………………………………………………………………………………
……………………………………………………………………………………………

Section (II): The operational problems in the UAE financial market
Please put a tick (√) in the box that best suits your opinion.

<table>
<thead>
<tr>
<th>No.</th>
<th>Statements</th>
<th>Always</th>
<th>Often</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The share prices of listed companies reflect their real situation.</td>
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<tr>
<td>2</td>
<td>There is leaking of inside information from its original source to other investors.</td>
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<td>3</td>
<td>There are loopholes or gaps in the ESCA law 2000 and regulation of financial market through which offenders of market abuse might escape.</td>
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<td>4</td>
<td>There are misleading recommendations or suggested investment strategies which are issued by financial advisers, brokers or investment analysts.</td>
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<tr>
<td>5</td>
<td>Shares prices are manipulated in the UAE financial markets.</td>
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<tr>
<td>6</td>
<td>The market abuse behaviour interferes with the normal process of supply and demand</td>
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</tbody>
</table>
in the local securities markets.

7 Rumours are spread in the financial markets in the UAE.

8 The available financial market legislations and rules are adequate to face such market abuse.

9 The SCA and local financial markets play their supervisory role to prevent market abuse practices.

10 A rumour is not usually about selling or buying securities, but it might refer to economic crisis or issuer’s activities which impact financial market negatively.

11 Listed companies always take action against a rumour which relates to their activities or securities by disclosing explanatory information.

12 There is a multiplicity and overlapping of jurisdiction between the SCA and local financial markets.

Section (III): Criminal punishments and another alternative solution instrument as a determent of market abuse activities

Please insert only one numbers from (1) to (5) opposite each of the following statements according to your agreement. Number (1) stands for the strongest agreement, Number (5) the weakest agreement.

<table>
<thead>
<tr>
<th>No.</th>
<th>statements</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>The criminal punishments in the ESCA law 2000 are not sufficient for deterring market abuse activities in the UAE financial market.</td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>To discourage market abuse from not taking place in financial market an offender name, his/her punishment and the kind of offence which he/she has committed</td>
<td></td>
</tr>
</tbody>
</table>
should be published in media

C The estimated fine imposed on the offender should not be less than the expected profits to be obtained or the loss to be avoided.

D Acknowledge the reconciliation scheme in the securities markets provided that it takes place prior to issuing a final decision in the case.

If you are willing to be interviewed, please write name, your e-mail address and mobile number below.
Name:…………………………………………………………
E-mail: ..........................................................................................
Mobile No:....................................................................................
I think it is appropriate now to think of establishing a specialized court for the financial markets... In addition, the legally responsible for the insider dealings should include any person and not necessarily the company employees. So, a new identification to the insider’s identity according to the laws and the legal regulations of financial markets in the country should be devised.
Appendix 9: open-ended question

Investors should be protected [by the SCA and financial markets] from manipulators in the financial market whether from brokers, financial advisors or executive managers.

<table>
<thead>
<tr>
<th>NO.</th>
<th>رقم</th>
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<tbody>
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<td>10</td>
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<thead>
<tr>
<th>الموضوع/اال주سوب</th>
<th>دلالة علت</th>
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<tbody>
<tr>
<td>أسعار الأسهم الشركات الخفيفة تعكس النشاط الشركات ووضعها الحقيقي</td>
<td>✔</td>
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<tr>
<td>هناك تدريب للمعلومات الداخلية من مصادرها الأصلية</td>
<td>✔</td>
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<tr>
<td>نص التشريع في قانون سوق المال لسنة 2000 واللوائح المنظمة من شأنها تطبيق مراقبة الممارسات الغير المشروعة من الأفراد من الملاحة التجارية والمنافسة</td>
<td>✔</td>
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<tr>
<td>هناك علاقة بين جرام المطلعين والملاعين في أسواق المال من حيث المكسب الذي يحققه على حساب الأطراف ومن حيث الأشخاص (مثل الوسطاء والمدارض التنفيذيين وغيرهم من المستثمرين المحترفين)</td>
<td>✔</td>
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<tr>
<td>المشاريع الخفيفة المشروعة كبيئة غير قانونية لا يمت بصفتها من قبل الهيئة أو أسواق المال</td>
<td>✔</td>
</tr>
<tr>
<td>يوجد توصيات وأقرانات صادرة أو إستعراض استمارة عبر صحة تشريع من الوسطاء أو المحالين والمستشارين المحترفين</td>
<td>✔</td>
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<tr>
<td>يوجد تدخل بأسعار الأسهم في أسواق المال العرض والطلب للأوراق المالية غير مستقر في أسواق المال المختلفة</td>
<td>✔</td>
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<tr>
<td>انتشار العقود في أسواق المال الالكتروني والتفويضية غير كافية في مواعيد الممارسات غير المشروعة في أسواق المال</td>
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</table>
Appendix 8: open-ended question.

The investors should be protected from the manipulators’ abuse in the financial market whether from brokers, financial advisors or executive managers.
There should be a severe punishment for disclosing inside information and then disclosing them promptly or after a short period of raising their shares.
Appendix 10: open-ended question.

Monitoring decision makers and their conversation on television as they mislead the investors. In addition, the decision makers are misleading more than anybody else.

<table>
<thead>
<tr>
<th>No.</th>
<th>رقم</th>
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<tbody>
<tr>
<td>1</td>
<td>اسم أمرهم الشركات المرابحة تعكس نشاط الشركتين ووضعها الحقيقي.</td>
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<tr>
<td>2</td>
<td>هناك تسرير للمعلومات الداخلية من مصادرها الأصلية</td>
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<tr>
<td>3</td>
<td>تنص التشريع في قانون سوق المال لسنة 2000 والوثائق المنظمة من شأنه تمكين مكتب الممارسات غير المدرجة من الأقاليم من الملاحظة الدائمة والنظرية</td>
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<tr>
<td>4</td>
<td>هناك علاقة بين جرائم المطلعين المتلقيين في أسواق المال من حيث الكسلاء التي تتحقق على حساب الآخرين ومن حيث الأشخاص (مثل الوسطاء والناشرو التلفزيون وغير هم من المستثمرين المحترفين)</td>
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<tr>
<td>5</td>
<td>الممارسات غير المدرجة كقائمة غير قانونية لا يتم ضبطها من قبل الهيئة أو أسواق المال</td>
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<tr>
<td>6</td>
<td>يوجد توقيعات وأقتراحات مشابهة أو استضافة استثمارية غير مسبقة من طرف أو محلين المتلقيين المتلقيين المحترفين والناشرو التلفزيونين المحترفين (الناشرو المتلقيين)</td>
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<td>7</td>
<td>يوجد تلاعب باسهم الأمرهم في أسواق المال</td>
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<td>8</td>
<td>الخروج والطلب للأوراق المالية غير مسجل في أسواق المال المحلية</td>
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<tr>
<td>9</td>
<td>انتشار الشائعات في أسواق المال</td>
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<tr>
<td>10</td>
<td>التشريعات والتوقعات المتوقعة غير كافية في مواجهة الممارسات غير المدرجة في أسواق المال</td>
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</tbody>
</table>
Appendix 5: open-ended question.

**enlightenment sessions for the investors should be given even on their own expenses to support his/her comprehensive understanding to the right way of investment in the stock market. In addition, warning the investors from risk taking and non-speculation so that we can build positive investment system. If not, we will be exposed to unbalanced stock market because of the speculations. Moreover, we should not protect the person who insists on speculations unconsciously even if he was tricked somehow.**

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**الimony**

- هناك تسريب المعلومات الداخلية من مصادرها الأصلية
- نقص الشريعة في قوانين سوق المال
- هناك علاقة بين جرام المطلعين والمتلاعبين في أسواق المال من حيث المبتكبة التي تحقق على حساب الأبرياء ومن حيث الأشخاص (مثل الوسطاء والمداراء التنظيم وغيرهم من المستثمرين)
- الممارسات غير المشروعة كشريعة غير قانونية لا يتم مساها من قبل الجهات أو أسواق المال
- يوجد توصيات وأقرارات مضللة أو أضرابات اشتدادية غير صحيحة مصدراً من الوسطاء أو المظلمين والاستشاريين الماليين
- يوجد تلاعب بأسعار الأسهم في أسواق المال
- العطش والطلب لأوراق المالية غير مستقر في أسواق المال المحلية
- إشارات المشتقات في أسواق المال
- الإشعاعات واللوحات النموذجية غير كافية في مواجهة الممارسات غير المشروعة في أسواق المال
The SCA should punish the administrations of companies that issues statements or news which negatively or positively influences the value of a share and then deny this news or information.
Appendix 3: open-ended question.

It should have experts specialised in the financial market who specialise in detecting manipulators...

<table>
<thead>
<tr>
<th>No.</th>
<th>رقم</th>
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<tbody>
<tr>
<td>1</td>
<td>اسماء الأسهم الشركات المدرجة تعكس انشطة الشركات ووضعها الحالى</td>
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<td>2</td>
<td>هناك تسبب للمعلومات الداخلية من المصدر الأصلي</td>
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<td>تنص التشريع في قانون سوق المال لسنة 2000 واللوائح المنظمة من شأنها تشكيل مرتبت الممارسات غير المشروعة من الأفراد من المحاكم الجائدة والمدنية</td>
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<tr>
<td>4</td>
<td>هناك علاقة بين جرائم المثلثين والمثلثين في سوق المال من حيث المحكمة التي تحقق على حساب الآخرين ومن حيث شخص (مثل الوسطاء والمدارس والنقابات وغيرها من المستثمرين المحترفين)</td>
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<tr>
<td>5</td>
<td>الممارسات غير المشروعة كالأنشطة الـ قانونية لا يتم مسحها من قبل الهيئة أو أسواق المال</td>
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<tr>
<td>6</td>
<td>وجود وصولات واقترادات مضللة أو استردادات استشراكية غير مسبوقة من أفراد السوق أو الممثليين والاستشاريين والمهنيين</td>
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<tr>
<td>7</td>
<td>وجود ناهض بتسهيل الأسهم في أسواق المال</td>
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<td>8</td>
<td>الاضطلاع والاطلاع المتسلقة غير المشروعة في أسواق المال المجانية غير مثبت في أسواق المال المجانية</td>
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<tr>
<td>9</td>
<td>التذكير والتذكير المتسلقة غير المشروعة في أسواق المال المجانية</td>
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<tr>
<td>10</td>
<td>التذكير والتذكير المتسلقة غير المشروعة في أسواق المال المجانية</td>
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</tbody>
</table>
CERTIFICATE OF ETHICAL APPROVAL

School/Academic Unit:
Institute of Arab and Islamic Studies, School of Humanities and Social Sciences,
University of Exeter

Title of Project:
A comparative legal study of market abuse: insider dealing and market manipulation
in the Financial Markets of the UAE

Name(s)/Title of Project Research Team Member(s):
Hamad Saif Alshamisi

Project Contact Point:
Email: ha222@exeter.ac.uk

Brief Description of Project:
This research will question (1) To what extent are the UAE jurisdictions (i.e. Federal
Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority and
Market (ESCA Law 2000) efficient for combating market abuse? (2) How has the
ESCA Law 2000 been appropriated to protect market integrity and the market
participants in market place?

This project has been approved for the period
From: March 2010
To: August 2010

School Ethics Committee approval reference: 23 02.10/vii

Signature: __________________________  Date: 23rd March 10
(Hannah Farrimond – Chair HUSS School Ethics Committee)
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