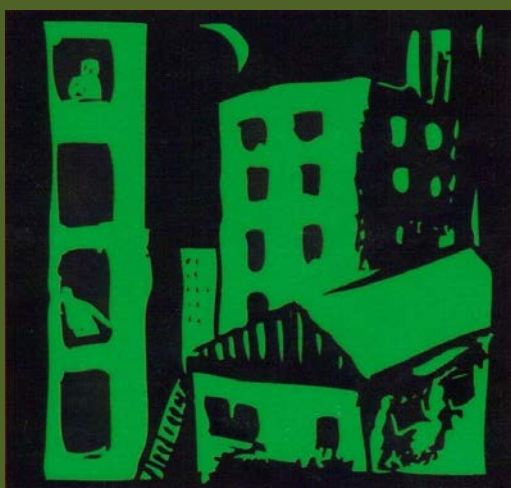


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**An overview
analysis of selected
challenges in the
enforcement of the
prohibition of
insider trading and
market
manipulation in the
European Union and
South African
regulatory
frameworks**

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1 INTRODUCTION

It is submitted that cross-border trading in securities has caused a great number of challenges for various national regulators, especially with regard to the

* This article was influenced in part by Chitimira H's doctoral thesis entitled *A comparative analysis of the enforcement of market abuse provisions* (unpublished LLD Thesis Nelson Mandela Metropolitan University 2012) at 258-304.

enforcement of market abuse laws.¹ For instance, cross-border trading in securities has exacerbated the commission of other related illicit trading practices, such as, high frequency trading, credit default swaps, short selling and front running, particularly during the 2008-2009 global financial crises.² Moreover, cross-border trading in securities has, to some extent, given rise to the inconsistent application and enforcement of the market abuse³ prohibition in South Africa⁴ and other European Union (EU) Member States.⁵ Accordingly, the need for strong co-operation and co-ordination between such regulators is still crucial and inevitable for the purposes of combatting market abuse in the EU⁶ and other jurisdictions, such as, South Africa. It is

¹ Rider B, Alexander K, Linklater L & Bazley S *Market abuse and insider dealing* (Haywards Heath: Tottel Publishing 2009) at 263; see further Ferran E “After the crisis: The regulation of hedge funds and private equity in the EU” (2011) 12 *European Business Organization Law Review* 379; Ferran E “The European single supervisory mechanism” (2013) 13 *Journal of Corporate Law Studies* 255; Ferran E “New regulation of remuneration in the financial sector in the EU” (2012) 9 *European Company and Financial Law Review* 1-34; Ferran E “Cross-border offers of securities in the EU: The Standard Life flotation” (2007) *European Company and Financial Law Review* 461; Hall M “The sub-prime crisis, the credit crunch and bank ‘failure’: An assessment of the UK authorities’ response” (2009) 17(4) *Journal of Financial Regulation and Compliance* 427 & Ferran E “Regulatory lessons from the payment protection insurance mis-selling scandal in the UK” (2012) 13 *European Business Organization Law Review* 247.

² Chitimira H “The inherent challenges in the South African anti-market abuse enforcement framework in relation to selected market abuse practices that occurred during the global financial crisis” (2014) 5(8) *Mediterranean Journal of Social Sciences* 60; Garcia G “Ignoring the lessons for effective prudential supervision, failed bank resolution and depositor protection” (2009) 17(3) *Journal of Financial Regulation and Compliance* 186; Carmassi J, Gros D & Micossi S “The global financial crisis: Causes and cures” (2009) 47(5) *Journal of Common Market Studies* 977 & Goddard J, Molyneux P & Wilson JOS “The financial crisis in Europe: Evolution, policy responses and lessons for the future” (2009) 17(4) *Journal of Financial Regulation and Compliance* 362.

³ This term refers to both insider trading and market manipulation activities in this article; also see further Chitimira H “Overview of the market abuse regulation under the Financial Markets Act 19 of 2012” (2014) *Obiter* 254.

⁴ See the relevant market abuse enforcement statistics of the Financial Services Board (2014). Available at <https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx> (accessed 28 April 2015), which reveal that during 2006 to 2015 only a minimal number of cases involving insider trading and market manipulation were timeously and successfully investigated, settled and/or prosecuted by either the FSB or the relevant courts. Also see further the FSB *Annual Report* (2011) at 99-101 and the FSB *Annual Report* (2013) at 128-130 which, *inter alia*, show the new, ongoing and completed investigations of market abuse cases between 2011 and 2013, respectively and Directorate of Market Abuse “Report by the Directorate of Market Abuse” *FSB Press Release* 2 December 2014, which indicates that about 19 cases of market abuse were investigated by the DMA between March 2007 and September 2014. Nonetheless, only one case out of the 19 cases of market abuse was successfully investigated and completed while the rest of the cases are still ongoing.

⁵ Rider, Alexander, Linklater & Bazley (2009) at 263-266 and Goddard, Molyneux & Wilson (2009) at 362-380 and Burn L “On keeping donkeys in stables: Does the market need better governance and control rather than more regulation?” (2009) 4(1) *Capital Markets Law Journal* 554.

⁶ Rider, Alexander, Linklater & Bazley (2009) at 263-266; Walker G “Liquidity risk management – policy conflict and correction” (2009) 4(4) *Capital Markets Law Journal* 451; Greene E, McIlwain K & Scott J “A closer look at ‘too big to fail’: National and international approaches to addressing the risks of large, interconnected financial institutions” (2010) 5(2) *Capital Markets Law Journal* 117; Greene E “Looking past consensus to implementation: A growing international consensus on the need for capital markets regulatory reform masks tough questions about implementing such reforms” (2009) 4(1) *Capital Markets Law Journal* 531; Staikouras P “Four years of MADness? The new market abuse prohibition revised: Integrated implementation through the lens of a critical, comparative analysis” (2008) 19(4) *European Business Law Review* 775 and Haynes A “Market abuse: An analysis of its nature and regulation” (2007) *Company Lawyer* 323.

against this background that some selected national regulators and/or role players in the enforcement of the market abuse prohibition in South Africa, such as, the Financial Services Board (FSB), the Directorate of Market Abuse (DMA) and the Enforcement Committee as well as the EU's Committee, of the Wise Men, the Forum of European Securities Commissions (FESCO), the Committee of European Securities Commissions Regulators (CESR), the European Securities and Markets Authority (ESMA), the Lamfalussy Process and the EU's Action Plan for Financial Services, will be discussed. This is mainly done to isolate and expose the challenges and/or flaws in the enforcement of market abuse laws in both the EU⁷ and South Africa⁸ in order to

⁷ See the relevant provisions of the Directive of the European Parliament and Council of 28 January 2003 on insider dealing and market manipulation (market abuse) 2003/6/EC [2003] OJ L96/16 (EU Market Abuse Directive). See further Rider, Alexander, Linklater & Bazley (2009) at 72-73; Avgouleas E *The mechanics and regulation of market abuse: A legal and economic analysis* (Oxford: University Press 2005) at 307; Russen J *Financial services authorisation, supervision and enforcement: A litigator's guide* (New York: Oxford University Press 2006) at 206; Hazen TL "Defining illegal insider trading - Lessons from the European community directive on insider trading" (1992) *Law and Contemporary Problems* 231 at 236 & Warren III MG "The regulation of insider trading in the European community" (1991) *Washington and Lee Law Review* 1037. Notably, the EU Market Abuse Directive will be repealed in accordance with the relevant provisions of the new Market Abuse Directive Regulation Proposal and the Criminal Sanctions Market Abuse Directive Proposal. In this regard, see the Regulation of the European Parliament and of the Council of 16 April 2014 on market abuse EU/596/2014 [2014] OJ L173/1 (new EU Market Abuse Directive), repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. See arts 1 to 39 of the new EU Market Abuse Directive. Also see the Directive of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse 2014/57/EU [2014] OJ L173/179 (new Criminal Sanctions Market Abuse Directive). See arts 1 to 10 of the new Criminal Sanctions Market Abuse Directive.

⁸ See ss 78; 80; 81 & 82 of the Financial Markets Act 19 of 2012, (Financial Markets Act). Also see related discussions on the regulation and enforcement of the market abuse provisions in South Africa by Van Zyl FH & Joubert K "The European Union directive on insider trading: A model for South Africa?" (1994) *SA Merc LJ* 291; Beuthin RC & Luiz SM *Beuthin's basic company law* (Durban: Butterworths 2000) at 235; Botha D "Control of insider trading in South Africa: A comparative analysis" (1991) *SA Merc LJ* 1; Botha D "Increased maximum fine for insider trading: A realistic and effective deterrent?" (1990) *SALJ* 504; Cassim R "An analysis of market manipulation under the Securities Services Act 36 of 2004 (Part 1)" (2008) *SA Merc LJ* 33; Cassim R "An analysis of market manipulation under the Securities Services Act 36 of 2004 (Part 2)" (2008) *SA Merc LJ* 177; Chitimira H & Lawack VA "Overview of the role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa" (2013) *Obiter* 200; Chitimira H & Lawack VA "An analysis of the general enforcement approaches to combat market abuse (part 1)" (2012) *Obiter* 548-565; Chitimira H "Overview of problems associated with ineffective enforcement of market abuse provisions in South Africa" (2014) *Mediterranean Journal of Social Sciences* 47; Chitimira H "Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa" (2014) *Speculum Juris* 108; Chitimira H "A historical overview of the regulation of market abuse in South Africa" (2014) *PER Journal* 937; Chitimira H *The regulation of insider trading in South Africa: A roadmap for an effective, competitive and adequate regulatory statutory framework* (unpublished LLM-dissertation University of Fort Hare 2008) at 104-163; Chitimira (2012) at 258-304; the DMA "DMA lists companies under investigation" (2014) *FSB Bulletin* 4; Henning JJ & Du Toit S "The regulation of false trading, market manipulation and insider trading" (2000) *JJS* 155; Henning JJ & Du Toit S "High-pressure selling of securities: From rigging the market to false trading, market manipulation and insider dealing" (2000) *The Company Lawyer* 29; Jooste R "A critique of the insider trading provisions of the 2004 Securities Services Act" (2006) *SALJ* 437; Luiz SM "Insider trading regulation - If at first you don't succeed..." (1999) *SA Merc LJ* 136; Luiz SM "Market abuse II-Prohibited trading practices and enforcement" (2002) *Juta's Business Law* 180; Luiz SM "Market abuse and the enforcement committee" (2011) *SA Merc LJ* 151; Osode PC "The new South African Insider Trading Act: Sound law reform or legislative overkill?" (2000) *Journal of African Law* 239 and Van Deventer G "New watchdog for insider trading" (1999) *FSB Bulletin* 2.

recommend, where applicable, possible anti-market abuse measures that could be employed to enhance the curbing of market abuse activities in their respective jurisdictions. Thereafter, some concluding remarks will be provided.

2 OVERVIEW OF THE ROLE-PLAYERS IN THE IMPLEMENTATION OF THE EU MARKET ABUSE DIRECTIVE

A general analysis⁹ of the implementation of the EU Market Abuse Directive by the selected role players in the EU will be undertaken in this part of the article. This will be done by, *inter alia*, discussing the approaches employed by such role players to enforce and implement the provisions of the EU Market Abuse Directive. Thereafter, a brief comparative analysis of the role players in the EU and South Africa will be undertaken.

2.1 The role of the FESCO

The FESCO was introduced in December 1997 as an independent organisation which oversees the public supervisory authorities (regulatory bodies) in the EU Member States.¹⁰ The FESCO was among the first proponents of a common administrative regime on market abuse across the EU capital markets.¹¹ However, the FESCO was replaced by the CESR.¹² Consequently, the role of the FESCO will not be discussed in much detail here, as there will be a greater focus on the role of its successor, the CESR, which will be analysed below.

2.2 The role of the CESR

Unlike its predecessor, the CESR was formed in June 2001 by the European Commission (EC) as an independent committee which polices the enforcement of the EU Market Abuse Directive's market abuse provisions by the relevant securities regulators in the EU Member States.¹³ Moreover, the CESR is one of the committees which were incorporated in the final report of the Committee of the Wise Men on the regulation of the EU securities markets.¹⁴

⁹ Notably, this analysis is not limited to the role players in any particular EU Member State.

¹⁰ See the FESCO "Forum of European securities commissions, market abuse: FESCO's response to call for views from the securities regulators under the EU's Action Plan for financial services com (1999) 232" (1999) 2. Available at <http://www.europesefesco.org/documents/recentpub/99-0961.pdf> (accessed 20 February 2014); Hansen JL "The new proposal for a European Union directive on market abuse" (2002) *University of Pennsylvania Journal of International Economic Law* 241 at 243. Also generally see Haynes (2007) at 323-335.

¹¹ Hansen (2002) at 243; also generally see Haynes (2007) at 323-335.

¹² FESCO (1999) at 2-17; also generally see Haynes (2007) at 323-335.

¹³ See the EC's decision of 6 June 2001/527/EC which was repealed and replaced by the Commission's decision of 23 January 2009 (2009/77/EC).

¹⁴ This Committee was chaired by Baron Alexandre Lamfalussy and its final report was adopted by the Heads of State at the European Council (Stockholm) Conference on 23 March 2001 and the European Parliament (European Parliament Resolution of 5 February 2002); also see the CESR "The committee of European Securities Regulators" (2011). Available at <http://www.cesr-eu.org/index.php?page=cesrinshort> (accessed 09 February 2014).

The functions of the CESR are outlined in its Charter, and they include, among others, to improve co-ordination between different securities regulators in the Member States. This further involves developing effective operational network mechanisms to improve the day-to-day consistent supervision and enforcement of the single market for financial services in the Member States. In relation to this, it should be pointed out that the CESR has been instrumental in the signing by all Member States of a Multilateral Memorandum of Understanding regarding, *inter alia*, the sharing of relevant information and co-operation between the regulatory authorities in order to combat cross-border market abuse activities.¹⁵

In addition, the CESR acts as an advisory group that assists the EUC, including advising the Commission on its preparatory draft implementing measures for the EU framework directives relating to securities. This has, in a way, enhanced the integration and harmonisation of the EU securities markets and the promotion of flexible adjustment of the relevant laws in the Member States to conform to the requirements of the EU Market Abuse Directive.¹⁶

The CESR also runs some operational groups and special expert groups which carry out certain mandates on behalf of the EC. Specifically, such operational groups include the Committee of European Securities Commissions Regulators Enforcement Sub-committee on Political Relations (CESR-Pol) which promotes co-operation between the supervisory authorities of the EU Member States. The CESR-Pol is staffed by specialists who ensure that securities regulators exchange relevant confidential information. On the other hand, the Committee of European Securities Commissions Regulators Financial Information and Reporting (CESR-Fin) provides guidance on the harmonised supervision of accounting standards in the EU and the Review Panel promotes the effective implementation of the requirements of the CESR in the Member States.¹⁷

In a nutshell, the CESR has to date played a key role in the formulation of a number of harmonised approaches for the EU securities regulators in order for them to implement the relevant securities legislation and in the promotion of a common

¹⁵ The policing of the implementation of legislation consistent with the EU Market Abuse Directive is usually carried by the Review Panel chaired by the CESR vice-chairman, the Committee of European Securities Commissions Regulators Enforcement Sub-committee on Political Relations (CESR-Pol) and the Committee of European Securities Commissions Regulators Financial Information and Reporting (CESR-Fin). The chair and vice-chair of the CESR are elected from the Member States for a period of two years.

¹⁶ The CESR implements the so-called Level 2 measures which deal with some of the technical requirements necessary to achieve the objectives of the EU Market Abuse Directive and other related securities legislation as well as the Level 3 measures which are aimed at ensuring the common and uniform enforcement of the requirements of the EU Market Abuse Directive in the Member States. See CESR's *Advice on level 2 implementing measures for the proposed market abuse directive*, CESR/02-089d (2002) 34; also see Avgouleas (2005) at 264-265; Rider, Alexander, Linklater & Bazley (2009) at 83-84.

¹⁷ See CESR "Public statement of consultation practices" Ref. CESR/01-007c, (2001); CESR *Report on accepted market practices and common approach for reporting suspicious transactions*, CESR/04-505b (2004); also see http://www.ec.europa.eu/internal_market/securities/transposition/index_en.htm (accessed 21 February 2014) and the European securities markets expert group's *Report on Market Abuse EU legal framework and its implementation by member states: A first evaluation*, Brussels 06 July 2007 at 2-3.

interpretation and application of the provisions of the EU Market Abuse Directive in all Member States.¹⁸ For example, the CESR has successfully enumerated a number of administrative sanctions and measures applicable to all the Member States.¹⁹ The CESR has, on a number of occasions, invited competent regulatory bodies from the Member States and other relevant stakeholders (academics and market participants) to share their experience and views regarding the practical implementation of the EU Market Abuse Directive.²⁰ This enabled the role of the European Securities Committee (ESC) to be reviewed and eventually replaced by the ESMA which now oversees the regulation and enforcement of the market abuse prohibition by the EU Member States.²¹ In addition, on 2 November 2006 the CESR published a comprehensive Level 3 consultation document addressing various concerns regarding the definition of inside information, client orders constituting inside information, and the recording of insider lists.²²

2.3 The role of the EU's Action Plan for Financial Services

The EU's Action Plan for Financial Services was perhaps one of the most ambitious programmes of legislative activity. It was aimed at formulating a common securities capital market in Europe.²³ In addition, the EU's Action Plan for Financial Services was formally proposed by the EUC in 1998.²⁴

¹⁸ Rider, Alexander, Linklater & Bazley (2009) at 266; Swan EJ *Market abuse regulation* (New York: Oxford University Press 2006) at 111-112; CESR Report "CESR members' powers and level 3 guidelines and information on common operation of the MAD to the market", available at <http://www.cesr.eu/index.php?docid=4853> (accessed 24 February 2014) & CESR Report "Market abuse additional level 2 implementing measures (CESR consultation document)" 03 102b. Available at <http://www.cesr.eu/index.php?docid=4853> (accessed 27 February 2014).

¹⁹ See http://www.cesr.eu/index.php?page=document_details&id=4852 (accessed 24 February 2014). See further Walker (2009) at 451-461 & Haynes (2007) at 323-335.

²⁰ For example, in February 2008, Member States were invited to a conference in order for them to respond to various concerns regarding the operation of the EU Market Abuse Directive; also see http://www.ec.europa.eu/internal_market/securities/docs/esme/mad_070706_en.pdf (accessed 24 February 2014), for further information regarding the role of the CESR.

²¹ See similar remarks in part 2.4 below; also see Fischer-Appelt D "The European securities and market authority: The beginnings of a powerful European securities authority?" (2011) *Law and Financial Markets Review* 21.

²² See CESR *Level 3 Consultation document* CESR/06-562 (2006).

²³ Blair MQC & Walker GA (eds) *Financial services law* (Oxford: Oxford University Press 2006) at 760-761: the EUC realised even 40 years after the Treaty of Rome that the legislation dealing with capital markets remained very different in all the Member States. Also see generally Ferrarini GA "The European market abuse directive" (2004) *Common Market Law Review* 711 at 737-741; Ferrarini GA "Best execution and competition between trading venues - MiFID's likely impact" (2007) *Capital Markets Law Journal* 404; Ferrarini G & Chiodini F "Regulating cross-border banks in Europe: A comment on the de Larosière report and a modest proposal" (2009) *Capital Markets Law Journal* 123.

²⁴ See the EU Commission Communication, *Financial services: building a framework for action*, COM (1998) 625; Maloney N "New frontiers in EC capital markets law: From market construction to market regulation" (2003) *CMLR* 809 at 811-813 & Avgouleas E "The harmonization of rules of conduct in EU financial markets: Economic analysis, subsidiarity and investor protection" (2000) *ELJ* 72 at 77-78 & 80-81.

It is submitted that the EU's Action Plan for Financial Services recommended the adoption of the EU Market Abuse Directive²⁵ due, *inter alia*, to the fact that:

- (a) a larger part of the financial services activity in the EU has been effected in different jurisdictions (on a cross-border basis); and
- (b) that some investors have taken advantage of opportunities offered by the Internet to trade in the financial instruments directly or through an intermediary regulated market (including Alternative Trading Systems (ATS)) based in other Member States to engage in cross-border market abuse practices.

The EU's Action Plan for Financial Services further recommended the integration of the EU financial markets, the combatting of cross-border market abuse activities and the repeal of the Investment Services Directive of 1996.²⁶ Substantial amendments were, therefore, introduced by the EU Market Abuse Directive, especially in relation to:

- (a) the regulation of listed securities;
- (b) dissemination of investment recommendations;
- (c) disclosure of documents regarding public offers;
- (d) prohibition of market manipulation;
- (e) prohibition of insider trading;
- (f) the measures for ATS;
- (g) the required conduct for periodic and continuous disclosures by the issuers of listed securities; and
- (h) the required conduct for stabilisations of new issues and share buy-backs.²⁷

2.4 The role of the Lamfalussy Process and the Committee of the Wise Men

In order to fully implement the EU's Action Plan for Financial Services, the Committee of the Wise Men²⁸ recommended the establishment of the ESC and the CESR²⁹ which have regulatory and advisory functions, respectively. The ESC was later replaced by the ESMA.³⁰ In line with this, the ESMA was given a more central enforcement role in June

²⁵ Avgouleas (2005) at 245-246 and 250-251; see further Abrams C "The Investment Services Directive - Who should be the principal regulator of cross-border services?" (1995) *European Financial Services Law* 317 and Abrams C "The Second Banking Directive and the Investment Services Directive: When and how can the single European passport be used for cross-border services?" (1997) *European Financial Services Law* 248.

²⁶ Blair & Walker (2006) at 760-761; Avgouleas (2005) at 245-246 and 250-251.

²⁷ Avgouleas E "A critical evaluation of the new EC financial market regulation: Peaks, troughs and the road ahead" (2004-2005) *The Transnational Lawyer* 179 at 184-185.

²⁸ See earlier related remarks in part 2.2 above; this Committee was chaired by Baron Alexandre Lamfalussy.

²⁹ These committees were introduced in June 2001.

³⁰ Verhelst S "Addressing the financial crisis: The EU's incomplete regulatory response" (2010) Egmont Institute for International Relations Paper 39 at 5-6; 27. Available at <http://www.egmontinstitute.be/ep39.pdf> (accessed 08 July 2014); Paulo S "Europe and the global financial crisis: Taking stock of the EU's policy response. Explained in 10 sheets" (April 2011, Fondation

2010 to supervise credit rating agencies across Europe. This allows the ESMA to obtain information from issuers of structured financial instruments about their credit rating agencies' transactions in order to prevent possible market abuse practices by discouraging the non-disclosure of unrequested ratings and temporarily prohibiting or suspending the issuing of credit ratings by a specific credit rating agency offender.³¹ Furthermore, the Committee of the Wise Men proposed the adoption of the so-called Lamfalussy Process in an attempt to fast-track the enactment and implementation of the legislation that deals with securities and market abuse regulation in the EU³² in order to comply with the EU's Action Plan for Financial Services.³³ Consequently, a four-level regulatory approach was introduced under the Lamfalussy Process, namely:

- (a) Level 1 which consists of the framework measures and objectives that the securities legislation of the Member States must achieve;³⁴
- (b) Level 2 which contains some technical requirements and implementing measures necessary to attain the objectives enumerated in Level 1;³⁵
- (c) Level 3 contains measures, guidelines and standards agreed by regulators as stipulated in the requirements of the CESR. In addition, such measures are intended to enhance co-operation and common interpretation of the accepted market practices as well as the format for reporting suspicious transactions by regulatory authorities in Member States;³⁶ and

Robert Schuman) at 14-15. Available at <http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf> (accessed 04 July 2014); Garcia (2009) at 186-209; Carmassi, Gros & Micossi" (2009) at 977-996 and Goddard, Molyneux & Wilson" (2009) at 362-380.

³¹ See related remarks by Chitimira (2012) at 101-187.

³² Avgouleas (2004-2005) at 185-186; the Committee of the Wise Men *Final report on the regulation of European securities markets*, Brussels, 15 February 2001. Available at http://www.europa.eu/int/comm/internal_market/en/finances/general/lamfalussyen.pdf (accessed 24 February 2014) and also see Avgouleas (2005) at 246-248.

³³ See part 2.3 above.

³⁴ Such measures include enacting and enforcing the provisions of the EU Market Abuse Directive.

³⁵ The examples of such implementing measures include Commission Directive 2003/124/EC of 22 December 2003 on the definition and public disclosure of inside information and the definition of market manipulation [2003] OJ L339/70 (Directive on the Public Disclosure of Inside Information); Commission Regulation (EC) of 22 December 2003 implementing the EU Market Abuse Directive as regards the exemptions for buy-back programmes and stabilisation of financial instruments [2003] OJ L336/33 (Regulation on Share Buy-backs and Stabilisations); Commission Directive 2003/125/EC of 22 December 2003 on the fair presentation of investment recommendations and the disclosure of conflicts of interest [2003] OJ L339/073 (Directive on Fair Presentation and Disclosure) and Commission Directive 2004/72/EC of 29 April 2004 on accepted market practices; definition of inside information in relation to derivatives on commodities; the drawing up of lists of insiders and the notification of managers' transactions and suspicious transactions [2004] OJ L162/70 (Accepted Market Practices Directive)

³⁶ CESR *Report on accepted market practices and common approach for reporting suspicious transactions*, CESR/04-505b (2004); related remarks in part 2.2 above & also see further http://www.ec.europa.eu/internal_market/securities/transposition/index_en.htm (accessed 21 February 2014) and Franx JP "Disclosure practices under the EU prospectus directive and the role of CESR" (2007) *Capital Markets Law Journal* 295.

- (d) Level 4 deals with the actual consistent enforcement and implementation of the enacted securities and market abuse legislation of the Member States.³⁷

The Lamfalussy Process has so far been utilised to draft the provisions of the EU Market Abuse Directive, the Markets in Financial Instruments Directive,³⁸ the Transparency Directive³⁹ and the Public Offers and Prospectus Admissions Directive.⁴⁰

2.5 Synoptical comparative evaluation and analysis of the role of regulators and other role players

Like the initial position in the EU where the market abuse regulatory authority was vested in the FESCO,⁴¹ such regulatory functions were a joint responsibility of the Registrar of Companies, the Department of Justice (DOJ)⁴² and the Securities Regulation Panel (SRP)⁴³ prior to 1998 in South Africa.⁴⁴ Moreover, like the CESR,⁴⁵ the FSB⁴⁶ replaced all the previous regulatory authorities and it bears the main responsibility to oversee the enforcement of market abuse provisions in South Africa.⁴⁷

Additionally, as is the position under the EU,⁴⁸ the FSB has its own established committees, namely, the DMA⁴⁹ which is an investigatory arm of the FSB, and the

³⁷ Avgouleas (2004-2005) at 185-186; Blair & Walker (2006) at 760-763 and generally see Avgouleas (2005) at 245-251.

³⁸ Directive 2004/39/EC of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC & Directive 2000/12/EC repealing Council Directive 93/22/EEC, [2004] OJ L145/1 (MiFID or Markets in Financial Instruments Directive).

³⁹ Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, [2004] OJ L390/38 (Transparency Directive). See further Fischer-Appelt D "Implementation of the Transparency Directive - Room for variations across the EEA" (2007) *Capital Markets Law Journal* 133.

⁴⁰ Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L345/64 (Public Offers and Prospectus Admissions Directive). See further Fischer-Appelt D "Prospectus Directive amendments - Discussion of key changes" (2010) *Law and Financial Markets Review* 490.

⁴¹ See related remarks in part 2.1 above.

⁴² The previous enforcement and other prosecutorial related functions of the DOJ are now directly vested in the Director of Public Prosecutions (DPP), see s 84(10) of the Financial Markets Act; also see similar remarks by Chitimira & Lawack (2013) at 200-217 and Chitimira "Overview of selected role-players" (2014) at 109-124, for further related remarks.

⁴³ Notably, the functions of the SRP have now been transferred to the Takeover Regulation Panel (TRP); see Chitimira "Overview of selected role-players" (2014) at 109-114, for further related remarks.

⁴⁴ See related remarks by Chitimira "A historical overview" (2014) at 937-965.

⁴⁵ See part 2.2 above, for further related remarks.

⁴⁶ Notably, the initial functions of the FSB were outlined in s 11 of the now repealed Insider Trading Act 135 of 1998 Insider Trading Act.

⁴⁷ See s 84 of the Financial Markets Act; also see similar remarks by Chitimira & Lawack (2013) at 200-217; Chitimira "Overview of selected role-players" (2014) at 109-124.

⁴⁸ See parts 2.1; 2.2; 2.3 and 2.4 above.

⁴⁹ The DMA was initially established as the Insider Trading Directorate (ITD) in terms of s 12 of the Insider Trading Act and its main mandate was limited to investigating insider trading violations in South Africa. See related discussions by Chitimira & Lawack (2013) at 200-217; Chitimira (2014) at 109-124; Chitimira "A historical overview" (2014) at 937-965; Chitimira (2008) at 104-163; Chitimira (2012) at 258-304; DMA (2014) at 4-36; Henning & Du Toit "The regulation of false trading" (2000) at 155-165;

Enforcement Committee⁵⁰ which polices the enforcement of the market abuse administrative sanctions on a referral basis.⁵¹ In this regard, it is important to note that the DMA usually investigates market abuse cases after receiving tip-offs from the Johannesburg Stock Exchange Limited (JSE)'s Market Practices Department and the Surveillance Division which are mainly responsible for detecting market abuse activities in the South African financial markets and listed companies.⁵² Put differently, the relevant courts, the JSE, the Appeal Board, the FSB, the DMA and the Enforcement Committee all have inter-related and distinct functions with regard to the enforcement of the market abuse prohibition in South Africa.⁵³ For instance, as indicated above, the FSB depends on the DMA to investigate market abuse practices and on the JSE's Market Practices Department and the Surveillance Division to detect the occurrence of such practices in the South African financial markets.⁵⁴ Similarly, the FSB relies on the Appeal Board to hear appeal cases of market abuse. The FSB also depends on the Enforcement Committee to impose unlimited administrative sanctions on market abuse offenders in South Africa.⁵⁵ However, despite the fact that the FSB oversees the enforcement of the market abuse prohibition, it may only prosecute criminal cases of market abuse in a competent court if the Director of Public Prosecutions declines or neglects to prosecute them.⁵⁶ Moreover, as earlier stated,⁵⁷ the FSB and other relevant enforcement authorities have struggled, to some extent, to consistently enforce the market abuse prohibition in South Africa and elsewhere (combatting cross-border market abuse cases).⁵⁸

Henning & Du Toit "High-pressure selling of securities" (2000) at 29-36; Jooste (2006) at 437-460; Luiz (1999) at 136-151; Luiz (2002) at 180-183; Luiz (2011) at 151-172; Osode (2000) at 239-263; and Van Deventer (1999) at 2-3. Also see s 85 of the Financial Markets Act for an outline of the current functions of the DMA.

⁵⁰ The functions of the Enforcement Committee were initially outlined in the now repealed ss 97 to 104 of the Securities Services Act 36 of 2004 (Securities Services Act)

⁵¹ See s 99 of the Financial Markets Act read with ss 6A to 6I of the Financial Institutions (Protection of Funds) Act 28 of 2001 as amended (Protection of Funds Act) which, *inter alia*, currently deals with the enforcement of the administrative sanctions for market abuse in South Africa. Also see related analysis by Luiz (2011) at 151-172; Chitimira & Lawack (2013) at 200-217; and Chitimira "A historical overview" (2014) at 937-965.

⁵² See generally the FSB *Annual Report* (2011) at 99-101; the FSB *Annual Report* (2013) at 128-130; the FSB *Integrated Annual Report* (2014) at 9-50; Chitimira & Lawack (2013) 200-217 and Luiz (2011) at 151-172, for further related analysis of the role and anti-market abuse enforcement efforts of the FSB.

⁵³ See Chitimira "Overview of selected role-players" (2014) at 109-124; Chitimira & Lawack (2013) at 200-217 & Luiz (2011) at 151-172, for further related comments.

⁵⁴ See Chitimira "Overview of selected role-players" (2014) at 109-124; Chitimira & Lawack (2013) at 200-217 and Luiz (2011) at 151-172, for further related comments.

⁵⁵ See Chitimira "Overview of selected role-players" (2014) at 109-124; Chitimira & Lawack (2013) at 200-217 and Luiz (2011) at 151-172, for further related comments

⁵⁶ S 84(10) of the Financial Markets Act.

⁵⁷ See related comments in part 1 above.

⁵⁸ For instance, about 19 cases of insider trading were investigated by the DMA between November 2004 and April 2007. Three of these cases were either abandoned or closed and the remaining 16 are still pending. See DMA "Directorate of Market Abuse Report" *Media Release*, available at <http://www.fsb.co.za> (accessed 13 June 2008); FSB *Integrated Annual Report* (2014) at 9-50 which outlines some of the roles and relevant activities of the DMA, the FSB and the Enforcement Committee; the FSB enforcement statistics (2014), which indicate that during the period between 2006 and 2015, very few cases involving

Notwithstanding the few flaws stated above, the FSB has to date fairly managed to perform its duties in relation to the enforcement of the market abuse prohibition,⁵⁹ which include, *inter alia*, investigating market abuse violations;⁶⁰ making market abuse rules;⁶¹ interrogating any persons accused of violating the market abuse provisions;⁶² and instituting administrative and other appropriate proceedings against any persons who commit market abuse offences.⁶³

However, unlike the Committee of the Wise Men's committees, namely the CESR, and the ESMA (including the repealed ESC),⁶⁴ the FSB (including its committees, the DMA and the Enforcement Committee) has no authority to oversee the enforcement of securities and market abuse laws by similar regulatory bodies across the African Union Member States.⁶⁵ This is influenced, in part, by the fact that there is no legislation similar to the EU Market Abuse Directive⁶⁶ which has been specifically enacted to harmonise the enforcement of the securities and market abuse laws in Africa.⁶⁷ Accordingly, the FSB's powers are primarily limited to the implementation and enforcement of the market abuse provisions in South Africa.⁶⁸ Nonetheless, in relation

insider trading and market manipulation were timeously and successfully investigated, settled and/or prosecuted by either the FSB or the relevant courts. Also see further FSB *Annual Report* (2011) at 99-101 and FSB *Annual Report* (2013) at 128-130 which shows that relatively few market abuse cases were successfully investigated, settled and/or prosecuted in South Africa between 2011 and 2013, respectively; and the DMA Report (2014), which indicates that only one out of the 19 reported cases of market abuse was successfully investigated and completed by the DMA between March 2007 and September 2014.

⁵⁹ See further related analysis by Chitimira & Lawack (2013) at 200-217; and Chitimira "Overview of selected role-players" (2014) at 109-124.

⁶⁰ Ss 84(2)(a) & (b) read with ss 84 (3) and (4) of the Financial Markets Act; also see DMA Report (2014) at 4-36.

⁶¹ S 84(2)(f) of the Financial Markets Act.

⁶² S 84(3) read with s 84 (4) of the Financial Markets Act.

⁶³ S 84(2)(c) and (d) read with s 82 of the Financial Markets Act.

⁶⁴ See parts 2.2; 2.4; and 2.3 above.

⁶⁵ See s 84 read with ss 82; 85 & 99 of the Financial Markets Act and ss 6A to 6I of the Protection of Funds Act. Also see related analysis by Luiz (2011) at 151-172; Chitimira & Lawack (2013) at 200-217; and Chitimira "Overview of selected role-players" (2014) at 109-124.

⁶⁶ Generally see parts 2.1; 2.2; 2.3 and 2.4 above.

⁶⁷ It is submitted that this might have generally contributed to the inconsistent enforcement and combating of cross-border market abuse practices especially in the South African and other African countries' securities and financial markets. Generally see Chitimira & Lawack (2013) at 200-217; Chitimira (2014) at 109-124; Jooste (2006) at 437-460; Luiz (1999) at 136-151; DMA Report (2014) at 4-36; Luiz (2002) at 180-183; Luiz (2011) at 151-172; Osode (2000) at 239-263; Chanetsa B "Insider trading is notoriously hard to prosecute" *Business Report* (26 April 2004); Van Deventer (1999) at 2-3; Van Deventer G "Anti-market abuse legislation in South Africa" (2008) 1-5. Available at <http://www.fsb.co.za/public/marketabuse/FSBReport.pdf> (accessed 05 May 2014); Barron C "Greg draws a blank in Belfort parallel" (2014). Available at <http://www.timeslive.co.za/Feeds/2014/02/02/greg-draws-a-blank-in-belfort-parallel> (accessed 03 March 2014); the FSB "Enforcement actions" (2014). Available at <https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx> (accessed 03 November 2014) & Blincoe R "Datatec directors pay up on insider trading charges" (2001). Available at http://www.theregister.co.uk/2001/05/23/datatec_directors_pay_up/ (accessed 03 March 2014).

⁶⁸ See s 84 read with ss 85 & 82 of the Financial Markets Act & also see further related analysis by Chitimira & Lawack (2013) at 200-217.

to this, it is noteworthy that the FSB is statutorily empowered to assist foreign regulators with investigations pertaining to any cross-border market abuse cases.⁶⁹ In light of this, the FSB has forged some multilateral co-operation agreements with like-minded authorities in the developed world, such as, the Financial Services Authority and the United States Securities and Exchange Commission in a bid to combat cross-border market abuse activities.⁷⁰

3 CONCLUDING REMARKS

As indicated above,⁷¹ various regulatory and enforcement efforts were made in a bid to enhance the combatting of market abuse practices in both the South African and the EU financial markets. For instance, as previously stated,⁷² the EU Market Abuse Directive⁷³ was probably one of the most ambitious regulatory frameworks ever to be adopted regarding the prohibition of market abuse activities in the EU. In addition, several committees, commissions and regulatory bodies were introduced from time to time in an attempt to deter and discourage all the relevant persons from committing market abuse offences in the EU.⁷⁴ Similarly, various anti-market abuse legislation, committees, commissions and regulatory bodies were introduced from time to time to discourage all unscrupulous persons from indulging in market abuse and other illicit trading activities in South Africa.⁷⁵

However, notwithstanding these commendable efforts and measures that were, and are still, clearly targeted at improving the detection and prevention of market abuse activities in the EU and South African financial markets, both the South African market abuse legislation and the EU Market Abuse Directive's regulatory framework have a considerable number of flaws. For instance, some EU Member States have sometimes inconsistently applied heterogeneous enforcement approaches in a bid to implement the EU Market Abuse Directive for the purposes of combatting market abuse practices in their respective financial markets.⁷⁶ Moreover, there are no specific provisions that provide adequate practical measures and/or guidelines regarding the uniform application of the EU Market Abuse Directive's provisions in the EU Member States to avoid balkanisation and other potential over-regulation problems.⁷⁷ Similarly, very few

⁶⁹ S 84(2)(b) of the Financial Markets Act; also see Chitimira & Lawack (2013) at 200-217.

⁷⁰ See JSE "Insider trading and other market abuses (including the effective management of price-sensitive information)" (2015) Insider Trading Booklet Final Draft at 23-25. Available at <https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Booklet.pdf> (accessed 30 April 2015); Chitimira & Lawack (2013) at 200-217 and Chitimira (2014) at 109-124.

⁷¹ See the discussions in part 2 above.

⁷² See part 2.3 above read with parts 2.4 & 2.5 above

⁷³ Arts 1(1) to (5); art 2 read with arts 3; 4 & 5 of the EU Market Abuse Directive.

⁷⁴ See related discussions in part 2 above.

⁷⁵ See related analysis in part 2.5 above.

⁷⁶ The United Kingdom is a case in point. See Chitimira (2012) at 258-304, for further related analysis. See further Ferrarini G & Ungureanu MC "Executive pay at ailing banks and beyond: A European perspective" (2010) *Capital Markets Law Journal* 197.

⁷⁷ See the relevant provisions of the EU Market Abuse Directive; see further Hansen JL "Insider dealing defined: The EU court's decision in Spector Photo Group" (2010) *European Company Law* 98 and Hansen

cross-border market abuse cases have been successfully investigated and prosecuted in South Africa.⁷⁸ Additionally, the South African market abuse prohibition is primarily limited to discouraging only insider trading and market manipulation practices.⁷⁹ Consequently, other related illicit trading practices, such as, high frequency trading, short selling, credit default swaps and front running, are not expressly and statutorily outlawed under the Financial Markets Act.⁸⁰ Furthermore, other anti-market abuse enforcement approaches, such as, whistle-blower immunity provisions and bounty rewards are not expressly and statutorily employed to encourage all persons to report market abuse violations to the relevant enforcement authorities in South Africa.⁸¹

Given this background, it submitted that the EU Market Abuse Directive should be amended to embody specific provisions that provide for adequate practical measures and/or guidelines regarding the uniform application of the EU Market Abuse Directive's provisions across the EU Member States. It is also recommended that such measures and/or guidelines should be carefully incorporated into the relevant provisions of the recently adopted new EU Market Abuse Directive⁸² and the new Criminal Sanctions Market Abuse Directive.⁸³ In the same vein, it is also recommended that South Africa's Financial Markets Act should be amended to contain specific provisions for other anti-market abuse enforcement approaches, such as, whistle-blower immunity provisions and bounty rewards, for the purpose of encouraging all persons to report market abuse activities to the FSB and/or other relevant enforcement authorities in South Africa.

It is further submitted that the bounty rewards and whistle-blower immunity provisions should be carefully and consistently utilised in both South Africa and the EU Member States to minimise the risk of discouraging potential investors, which is generally associated with overregulation.⁸⁴ Lastly, it is submitted that the Financial Markets Act should be reviewed to embody provisions which broadly extend the scope of its market abuse prohibition to expressly cover other related illicit trading practices, such as, high frequency trading, short selling, credit default swaps and front running, to enable the FSB and other relevant regulatory authorities to curb the market abuse challenges posed by such practices in South Africa.

JL & Moalem D "The MAD disclosure regime and the twofold notion of inside information: The available solution" (2009) *Capital Markets Law Journal* 323.

⁷⁸ Generally see related discussions by Chitimira (2012) at 258-304; Jooste (2006) at 437-460; Luiz(1999) at 136-151; DMA (2014) at 4-36; Luiz (2011) at 151-172; Osode (2000) at 239-263; Chanetsa (2004); Van Deventer (2008) 1-5; and Barron (2014).

⁷⁹ See ss 78; 80; 81 and 82 of the Financial Markets Act; also see related discussions in the *DMA Report* (2014) at 4-36; the enforcement actions of the FSB (2014); Chitimira (2012) at 258-304 and part 2.5 above.

⁸⁰ See ss 78; 80; 81 & 82; also see related discussions by Chitimira (2012) at 258-304

⁸¹ See ss 78; 80; 81 and 82 of the Financial Markets Act; also see Chitimira (2012) at 258-304 & part 2.5 above.

⁸² See arts 1 to 39 of the new EU Market Abuse Directive.

⁸³ See arts 1 to 10 of the new Criminal Sanctions Market Abuse Directive.

⁸⁴ Generally see Chitimira (2012) at 258-304 & paragraph 2.5 above.