Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa

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Abstract

The increasingly global market has given rise to increased interaction and interdependence among national regulators as well as investors in different jurisdictions. However, this has brought several regulatory problems to the enforcement authorities particularly with regard to the detection, investigation and prosecution of cross-border market abuse activities in many jurisdictions, such as the European Union and South Africa. Consequently, the European Union became the first body to establish multinational market abuse laws in order to enhance the detection and combating of cross-border market abuse practices. The European Union Insider Dealing Directive was subsequently adopted in 1989 and was the first law that harmonised the insider trading ban among the European Union member states. Thereafter, the European Union Directive on Insider Dealing and Market Manipulation was adopted in a bid to increase the combating of all the forms of market abuse in the European Union’s securities and financial markets. Similar anti-market abuse regulatory efforts were also made in South Africa. In light of this, selected regulatory aspects of market abuse in the European Union and South Africa will be briefly and comparatively discussed in tandem. Thereafter, some concluding remarks will be provided.

Keywords

Enforcement – insider trading – market abuse – market manipulation – regulation
Introduction

The increasingly global market has given rise to increased interaction and interdependence among national regulators, as well as investors in different jurisdictions. However, this has brought several regulatory problems to the enforcement authorities particularly with regard to the detection, investigation and prosecution of cross-border market abuse activities in many jurisdictions such as the European Union (EU) and South Africa. Consequently, the EU became the first body to establish multinational market abuse laws in order to enhance the detection and combating of cross-border market abuse practices. Put differently, following a series of consultations which dates back to as early as 1976, the Commission of the EU proposed that a common insider trading legislation must be adopted by all the member states. The EU

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2 This term is employed to refer to both insider trading and market manipulation in this article.
3 Rider et al. (note 1), at 263–266.
Insider Dealing Directive was subsequently adopted in 1989 and was the first law that harmonised the insider trading ban among the EU member states. However, owing to various concerns from the member states that the Insider Dealing Directive was not applicable to other forms of market abuse, the so-called Lamfalussy process and the Committee of the Wiseman were launched to implement the EU’s Action Plan for Financial Services and to enhance a further level of harmonisation with regard to the enforcement of market abuse laws across the EU member states. Thereafter, the EU Directive on Insider Dealing and Market Manipulation was adopted in a bid to increase the combating of all the forms of market abuse in the EU’s securities and financial markets. Notably, similar anti-market abuse regulatory efforts were also made in South Africa. In light of this, selected regulatory aspects of market abuse in the EU and South Africa will be briefly and comparatively discussed in tandem. Thereafter, some concluding remarks will be provided.


9 See the earlier anti-market abuse regulatory efforts in South Africa as indicated in the relevant provisions of the now repealed legislation such as the Financial Markets Control Act 55 of 1989, hereinafter referred to as the Financial Markets Control Act; the Stock Exchanges Control Act 1 of 1985, hereinafter referred to as the Stock Exchanges Control Act; the Insider Trading Act 135 of 1998, hereinafter referred to as the Insider Trading Act and the Securities Services Act 36 of 2004, hereinafter referred to as the Securities Services Act. It is important to note that market abuse practices are currently outlawed in the Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act, see Sections 78; 80; 81 and 82; also see related comments by Chitimira (note 4), 937–965 and Henning and Du Toit (note 4), 155–165.

10 Notably, about 27 member states have successfully enacted laws to implement the requirements of the EU Market Abuse Directive. Be that as it may, for the purposes of this article, selected aspects on the enforcement of the EU Market Abuse Directive in the United Kingdom (UK) will be referred to where necessary for further comparative analysis. The UK was, inter alia, selected because it has relatively managed to implement the requirements of the EU Market Abuse Directive and it is among the biggest economies in the EU.
2 Historical Overview of Market Abuse Prohibition

2.1 Historical Overview of Insider Trading Prohibition

As stated earlier, the Insider Dealing Directive offered the pioneering insider trading provisions which were applicable in the EU member states. Put differently, insider trading practices were expressly outlawed under the Insider Dealing Directive to include any conduct by an insider who took advantage of inside information with full knowledge of the facts by acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates. Therefore, other related violations like fraud could not give rise to insider trading. Seemingly, the prohibition on insider trading under the Insider Dealing Directive was not solely based on a fiduciary duty but rather on the actual tipping or dealing in the affected securities by an insider while in possession of inside information. Selective disclosure and other related tipping activities were also prohibited under the Insider Dealing Directive.

In addition, the provisions of the Insider Dealing Directive were heterogeneously implemented in most member states either through the promulgation of administrative regulations like voluntary codes of conduct or the enactment of legislation that outlaws insider trading. For instance, the UK enacted the Criminal Justice Act 1993 to implement the provisions of the Insider Dealing

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11 See further Section 1 above.
12 The Insider Dealing Directive broadly defined transferable securities to include shares, debt securities, financial futures, futures contracts, options and index contracts in respect of securities. Thus, transferable securities could further include any rights related to such securities and/or any rights in respect of fixed term financial instruments, when admitted to trading on a market which is regulated and supervised by public authorities and which operates regularly and is accessible directly or indirectly to the public. Article 1(2) of the IDD.
13 Article 2(1) of the IDD.
14 Tipping constituted, inter alia, the recommending or disclosure of inside information by an insider to any third party, to acquire or dispose of transferable securities unless such disclosure is made in the normal course of the exercise of his employment, profession or duties. Article 3 of the IDD.
15 Article 2(1), 2(2) and 2(3) read with Articles 3 and 4 of the IDD; also see generally Hazen (note 5), 236.
16 In light of this, this sub-heading will briefly discuss the implementation of the Insider Dealing Directive mainly in the UK.
17 The Criminal Justice Act 1993 (c 36), hereinafter referred to as the Criminal Justice Act.
Directive. Thus, although the UK already had legislation in place to combat insider trading as early as 1980, the amendments necessary to implement the provisions of the Insider Dealing Directive were only adopted in 1993. Specifically, Part V of the Criminal Justice Act implemented the provisions of the Insider Dealing Directive and treated insider trading as an abuse of the market rather than a breach of an insider’s fiduciary obligations to the company. Furthermore, any violation of the insider trading provisions attracted only criminal sanctions under the Criminal Justice Act. Furthermore, the enforcement of the provisions of the Insider Dealing Directive did not give rise to similar (harmonised) regulations in some member states. Notably, one of the main inconsistencies was found in relation to the definition of ‘insider’, where other member states such as the UK maintained that a person would be an insider only if he knew (the so-called requirement of knowledge) that he had inside information either by virtue of being a director, shareholder or employee of a company.

Similarly, there were different approaches in some EU member states with regard to the way in which ‘inside information’ was defined, especially in relation to the required degree of publicity before information could be said to have been made public and in determining whether inside information was price-sensitive in nature for the purposes of the Insider Dealing Directive. The Insider Dealing Directive did not give clear guidelines as to when information was regarded as having been made public. As a result some member states like the UK regarded that inside information could be considered as having been made public even though it was published only to a section of the public or if it could be acquired only by persons exercising due diligence and/or expertise. There was further discord regarding the actual degree of specificity and/or required effect of inside information on the price of the affected

18 See the related discussion by Chitimira (LLD Thesis, note 4) 305–353.
19 See further related analysis by Chitimira (LLD Thesis, note 4) 305–353.
20 On the other hand, a different approach was employed in other member states like France, Germany, Spain and the Netherlands. See J. Welch, M. Pannier, E. Barrachino, J. Bernd and P. Ledeboer, ‘Comparative Implementation of the EU Directives (I)–Insider Dealing and Market Abuse’, British Institute of International and Comparative Law City Research Series Volume 8 (London: The British Institute of International and Comparative Law, 2005) pp. 1, 8–9; 16–17 and 19.
21 Ibid., at 10–11.
22 Section 58(3) of the Criminal Justice Act. On the other hand, other member states like France did not regard the publication of inside information to a Section of the public or market professionals alone as sufficient. Article 1 of the Commission des Operations de Bourse Regulation 90-08; also see Welch et al. (note 20), pp. 10–11 and 44.
securities for the purposes of the Insider Dealing Directive among some member states.23

Member states also differed on some elements (requirements) of the insider trading offence itself.24 For instance, while the Insider Dealing Directive required the insider to take advantage of inside information with the full knowledge of the facts when dealing, an insider could only incur liability if he knowingly dealt in the affected securities on the basis of inside information in the UK.25 Furthermore, the Insider Dealing Directive left it up to the member states to provide appropriate sanctions26 and to establish competent regulatory bodies that oversee the enforcement of the insider trading prohibition. In nutshell, despite the fact that the Insider Dealing Directive defined key terms like ‘inside information’, ‘transferable securities’, ‘tipping’ and ‘insider’, there were confusingly different types of sanctions and enforcement approaches adopted in all the member states.27 Consequently, the Insider Dealing Directive was repealed and replaced by the EU Market Abuse Directive.28

2.1.1 Evaluation and Analysis of the Historical Overview of Insider Trading Prohibition

As earlier stated,29 the Insider Dealing Directive introduced the insider trading prohibition that was enforceable across the EU member states.30 Nonetheless, the insider trading ban contained in the Insider Dealing Directive was somewhat inadequate.31 Owing to this and other reasons, the Insider Dealing Directive was

__Note for References__

23 For instance, the UK, France, Germany and the Netherlands employed different approaches in this regard. See Welch et al. (note 20), pp. 10–11.
24 For instance, there was confusion especially around the interpretation of Articles 2(4) and 7 of the IDD.
25 Section 57 read with Section 52 of the Criminal Justice Act; also see Welch et al. (note 20), pp. 11; 16–17 and 19.
26 The IDD failed to provide specific types of penalties (criminal, civil or administrative sanctions) as well as the severity of such penalties for the purposes of its insider trading ban.
27 For example, there was confusion regarding the interpretation and enforcement of Article 13 of the IDD.
28 Consequently, the implementation of the provisions of the IDD will not be analysed in detail.
29 See related remarks in Sections 1 and 2.1 above.
30 Articles 1(2) and 2(1) of the IDD. See further Chitimira (LLD Thesis, note 4), pp. 258–304 and 421–496.
31 See related remarks in Sections 1 and 2.1 above; also see Chitimira (LLD Thesis, note 4), pp. 258–304 and 421–496.
was eventually repealed and replaced\textsuperscript{32} by the EU Market Abuse Directive\textsuperscript{33} which brought some notable changes such as an insider trading prohibition that applies to a relatively broad spectrum of financial instruments\textsuperscript{34} and three definitions of inside information\textsuperscript{35} in a bid to effectively curb insider trading.\textsuperscript{36}

Likewise, an early attempt to combat insider trading practices in the South African financial markets was introduced and contained in the Companies Act\textsuperscript{37} and all its amendments.\textsuperscript{38} In other words, it is submitted that the insider trading ban was introduced by the relevant provisions of the Companies Act.\textsuperscript{39} These provisions were enacted in line with the Van Wyk de Vries Commission of Inquiry into the Companies Act of 1973\textsuperscript{40} recommendations. Nonetheless, these provisions were repealed and later replaced by the Insider Trading Act\textsuperscript{41} in an effort to broaden the scope of the prohibition of insider trading. Notably, the Insider Trading Act treated insider trading as a criminal offence\textsuperscript{42} and it also brought some civil remedies\textsuperscript{43} for the insider trading victims. Moreover,
as is the position in the EU, the insider trading ban was extended to a wide spectrum of financial instruments other than securities of companies. Be that as it may, the Insider Trading Act was still flawed in some respects, especially, with regard to its civil penalties and defences. Consequently, it was repealed and replaced by the Securities Services Act which expressly extended its insider trading ban to both natural and juristic persons. It also increased the monetary criminal penalties to a R50 million fine while the imprisonment term remained ten years for those who could be found guilty of insider trading offences.

The Securities Services Act was repealed and replaced by the Financial Markets Act in another attempt to, inter alia, align the South African securities and financial markets regulation with the international best practices and enhance the combating of illicit trading activities. For instance, the Financial Markets Act replaced the so-called old civil penalty regime for insider trading with administrative penalties that are mainly enforced by the Enforcement Committee (EC) on behalf of the Financial Services Board (FSB).

Nonetheless, unlike the EU Market Abuse Directive’s insider trading prohibition (which applies to financial instruments traded on both the regulated markets and the over the counter markets), the Financial Markets

44 See earlier related comments above.
45 See Osode (note 4), 239–248; Chitimira, (note 4) 937–965.
46 Ibid.
48 See Section 115(a) read with Section 73 of the Securities Services Act; also see Chitimira (LLD Thesis, note 4), pp. 258–304 and 421–496; Jooste (note 4), 437–460.
49 See Sections 78 and 82 read with Sections 80; 81 and 109(a) of the Financial Markets Act.
50 See Section 77 of the Securities Services Act.
52 Article 1(3) read with (4) and Articles 2, 3 and 4 of the EU Market Abuse Directive; see further Section 2.3.3 below; also see Chitimira (LLD Thesis, note 4), pp. 258–304 and 421–496.
Act’s insider trading ban is mainly restricted to securities dealings conducted on a regulated market as defined. In this regard, it is submitted that the EU Market Abuse Directive’s insider trading prohibition is relatively broader than the similar prohibition contained in the Financial Markets Act. Accordingly, it remains to be seen whether the Financial Markets Act’s insider trading ban will be consistently enforced to curb cross-border insider trading practices in South Africa and elsewhere.

2.2 Historical Overview of Market Manipulation Prohibition

The concept of market manipulation is expressly outlawed in the EU Market Abuse Directive and the practices that are statutorily discouraged include, inter alia, the following:

(i) transactions or orders to trade which give or are likely to give false or misleading signals as to the supply of, demand for or price of financial instruments or 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

See Section 77 read with Sections 78 and 82 of the Financial Markets Act.

See Sections 78 and 82; see further Chitimira (1.LD Thesis, note 4), pp. 258–304 and 421–496; Chitimira and Lawack (note 51), 200–217; Chitimira (note 51), 108–124.


Article 5 read with articles 6; 7 and 8 of the EU Market Abuse Directive.
and that these transactions or orders to trade conform with the accepted market practices on the regulated market concerned;

(ii) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance;

(iii) the 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.

A closer look at the aforementioned prohibition on market manipulation shows that the EU Market Abuse Directive has seemingly treated market manipulation as an objective (effect-based) offence in a bid to increase the number of successful prosecutions and settlements by the relevant regulatory authorities in the member states.

In addition, the EU Market Abuse Directive outlines a number of practices which could amount to market manipulation as outlined above, to include inter alia:

(i) conduct by a person or persons acting in collaboration to secure a dominant position over the supply of, or the demand for a financial instrument which has the effect of fixing, directly or indirectly, the purchase or sale prices or creating other unfair trading conditions;

(ii) the buying or selling of financial instruments at the close of the market with the effect of misleading investors who act on the basis of closing prices; and

57 Accepted practices are defined as practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with the guidelines adopted by the Commission in accordance with the procedure laid down in Article 17(2) of the EU Market Abuse Directive. See further article 1(5) and read with Subsection (3) of the EU Market Abuse Directive.

58 Article 1(2)(a) of the EU Market Abuse Directive.

59 Article 1(2)(b) of the EU Market Abuse Directive.

60 Article 1(2)(c) read with article 11 of the EU Market Abuse Directive.

(iii) taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.62

As highlighted above, it is clear that the EU Market Abuse Directive discourages about three main forms of market manipulation, namely (a) artificial (fictitious) transactions and wash sales; (b) disclosure-based manipulations effected by disseminating false and misleading information;63 and (c) trade-based (misleading trades) manipulations.64

2.2.1 Evaluation and Analysis of the Historical Overview of Market Manipulation Prohibition

Notably, market manipulation was not expressly prohibited under the Insider Dealing Directive.65 Nevertheless, unlike the position under the EU Market

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62 Article 1(2)(c) read with articles 5; 6; 7 and 8 of the EU Market Abuse Directive. Other examples of market manipulation activities that are prohibited under the EU Market Abuse Directive includes a conspiracy to defraud, which the relevant market does not know about; fictitious (wash sales) transactions that are conducted to create a misleading appearance of active trading; false maintenance of the price by guarantees, indemnities or loss-sharing agreements unknown to the market in order to distort the price of financial instruments; short sales done with the intention to deceive and induce others to buy certain financial instruments; dishonest statements of financial prospects issued with a view to deceive innocent purchasers and false recommendations by financial analysts, journalists and others holding the stock (the so-called scalping) done to deceive and make a profit. See further P.R. Wood, Regulation of International Finance (The Law and Practice of International Finance Series Volume 7) (London: Sweet and Maxwell, 2007), pp. 534–544.


64 Avgouleas (note 8), 276–79.

65 See Section 2.1 above.
Abuse Directive, only two forms of market manipulation, namely trade-based market manipulation and disclosure-based market manipulation relating to listed securities were initially and expressly outlawed under the Stock Exchanges Control Act. Moreover, it is submitted that the delayed publication of price-sensitive information relating to listed securities was probably the most common form of disclosure-based market manipulation in South Africa in the early 1980s. Notwithstanding this early commendable effort to discourage market manipulation, the Stock Exchanges Control Act was later repealed to, inter alia, increase the curbing of illicit trading practices in the South African securities and financial markets.

Another early attempt to curb manipulation was brought under the Financial Markets Control Act. The Financial Markets Control Act prohibited trade-based market manipulation and disclosure-based market manipulation relating to listed securities, especially, in relation to option and term contracts transactions. Additionally, the dissemination or making of statements which a person knew or ought reasonably to have known were likely to induce other persons to deal in financial instruments or have the effect of altering the price for dealing in financial instruments was outlawed under the Financial Markets Control Act. Moreover, in contrast to the position under the EU Market Abuse Directive, the publication or non-publication of information which had the effect of inducing another person to deal in a financial instrument on a financial market was further prohibited. The Financial Markets Control Act was later repealed and another prohibition on market manipulation was incorporated in the Securities Services Act.

The Securities Services Act prohibited trading practices (trade-based market manipulation) and the publication of false, misleading or deceptive

66 See Section 2.2 above.
67 Section 40 of the Stock Exchanges Control Act; also see related analysis by Chitimira (note 4), 937–965 and Henning and Du Toit (note 4), 155–165.
68 Henning and Du Toit (note 4), 159.
69 Generally see Chitimira (note 4), 937–965 and Henning and Du Toit (note 4), 155–165.
70 See Sections 20–23; see further Chitimira (note 4), 937–965 and Henning and Du Toit (note 4), 155–165.
71 See Section 20.
72 See Section 21; also see Chitimira (note 4), 937–965 and Henning and Du Toit (note 4), 158.
73 It should be noted that inducement on the part of the affected person is not a requirement under the EU Market Abuse Directive, see Article 1(2)(c); also related discussion in Section 2.2 above.
74 See Section 22 of the Financial Markets Control Act; also see Chitimira (note 4), 937–965 and Henning and Du Toit (note 4), 158.
75 See Section 75.
statements relating to listed companies (disclosure-based market manipulation). This prohibition was still flawed in some respects, for instance, it did not provide a civil remedy for market manipulation and sufficient defences for the market manipulation offences. Due to this and other reasons, the Securities Services Act was repealed and replaced by the Financial Markets Act.

As is the position under the EU Market Abuse Directive, several trade-based market manipulation practices are prohibited in the Financial Markets Act. In light of this, any person who directly or indirectly used or knowingly participated in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a regulated market, either for such person’s own account or on behalf of another person, where such practice creates or might create a false or deceptive appearance of the trading activity in connection with or an artificial price for that security will be guilty of an offence. Likewise, any person who places an order to buy or sell listed securities which, to his knowledge could, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with or an artificial price for such securities will be guilty of an offence. Moreover, like the position under the EU Market Abuse Directive, a number of practices that are deemed to amount to market manipulation are outlined in the Financial Markets Act.

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76 See Section 76.

78 See related comments in Section 2.1.1 above.
79 See Section 2.2 above.
80 Section 80.
82 Sections 80(1)(b) and (2) of the Financial Markets Act; see further Chitimira (LLD Thesis, note 4), pp. 258–304 and 421–496 and Chitimira (note 81), 47–58.
83 See Article 1(2)(c); also see Section 2.2 above.
84 See Section 80(3) read with Subsections (4) and (5). See further Chitimira (LLD Thesis, note 4), pp. 258–304 and 421–496; Chitimira (note 81), 47–58; A. Alcock, ‘Market Abuse’, 23
Furthermore, like the position under the EU Market Abuse Directive, disclosure-based market manipulation activities are prohibited under the Financial Markets Act. For instance, any person who directly or indirectly made or published in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which was, at the time and in the light of the circumstances in which it was made, false or misleading or deceptive in respect of any material fact and which the person knew, or ought reasonably to have known was false, misleading or deceptive will be guilty of an offence. In the same vein, any person who directly or indirectly, made or published in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which was, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knew, or ought reasonably to have known was rendered false, misleading or deceptive by reason of the omission of that fact will be liable for an offence. However, unlike the EU Market Abuse Directive, the Financial Markets Act does not expressly prohibit Internet-related disclosure-based market manipulation activities. Moreover, the Financial Markets Act does not expressly provide a civil remedy as well as sufficient penalties and defences for the market manipulation offences.

2.3 **Overview of Selected Definitional Concepts**

### 2.3.1 Inside Information

The EU Market Abuse Directive offers a more comprehensive definition of inside information than the one which was contained in the Insider Dealing

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85 See Section 2.2 above.
86 Section 81.
87 Section 81(1)(a) of the Financial Markets Act.
88 Section 81(1)(b) of the Financial Markets Act.
89 See Article 1(2)(c); also see Section 2.2 above.
90 See Section 81.
91 However, it is submitted that such civil and/or administrative remedies are provided under the Protection of Funds Act, see Sections 6A–I read with Section 99 of the Financial Markets Act.
92 See Sections 80 and 81 read with Sections 82 and 109(a) of the Financial Markets Act; see further Chitimira (LLD Thesis, note 4), pp. 258–304 and 421–496; Chitimira (note 81) 47–58 and related comments in Section 2.1.1 above.
In line with this, it should be noted that under the Insider Dealing Directive, inside information was only defined as information which has not been made public and is of a precise nature relating directly or indirectly to one or several issuers of transferable securities or to one or several transferable securities and which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question. Accordingly, information was required to meet three main requirements, namely, not to have been made public, to be precise in nature and to give rise to a significant effect on the price of the securities which it concerns, for it to be regarded as inside information. Put differently, the publication of inside information was required to be consistent with the Insider Dealing Directive and other similar legislation in the EU member states. In this regard, it must be noted that the Insider Dealing Directive imposed a mandatory disclosure requirement on all the issuers of securities that were publicly traded in regulated markets to disclose to the public as soon as possible any inside information which relates to such issuers. Moreover, inside information was required not only to be confidential but also to be accurate and precise in nature. Thus, rumours, speculations and other inauthentic information could not be regarded as inside information. Lastly, inside information was required to have a significant effect on the price of the affected securities. Therefore, not all information unknown to the public was treated as inside information for the purposes of the Insider Dealing Directive. On the other hand, the EU Market Abuse Directive gives a general definition of inside information and other two special or complementary definitions which relate to trading in derivatives on commodities and to persons charged with the execution of orders concerning financial instruments. Accordingly, inside information is generally defined as information of a precise nature which has not been made public, relating, directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be

93 Article 1(1) of the IDD.
94 Article 1(1) of the IDD; also see related discussion in Section 2.1 above.
96 See Pingel (note 7), 8–9.
97 Article 1(1) of the EU Market Abuse Directive; also see Wood (note 62), 162–163; Avgouleas (note 8) 253–259; Avgouleas (note 61), 203–204.
likely to have a significant effect on the prices of such financial instruments or on the price of related derivative financial instruments.\footnote{Article 1(1) of the EU Market Abuse Directive.}

In relation to derivatives on commodities, inside information is defined in the EU Market Abuse Directive, as information of a precise nature which has not been made public, and which relates directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with the accepted market practices on those markets.\footnote{Article 1(1) and 1(5) of the EU Market Abuse Directive; also see Article 4 of the 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 (hereinafter referred to as the Accepted Market Practices Directive), which states that users of the markets on which commodity derivatives are traded are deemed to expect to receive inside information, when it relates directly or indirectly to one or more commodity derivatives and when it is routinely made available to those users of the markets and/or is required to be disclosed in accordance with any regulatory provisions, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market. See further Avgouleas (note 8), 254 and 307–308.}

With regard to the persons charged with the execution of orders concerning financial instruments, inside information means information conveyed by a client and related to the client's pending orders, which is of a precise nature and which relates directly or indirectly to one or more issuers of financial instruments, or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.\footnote{Article 1(1) of the EU Market Abuse Directive.} Seemingly, the general definition of inside information is broadly applicable to all persons who have inside information and to classes of financial instruments other than commodity derivatives. On the other hand, the first special or complementary definition of inside information applies only to derivatives on commodities and is consequently not applicable to other classes of financial instruments.\footnote{Article 1(1) of the EU Market Abuse Directive.} The second special or complementary definition of inside information applies to intermediate or executing brokers (or any other person charged with the execution of orders concerning financial instruments) who have client information regarding their pending orders. This definition seem to be targeting the so-called front running and other related market abuse practices by intermediate and/or executing brokers, who use privileged information contained in client orders by placing orders to be executed ahead of...
the relevant client orders in order to achieve their own manipulative benefits at the detriment of such clients.\textsuperscript{102} However, the second special or complementary definition of inside information has been criticised as constituting a duplication of requirements that are already regulated by other member states and thus creating the overlapping of some definitions and unnecessary confusion in relation to its application.\textsuperscript{103}

In addition, the general definition of inside information and the second special or complementary definition relating to persons charged with the execution of orders concerning financial instruments contains an element of price sensitivity, namely, that the relevant information must further have a significant effect on the prices of financial instruments or on the price of related derivative financial instruments.\textsuperscript{104} In contrast to this criterion, the first special or complementary definition relating to trading on derivatives on commodities substitutes the element of price-sensitivity with relevant information that the users of commodity derivatives markets would expect to receive in accordance with accepted practices.\textsuperscript{105}

### 2.3.2 Insider

An insider is defined as any person who possesses inside information by virtue of his membership of the administrative, management or supervisory bodies of the issuer;\textsuperscript{106} or by virtue of his holding in the capital of the issuer;\textsuperscript{107} or by virtue of having access to the information through the exercise of his employment, profession or duties;\textsuperscript{108} or by virtue of his criminal activities.\textsuperscript{109} As enumerated above, this definition clearly provides approximately four categories of the so-called primary insiders.\textsuperscript{110} In addition, if a primary insider is a legal person, the prohibition extends to the natural persons (corporate insiders) who take part in the decision to carry out any transactions on behalf of the legal person concerned.\textsuperscript{111}

The aforementioned categories of primary insiders are almost identical to the classes of primary insiders that were provided under the Insider Dealing

\textsuperscript{102} Avgouleas (note 8), 263.
\textsuperscript{103} Avgouleas (note 8), 263.
\textsuperscript{104} Article 1(1) of the EU Market Abuse Directive.
\textsuperscript{105} Article 1(1) of the EU Market Abuse Directive; also see Avgouleas (note 61) 204.
\textsuperscript{106} Article 2(1)(a) of the EU Market Abuse Directive.
\textsuperscript{107} Article 2(1)(b) of the EU Market Abuse Directive.
\textsuperscript{108} Article 2(1)(c) of the EU Market Abuse Directive.
\textsuperscript{109} Article 2(1)(d) of the EU Market Abuse Directive.
\textsuperscript{110} Article 2(1) of the EU Market Abuse Directive; also see generally Avgouleas (note 61), 202; see further Wood (note 62), 166.
\textsuperscript{111} Article 2(2) of the EU Market Abuse Directive.
Notably, under the Insider Dealing Directive the term ‘insider’ was defined to include any person who, with full knowledge of the facts, acquired inside information as a result of his employment, profession, duties or other direct positional access to the original source of the information (primary insider) or otherwise than as a result of a special relationship from the original source or from a source who is, directly or indirectly a primary insider (secondary and/or corporate insiders). Precisely, this definition of insider extends to all outsiders who possessed inside information by virtue of their status or position and who would include, apart from primary insiders, all persons who accessed such information by any other means. However, the Insider Dealing Directive was unclear on the question of whether the mere fact that a person was an executive or director could suffice as sufficient proof to presume that such person possessed inside information or whether insider trading required proof on the part of the prosecuting authorities that the director or the executive person in question was actually in possession of inside information. Be that as it may, the EU Market Abuse Directive has nonetheless added a new category of primary insiders who acquire inside information by virtue of their criminal activities. This new category was probably introduced to curb organised crime and to discourage terrorist market abuse activities in the EU securities markets. On the other hand, the term ‘insider’ could also mean any person other than the persons who fall in the primary insiders’ category, who possess inside information while that person knows or ought to have known that it is inside information. This category is usually referred to as secondary insiders. In relation to this, it appears as if secondary insiders may be exempted from any liability if they prove that they did not know or should not have known that they were in possession of inside information. Nevertheless, this defence of lack of actual knowledge or of lack of an objective obligation to know that the information in question was

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112 Article 2(1) of the IDD.
113 Article 2(1) of the IDD.
114 Articles 4 and 2(2) of the IDD; also see Van Zyl and Joubert (note 6), 293–294 and Warren (note 5) 1070–1071.
115 Articles 2 and 4 of the IDD read with Articles 2 and 5 of the EU Market Abuse Directive.
117 Article 2(1)(d) of the EU Market Abuse Directive.
118 Such activities could include theft of inside information and the running of extortion rackets aimed at the acquisition of inside information. See generally Avgouleas (note 61), 202.
119 Article 4 read with Articles 2 and 3 of the EU Market Abuse Directive.
120 Article 4 read with Articles 2 and 3 of the EU Market Abuse Directive.
inside information is not expressly available to primary insiders. However, it should be noted that the prosecution and regulatory authorities do not have to prove that the person under investigation had an intention to use inside information for personal gain or for the benefit of another person.

2.3.3 Insider Trading
The concept of insider trading is not expressly defined under the EU Market Abuse Directive. However, the EU Market Abuse Directive enumerates various practices that could give rise to insider trading to include dealing (acquiring or disposing or attempting to acquire or dispose of financial instruments) directly or indirectly in financial instruments on the basis of inside information, for own account or for account of a third party, by primary insiders or any other person who possesses such information and who knows or ought to have known that it is inside information; or the disclosure of inside information by a primary or secondary insider to third parties, unless such disclosure is made in the normal course of his employment, profession or duties; and the recommendation or inducement of another person by primary or secondary insiders on the basis of inside information, to deal (acquiring or disposing of financial instruments) in financial instruments to which the information relates. This prohibition does not, however, apply to any transactions conducted by a person in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement conducted before the person concerned possessed inside information.

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121 For example, Articles 2(1), 2(2) and 3 of the EU Market Abuse Directive do not have such a defence for primary insiders.
122 See generally Avgouleas (note 61), 202.
123 Article 2(1) read with Subsection (2) and Article 4 of the EU Market Abuse Directive.
124 Article 3(a) read with Article 4 of the EU Market Abuse Directive.
125 Article 3(b) read with Article 4 of the EU Market Abuse Directive. Also see Avgouleas (note 61), 201; Wood (note 62), 552–555.
127 Article 2(3) of the EU Market Abuse Directive.
It is therefore clear that the prohibition on insider trading under the EU Market Abuse Directive expressly discourages approximately three main types of conduct, namely (a) actual dealing (acquiring or disposing of financial instruments) in financial instruments by primary insiders on the basis of inside information; (b) improper disclosure of inside information by either primary or secondary insiders to other persons (third parties); and (c) recommending or inducement (tipping) of other persons by primary or secondary insiders to deal in financial instruments on the basis of inside information.128 In relation to this, the EU Market Abuse Directive extends the prohibition on insider trading to financial instruments if they are admitted to trading on a regulated market in at least one member state or when a request for admission to trading on such market has been made, regardless of whether the transaction in question occurred on a regulated market or on over the counter markets.129 Furthermore, the prohibition on insider trading under the EU Market Abuse Directive applies to over the counter financial instruments which are not admitted to trading on a regulated market in a member state and for which no request for admission to trading has been made, if their value depends on admitted financial instruments or instruments for which admission is pending.130

2.3.4 Market Manipulation

As indicated earlier,131 market manipulation is expressly defined in the EU Market Abuse Directive to include:

(i) transactions or orders to trade which give or are likely to give false or misleading signals as to the supply of, demand for or price of financial instruments or 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

128 Wood (note 62), 552–555; also see related discussion in Section 2.1 above.

129 Articles 1(3) and 9 of the EU Market Abuse Directive; also see Avgouleas (note 8), 262.

130 Such instruments could include over the counter stock index contracts or contracts of differences, where the underlying or reference financial instrument is traded or is about to be traded on a regulated market in the EU. Articles 1(3) and 9 of the EU Market Abuse Directive; also see Avgouleas (note 8) 262–263.

131 See related comments in Section 2.2 above.
and that these transactions or orders to trade conform with the accepted market practices on the regulated market concerned; transaction or orders to trade which employ fictitious devices or any other form of deception or contrivance; and the 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.

As indicated above, it is clear that the EU Market Abuse Directive's definition of market manipulation has attempted, as much as possible, to dispense with the rigid requirement of proving intent (on the part of offenders) for the purposes of the market manipulation offence in the EU member states.

2.3.5 Evaluation and Analysis of Selected Definitional Concepts

As indicated above, the EU Market Abuse Directive introduced several changes such as the three definitions of inside information in a bid to effectively curb market abuse activities in the EU securities and financial markets. Likewise, in South Africa, inside information is currently defined in the Financial Markets Act as specific or precise information which has not been made public and which is obtained or learned by an insider and which, if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market. It is important to note that this definition reveals a number of key elements that are also employed in

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132 See article 1(5) and read with subsection (3) and article 17(2) of the EU Market Abuse Directive; also see related comments in paragraph 2.2 above.
133 Article 1(2)(a) of the EU Market Abuse Directive; also see related comments in paragraph 2.2 above.
134 Article 1(2)(b) of the EU Market Abuse Directive; also see related comments in paragraph 2.2 above.
135 Article 1(2)(c) of the EU Market Abuse Directive; also see related comments in Section 2.2 above.
136 See Article 1(2) of the EU Market Abuse Directive; see further Avgouleas (note 8), 104–111; Avgouleas (note 61), 206; also see related comments in Section 2.2 above.
137 See Sections 2.1, 2.2, 2.3.1, 2.3.2, 2.3.3 and 2.3.4 above.
138 See Article 1(1) of the EU Market Abuse Directive.
139 See Section 77.
a similar general definition of inside information contained in the EU Market Abuse Directive.\textsuperscript{140} Such elements include the requirements that:

(i) information must not have been made public;
(ii) information must be precise or specific; and
(iii) if such information were to be made public, it would be likely to have a material or significant effect on the price or value of the affected securities or financial instruments.\textsuperscript{141}

Put differently, the definition of inside information contained in the Financial Markets Act,\textsuperscript{142} like the position under the EU Market Abuse Directive,\textsuperscript{143} also incorporates an element of specificity. As a result, unconfirmed information or rumours do not qualify or fall under the ambit of the definition of inside information stipulated in the Financial Markets Act.\textsuperscript{144} In addition, like the position under the EU Market Abuse Directive,\textsuperscript{145} the definition of inside information contained in the Financial Markets Act also includes an element and/or degree of price-sensitivity, in that the relevant information should be likely to have a significant or material effect on the price of securities if it were made public.\textsuperscript{146} Nonetheless, unlike the general definition of inside information contained in the EU Market Abuse Directive,\textsuperscript{147} the definition of inside information provided in the Financial Markets Act\textsuperscript{148} is limited only to securities listed on a regulated market. Furthermore, in contrast to the position under the EU Market Abuse Directive,\textsuperscript{149} the Financial Markets Act does not provide special or complementary definitions of inside information in relation to derivatives on commodities and/or to the persons involved in the execution of orders relating to listed securities or other related derivative financial instruments.\textsuperscript{150} It is submitted that this gap, if not expressly addressed, could easily result in the commission of front running or other market abuse activities.

\begin{itemize}
\item\textsuperscript{140} See Article 1(1) of the EU Market Abuse Directive; also see Section 2.3.1 above.
\item\textsuperscript{141} See Section 77 of the Financial Markets Act read with Article 1(1) of the EU Market Abuse Directive. Also see Section 2.3.1 above.
\item\textsuperscript{142} See Section 77.
\item\textsuperscript{143} See Article 1(1) of the EU Market Abuse Directive; also see Section 2.3.1 above.
\item\textsuperscript{144} See Section 77; also see related comments in Sections 2.3.1 and 2.2 above.
\item\textsuperscript{145} See related comments in Sections 2.2 and 2.3.1 above.
\item\textsuperscript{146} See Section 77 of the Financial Markets Act.
\item\textsuperscript{147} See Article 1(1) of the EU Market Abuse Directive; also see Section 2.3.1 above.
\item\textsuperscript{148} See Section 77.
\item\textsuperscript{149} See Article 1(1) of the EU Market Abuse Directive; also see Section 2.3.1 above.
\item\textsuperscript{150} See Section 77 of the Financial Markets Act.
\end{itemize}
pertaining to commodities derivatives by some unscrupulous financial brokers and/or other related market participants in South Africa.

Furthermore, in South Africa, an ‘insider’ means a person who has inside information through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or having access to such information by virtue of employment, office or profession; or where such person knows that the direct or indirect source of the information was an insider as contemplated in the Financial Markets Act.\(^{151}\) Thus, like the position under the EU Market Abuse Directive,\(^{152}\) this definition also provides the primary insiders category comprising directors, employees or shareholders of the issuer of securities listed on a regulated market and other persons who accessed inside information by virtue of their employment, office or profession.\(^{153}\) Moreover, the secondary insiders category is also provided under the Financial Markets Act, consisting of any person who knows that the direct or indirect source of his inside information was a primary insider.\(^{154}\) The definition of insider which is stipulated in the Financial Markets Act is further applicable to both natural and juristic persons. However, unlike the EU Market Abuse Directive,\(^{155}\) the Financial Markets Act does not expressly provide whether its market abuse provisions apply to natural persons (legal persons or corporate insiders) who participate in the execution of transactions on behalf of a primary insider who is a legal or juristic person in order to combat market abuse practices by such agents in the South African financial markets.\(^{156}\) In relation to this, a company (legal person) which repurchases its own shares would be an insider to itself. This should have been acknowledged in the definition of an insider which is provided in the Financial Markets Act, to protect shareholders of a company against such company taking advantage of the non-public price-sensitive information to repurchase their shares at a lower price than what the company would have paid if the information had been made public.

Moreover, like the situation under the EU Market Abuse Directive,\(^{157}\) the concept of insider trading is not expressly defined in the Financial Markets Act.\(^{158}\) However, it is generally understood that insider trading refers to the sale or purchase of securities based on material, non-public information obtained through an insider’s position.\(^{159}\) This definition is consistent with the EU Market Abuse Directive,\(^{160}\) which defines insider trading as the use of privileged information for personal gain.

151 See Section 77 of the Financial Markets Act.
152 See Section 2.3.2 above.
154 See Section 77 of the Financial Markets Act.
155 See Article 2(2) of the EU Market Abuse Directive; also see Section 2.3.2 above.
156 See Section 77 read with Sections 78 and 80–82 of the Financial Markets Act.
157 See Section 2.3.3 above.
Nonetheless, like the EU Market Abuse Directive, the Financial Markets Act merely enumerates and prohibits four types of practices, namely, (a) dealing (directly or indirectly) in securities listed on a regulated market by an insider who knows that he has inside information which relates to such securities for his own personal benefit; (b) dealing (directly or indirectly) in securities listed on a regulated market by an insider who knows that he has inside information which relates to such securities for the benefit of another person; (c) improper disclosure of inside information to another person by an insider who knows that he has such information; and (d) the encouraging or discouraging of another person by an insider, to deal in securities listed on a regulated market.

Lastly, in a striking contrast to the EU Market Abuse Directive’s market manipulation prohibition, the concept of market manipulation is not expressly defined in the Financial Markets Act. In light of this, it is submitted that the absence of adequate definitions of the concepts of insider trading and market manipulation in the Financial Markets Act could, if not timeously and properly addressed, hinder the enforcement of its anti-market abuse provisions in South Africa.

3 Concluding Remarks

From the analysis above, it is evident that various commendable efforts to improve the combating of market abuse activities were undertaken from time to time through the enactment of several anti-market abuse legislations in both the EU and South Africa. In this regard, it is important to note that broader definitions of ‘accepted market practices’, ‘regulated market’, ‘financial instruments’, ‘inside information’ and ‘market manipulation’ were introduced by the EU Market Abuse Directive. Similarly, the Financial Markets Control Act; the Stock Exchanges Control Act; the Insider Trading Act and the Securities Services Act were repealed in a bid to, inter alia, improve the

158 See Section 77 read with Sections 78 and 82.
159 See Section 2.3.3 above.
160 See Section 78 read with Section 82 of the Financial Markets Act; also see related discussion by Chitimira (note 81), 47–58.
161 See Sections 2.2 and 2.3.4 above.
162 See Sections 2.1, 2.2, 2.3.1, 2.3.2, 2.3.3 and 2.3.4 above.
163 See Sections 2.1.1, 2.2.1 and 2.3.5 above.
164 Articles 1(1) to (5) read with Articles 2–5 of the EU Market Abuse Directive; also see discussions in Sections 2.1, 2.2, 2.3.1, 2.3.2, 2.3.3 and 2.3.4 above.
curbing of market abuse and other illicit trading practices in South Africa.\textsuperscript{165} Eventually, the Financial Markets Act was enacted in order to, \textit{inter alia}, align the South African securities and financial markets regulation with the international best practices.\textsuperscript{166} This Act also promotes the use of administrative sanctions to combat market abuse activities.\textsuperscript{167}

Despite these notable achievements, some gaps and flaws are still embedded in the current anti-market abuse regimes in both the EU and South Africa. For example, the EU Market Abuse Directive does not expressly provide whether its provisions are applicable to transactions conducted on other trading platforms such as the multilateral trading facilities (MTFs) and organised trading facilities (OTFs).\textsuperscript{168} Moreover, the EU Market Abuse Directive does not specifically prohibit attempted insider trading and attempted market manipulation in the EU. In relation to this, it is submitted that the provisions of the new Criminal Sanctions Market Abuse Directive Proposal\textsuperscript{169} and the new Market Abuse Directive Regulation Proposal\textsuperscript{170} which now expressly outlaws both attempted insider trading and attempted market manipulation practices in the regulated markets and other MTFs and OTFs should quickly come into force and be carefully and/or consistently utilised to discourage such practices in the EU.\textsuperscript{171}

Likewise, the Financial Markets Act does not expressly define the concepts of insider trading and market manipulation.\textsuperscript{172} Moreover, as earlier stated,\textsuperscript{173}
the Financial Markets Act does not expressly prohibit Internet-related disclosure-based market manipulation activities. Furthermore, the Financial Markets Act does not provide a civil remedy and sufficient defences for its market manipulation offences. Lastly, in light of this, it is recommended that the Financial Markets Act should be reviewed in line with the relevant provisions of the New Criminal Sanctions Market Abuse Directive and the New EU Market Abuse Directive in order to enact adequate market abuse provisions\textsuperscript{174} which expressly apply to securities transactions that are conducted on the regulated markets, Internet, MTFs and others OTFs in South Africa and elsewhere.

Acknowledgement

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\textsuperscript{174} Such provisions must provide for attempted insider trading and attempted market manipulation offences, as well as the applicable civil and/or administrative remedies and defences for such offences.