

A historical overview of the general implementation of the European Union Market Abuse Directive in the United Kingdom before Brexit and its future implications

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Abstract

The European Union (EU) was arguably the first body to establish multinational anti-market abuse laws aimed at enhancing the detection and curbing of cross-border market abuse activities in its Member States. Put differently, the EU Insider Dealing Directive was adopted in 1989 and was the first law that harmonized the insider trading ban among the EU Member States. Thereafter, the European Union Directive on Insider Dealing and Market Manipulation (EU Market Abuse Directive) was adopted in a bid to improve and effectively discourage all forms of market abuse in the EU's securities and financial markets. However, the EU Market Abuse Directive had its own gaps and flaws. In light of this, the Market Abuse Regulation and the Criminal Sanctions for Market Abuse Directive were enacted to repeal and replace the EU Market Abuse Directive in 2016. The article examines the adequacy of the EU Market Abuse Directive and its implementation in the United Kingdom (UK) prior to the UK's vote to leave the European Union (Brexit). This is done to investigate the possible implications of the Brexit referendum outcome of 23 June 2016 on the future regulation of market abuse in the UK.

Keywords

Market Abuse, Insider Trading, Market Manipulation, European Union, United Kingdom

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I. Introduction

The EU was arguably the first body to establish multinational anti-market abuse laws aimed at enhancing the detection and curbing of cross-border ‘market abuse’¹ activities in its Member States.² Put differently, this giant step was further targeted at strengthening the enforcement of the anti-market abuse laws throughout the EU Member States.³ As a result, the EU Insider Dealing Directive (IDD)⁴ was adopted in 1989 and was the first law that harmonized the insider trading ban among the EU Member States. Thereafter, the European Union Directive on Insider Dealing and Market Manipulation (EU Market Abuse Directive)⁵ was adopted in a bid to improve and effectively discourage all forms of market abuse in the EU’s securities and financial markets.

Nevertheless, the EU Market Abuse Directive had its own gaps and flaws. For instance, its penalties are still relatively minimal and less dissuasive for deterrence purposes. Moreover, its market abuse prohibition is inapplicable in other trading platforms such as multilateral trading facilities (MTFs) and organised trading facilities (OTFs).⁶ Additionally, the homogeneous implementation of the EU Market Abuse Directive across the EU Member States is still inconsistent and problematic.⁷ Owing to these and other flaws, the Market Abuse Regulation⁸ and the Criminal

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1. For the purposes of this article, this term includes insider trading and market manipulation.
 2. T.L. Hazen, ‘Defining illegal insider trading-Lessons from the European Community Directive on insider trading’, 55 *Law and Contemporary Problems* (1992), p. 231, 236; and M.G. Warren III, ‘The regulation of insider trading in the European Community’, 48 *Washington and Lee Law Review* (1991), p. 1037, 1037-1078.
 3. B. Rider et al., *Market Abuse and Insider Dealing* (Bloomsbury, 2009), p. 263-266.
 4. Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, [1989] OJ L 334/30 (the IDD). See also the article by I. Pingel, ‘The EC Directive of 1989’, in E. Gaillard (ed.), *Insider Trading: The Laws of Europe, the United States and Japan* (Wolters Kluwer, 1992), p. 5; and F.H. Van Zyl and K. Joubert, ‘The European Union Directive on insider trading: A model for South Africa?’, 6 *South African Mercantile Law Journal* (1994), p. 291-301.
 5. See the relevant provisions of Directive 2003/6/EC of the European Parliament and Council of 28 January 2003 on insider dealing and market manipulation (market abuse), [2003] OJ L 96/16 (the EU Market Abuse Directive). See further, B. Rider et al., *Market Abuse and Insider Dealing*, p. 72-73; E. Avgouleas, *The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis* (Oxford University Press, 2005), p. 307; J. Russen, *Financial Services Authorisation, Supervision and Enforcement: A Litigator’s Guide* (Oxford University Press, 2006), p. 206; T.L. Hazen, 55 *Law and Contemporary Problems* (1992), p. 236; and M.G. Warren III, 48 *Washington and Lee Law Review* (1991), p. 1037-1078.
 6. See Articles 7 and 8 read in conjunction with Articles 9 and 10 of the EU Market Abuse Directive. See also, E. Ferran, ‘After the crisis: The regulation of hedge funds and private equity in the EU’, 12 *European Business Organization Law Review* (2011), p. 379, 380-414; E. Ferran, ‘The European single supervisory mechanism’, 13 *Journal of Corporate Law Studies* (2013), p. 255, 256-285; E. Ferran, ‘New regulation of remuneration in the financial sector in the EU’, 9 *European Company and Financial Law Review* (2012), p. 1, 3-34; E. Ferran, ‘Cross-border offers of securities in the EU: The standard life flotation’, 4 *European Company and Financial Law Review* (2007), p. 461, 463-490; M. Hall, ‘The sub-prime crisis, the credit crunch and bank “failure”: An assessment of the UK authorities’ response’, 17 *Journal of Financial Regulation and Compliance* (2009), p. 427, 430-452; and E. Ferran, ‘Regulatory lessons from the payment protection insurance mis-selling scandal in the UK’, 13 *European Business Organization Law Review* (2012), p. 247, 250-270.
 7. See further, G.A. Ferrarini, ‘The European market abuse directive’, 41 *Common Market Law Review* (2004), p. 711, 737-741; G.A. Ferrarini, ‘Best execution and competition between trading venues – MiFID’s likely impact’, 2 *Capital Markets Law Journal* (2007), p. 404, 406-413; G. Ferrarini and F. Chiodini, ‘Regulating cross-border banks in Europe: A comment on the de Larosière report and a modest proposal’, 4 *Capital Markets Law Journal* (2009), p. 123, 125-140.
 8. See, Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6 of the European Parliament and of the Council and

Sanctions for Market Abuse Directive⁹ were adopted in 2014 by the EU in another attempt to increase the homogeneous enforcement of the market abuse laws across the EU financial markets. Both the new EU Market Abuse Regulation and the new Criminal Sanctions Market Abuse Directive repealed and replaced the EU Market Abuse Directive in 2016.

Against this background, this article examines the adequacy of the EU Market Abuse Directive and its implementation in the United Kingdom (UK)¹⁰ prior to the British EU (Brexit) referendum.¹¹ This is done to investigate the possible implications of the Brexit referendum on the future regulation of market abuse in the UK. In relation to this, the article further investigates whether the new EU Market Abuse Regulation and the new Criminal Sanctions Market Abuse Directive will improve the homogeneous implementation of the market abuse prohibition in the EU. Nonetheless, owing to the UK's decision to withdraw from the EU, it remains to be seen whether the UK will enact its own anti-market abuse laws that are equivalent or similar to the new EU Market Abuse Regulation and the new Criminal Sanctions Market Abuse Directive.¹² Lastly and where applicable, possible anti-market abuse measures that could be employed to improve the implementation of the market abuse prohibition in the UK and other selected jurisdictions, such as South Africa,¹³ will be provided.

Commission Directives 200/124/EC, 2003/125/EC and 2004/72/EC, [2014] OJ L 173/1 (the EU Market Abuse Regulation). This Regulation came into effect on 3 July 2016.

9. See, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse, [2014] OJ L 173/179 (the Criminal Sanctions Market Abuse Directive). See also, Articles 1 to 10 of the new Criminal Sanctions Market Abuse Directive. This Directive came into effect on 3 July 2016. The UK and Denmark have opted not to be regulated by the new Criminal Sanctions Market Abuse Directive while Ireland has opted to be regulated by the same Directive in accordance with the provisions of the consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), see Protocol 21 on the position of the UK and Ireland in Respect of the Area of Freedom, Security and Justice, [2012] OJ C 202/295.
10. Notably, the UK was selected because it is among the most developed economies in the EU.
11. The Brexit referendum was held on 23 June 2016 to enable all British citizens to vote and decide whether to stay or leave the EU. The majority of British citizens in that referendum voted to leave the EU. In this regard, the UK is now required to notify the European Council of its intention and/or decision to leave the EU at least two years before the actual exit. Thus, the UK is likely to be totally independent from the EU by at least June 2018. Until then, the UK remains an EU Member State which must comply with the relevant EU legislation. See, SIA Partners (Banking and Insurance), 'Brexit and the Impact on the UK's Regulatory Framework', *SIA* (2016), <http://en.finance.sia-partners.com/brexit-and-impact-uks-regulatory-framework>, p. 1-4.
12. Dentons, 'Brexit: Potential Regulatory and Transactional Impacts for Financial Institutions', *Dentons* (2016), <http://www.dentons.com/en/insights/articles/2016/july/27/brexit-potential-regulatory-and-transactional-impacts-for-financial-institutions>, p. 1, 8.
13. See Sections 78, 80, 81 and 82 of the South African Financial Markets Act 19 of 2012 (the Financial Markets Act). See also, H. Chitimira, *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LL.D. Thesis, Nelson Mandela Metropolitan University, 2012), p. 258-304, 421-496. See further, S.M. Luiz, 'Market abuse and the Enforcement Committee', 23 *South African Mercantile Law Journal* (2011), p. 151, 154-172; A. Myburgh and B. Davis, 'The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board', *Genesis* (2004), <http://www.genesis-analytics.com/public/FSBReport.pdf>, p. 8-33; D. Botha, 'Control of insider trading in South Africa: A comparative analysis', 3 *South African Mercantile Law Journal* (1991), p. 1-18; G. Van Deventer, 'Anti-market Abuse Legislation in South Africa', *South African Financial Services Board* (2008), <http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>, p. 1-5; D. Botha, 'Increased maximum fine for insider trading: A realistic and effective deterrent?', 107 *South African Law Journal*, p. 504, 505-508; H. Chitimira, *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LL.M. Thesis, University of Fort Hare, 2008), p. 137-163; P.C. Osode, 'The new South African insider trading Act: Sound law reform or legislative overkill?', 44 *Journal of African Law* (2000), p. 239, 241-263; R. Jooste, 'A critique of the insider

2. Synopsis of the implementation of the EU Market Abuse Directive in the UK prior to Brexit

27 Member States have successfully enacted laws to implement the requirements of the EU Market Abuse Directive.¹⁴ However, for the purposes of this sub-heading, a historical comparative overview of the implementation of the EU Market Abuse Directive in the UK prior to Brexit as well as the possible impact of the new EU Market Abuse Regulation and the new Criminal Sanctions Market Abuse Directive will be briefly discussed below.¹⁵

The UK enacted the Financial Services and Markets Act 2000¹⁶ and the Market Abuse Regulations 2005¹⁷ to implement the provisions of the EU Market Abuse Directive. The UK market abuse regime did not only enact the provisions that were similar to those contained in the EU Market Abuse Directive in relation to insider trading, but its prohibition went, in some instances, beyond the requirements of the EU Market Abuse Directive insofar as it attempted to discourage all forms of market abuse activities.¹⁸ The definition of inside information in the Financial

trading provisions of the 2004 Securities Services Act', 123 *South African Law Journal* (2006), p. 437, 441–460; G. Van Deventer, 'New watchdog for insider trading', 1 *Financial Services Board Bulletin* (1999), p. 2-3; S.M. Luiz, 'Insider trading regulation – If at first you don't succeed . . .', 11 *South African Mercantile Law Journal* (1999), p. 136-151; and R.C. Beuthin and S.M. Luiz, *Beuthin's Basic Company Law* (Butterworths, 2000), p. 235-238, for further comparative analysis on the implementation of the market abuse ban in South Africa.

14. See the report and analysis at European Commission, Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive), http://www.ec.europa.eu/internal_market/securities/transpositionindex_en.htm, p. 2-16. See further, the related discussion by G. Walker, 'Liquidity risk management – Policy conflict and correction', 4 *Capital Markets Law Journal* (2009), p. 451, 455-461; E. Greene, K. McIlwain and J. Scott, 'A closer look at "too big to fail": National and international approaches to addressing the risks of large, interconnected financial institutions', 5 *Capital Markets Law Journal* (2010), p. 117, 120-140; E. Greene, 'Looking past consensus to implementation: A growing international consensus on the need for capital markets regulatory reform masks tough questions about implementing such reforms', 4 *Capital Markets Law Journal* (2009), p. 1, 40-53; P. Staikouras, 'Four years of MADness? The new market abuse prohibition revised: Integrated implementation through the lens of a critical, comparative analysis', 19 *European Business Law Review* (2008), p. 775, 780-809; and A. Haynes, 'Market abuse: An analysis of its nature and regulation', 28 *Company Lawyer* (2007), p. 323, 325-335.
15. Despite the recent Eurozone debt crisis, it is important to note that the UK is among the biggest economies in the EU and as such, a brief overview of its implementation of the EU Market Abuse Directive prior to the Brexit will be considered under this sub-heading. See further, N. Maloney, 'New frontiers in EC capital markets law: From market construction to market regulation', 40 *Common Market Law Review* (2003), p. 809, 811-813; E. Avgouleas, 'The harmonization of rules of conduct in EU financial markets: Economic analysis, subsidiarity and investor protection', 6 *European Law Journal* (2000), p. 72, 77-78, 80-81; G. Garcia, 'Ignoring the lessons for effective prudential supervision, failed bank resolution and depositor protection', 17 *Journal of Financial Regulation and Compliance* (2009), p. 186, 190-209; J. Carmassi, D. Gros and S. Micossi, 'The global financial crisis: Causes and cures', 47 *Journal of Common Market Studies* (2009), p. 977, 980-996; and J. Goddard, P. Molyneux and J. Wilson, 'The financial crisis in Europe: Evolution, policy responses and lessons for the future', 17 *Journal of Financial Regulation and Compliance* (2009), p. 362, 365-380.
16. Financial Services and Markets Act 2000 (c 8), (the Financial Services and Markets Act 2000). See, Section 118 of the Financial Services and Markets Act 2000.
17. Financial Services and Markets: The Prospectus Regulations, [2005] SI 2005/381 (the Market Abuse Regulations 2005), which amended the Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, SI 2001/1996 (the Market Abuse Regulations 2001).
18. Sections 118B and 118C read together with section 118A of the Financial Services and Markets Act 2000; read together with Articles 2, 3 and 4 of the EU Market Abuse Directive; Article 4 of Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of

Services and Markets Act 2000¹⁹ was almost identical to the definition of inside information provided in the EU Market Abuse Directive.²⁰ However, the Financial Services and Markets Act 2000 defined inside information as information that was not generally available,²¹ as opposed to a similar definition which was contained in the EU Market Abuse Directive which referred to inside information as information of a precise nature which had not been made public.²² The EU Market Abuse Directive²³ and the Financial Services and Markets Act 2000²⁴ also contained similar definitions of inside information in relation to commodity derivatives.²⁵ Likewise, the EU Market Abuse Directive²⁶ and the Financial Services and Markets Act 2000²⁷ had an almost identical definition of inside information in relation to agents and/or intermediaries, which was mainly aimed at combating front running (dealing ahead of investors' orders).²⁸ Moreover, in line with Recital 31 of the Preamble to EU Market Abuse Directive, the Financial Services Authority (FSA) issued its Code of Market Conduct which inter alia enumerated a number of factors which were to be considered when determining whether information is generally available.²⁹

insiders, the notification of managers' transactions and the notification of suspicious transactions, [2004] OJ L 162/70, (the Accepted Market Practices Directive).

19. Section 118C of the Financial Services and Markets Act 2000.

20. Article 1(1) of the EU Market Abuse Directive. Notably, the definition of inside information contained in Article 7(1) of the new EU Market Abuse Regulation read in conjunction with Article 2 of the new Criminal Sanctions Market Abuse Directive is now commendably extended to transactions or dealings involving emission allowances. See, Article 7(1)(c) of the new EU Market Abuse Regulation. Nonetheless, in the wake of the Brexit outcome, it remains to be seen whether the UK will enact its own anti-market abuse laws that embraces this change in line with the definition of inside information contained in the new EU Market Abuse Regulation. Notably, EU Member States are given two years to transpose the provisions of the new Criminal Sanctions Market Abuse Directive into their respective market abuse national legislations while the provisions of the new EU Market Abuse Regulation applies directly to all Member States without the need for such transposition. See, European Commission, 'Daily News – 12.06.2014', *European Commission* (2014), [http://europa.eu/rapid/midday-express-12-06-2014.htm? locale=en](http://europa.eu/rapid/midday-express-12-06-2014.htm?locale=en).

21. Section 118C of the Financial Services and Markets Act 2000.

22. Article 1(1) of the EU Market Abuse Directive and Article 7(1) of the new EU Market Abuse Regulation read in conjunction with Article 2 of the new Criminal Sanctions Market Abuse Directive.

23. Article 1(1) of the EU Market Abuse Directive and see also, Article 4 of the Accepted Market Practices Directive.

24. Section 118C(3) of the Financial Services and Markets Act 2000 read together with section 118C(7) of the Financial Services and Markets Act 2000.

25. On the other hand, the definition of inside information in relation to commodity derivatives contained in Article 7(1)(b) of the new EU Market Abuse Regulation read with Article 2 of the new Criminal Sanctions Market Abuse Directive, is now broadly extended to transactions or dealings involving spot commodity contracts as defined in Article 3(1)(15) of the new EU Market Abuse Regulation. In light of this, it is hoped that the UK will also incorporate this change in accordance with the definition of inside information provided in the new EU Market Abuse Regulation.

26. Article 1(1) of the EU Market Abuse Directive.

27. Section 118C(4) of the Financial Services and Markets Act 2000.

28. Interestingly, this definition of inside information as regards agents and/or intermediaries is now applicable to spot commodity contracts transactions, see Article 7(1)(d) of the new EU Market Abuse Regulation read with Article 2 of the new Criminal Sanctions Market Abuse Directive. It is submitted that the UK should consider enacting a similar and/or related definition of inside information in its post-Brexit anti-market abuse laws in order to effectively combat market abuse practices in its financial markets and other related trading platforms.

29. This indicates that Section 118C of the Financial Services and Markets Act 2000 fully implemented Article 1(1) of the EU Market Abuse Directive and the Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, [2003] OJ L 339/70 (the Directive on the Public Disclosure of Inside Information). See further, J. Welch et al., 'Comparative implementation of the EU Directives (1)– Insider dealing and market abuse', *British Institute of International and Comparative Law City Research Series* No. 8

There was no material difference between the definition of insider information contained in either the EU Market Abuse Directive³⁰ and the Financial Services and Markets Act 2000.³¹ Notably, both the EU Market Abuse Directive³² and the Financial Services and Markets Act³³ distinguished primary insiders from secondary insiders. Likewise, both the EU Market Abuse Directive³⁴ and the Financial Services and Markets Act³⁵ prohibited corporate insiders (legal or juristic persons) from indulging in market abuse offences. Both the EU Market Abuse Directive³⁶ and the Financial Services and Markets Act 2000³⁷ specifically prohibited insider trading and market manipulation. Nevertheless, the UK has somewhat delayed and/or inconsistently implemented the provisions pertaining to the financial instruments that were covered by the EU Market Abuse Directive.³⁸

In other words, as evidenced above, the EU Market Abuse Directive was adopted to ensure that a common approach vis-à-vis the co-operation and enforcement of the market abuse prohibition is employed throughout the EU Member States.³⁹ Subsequently, the general concepts and practices regarding the combating of market abuse have hitherto been transposed into the relevant national legislation by most EU Member States, including the UK. In relation to this, it is reported that there have been relatively few suspicious transactions before issuers' regulatory announcements over the last few years in the UK.⁴⁰

(2005), <https://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/2007-2000/Comparative%20Implementation%20of%20EU%20Directives%20Insider%20Dealing%20and%20Market%20Abuse.pdf>, p. 1, 21. Nevertheless, it is still unclear whether the UK will choose to enact its own distinct anti-market abuse laws or to enact anti-market abuse laws that are related and/or influenced by the new EU Market Abuse Regulation and the new Criminal Sanctions Market Abuse Directive.

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

31. Section 118B of the Financial Services and Markets Act 2000.

32. Article 2(1) of the EU Market Abuse Directive applies to primary insiders and Article 4 applies to secondary insiders.

33. Section 118B(a) to (d) of the Financial Services and Markets Act 2000 applies to primary insiders and it is not necessary for such insiders to know that the information in their possession is inside information before they can incur market abuse liability and section 118B(e) applies to secondary insiders and such persons will incur market abuse liability if they know or ought to have known that they obtained information from a primary insider and/or if they know or ought to have known that it is inside information. See further, J. Welch et al., *British Institute of International and Comparative Law City Research Series* No. 8 (2005), p. 25.

34. See, Article 2(2) of the EU Market Abuse Directive, which applies directly to corporate insiders.

35. See, Section 118B of the Financial Services and Markets Act 2000 which applies to both individuals and bodies corporate (companies) in comparison to the provisions of the Criminal Justice Act 1993 (c 36) (the Criminal Justice Act 1993), which only applies to individuals.

36. Articles 1(2), 2, 3, 4 and 5 of the EU Market Abuse Directive.

37. Section 118 of the Financial Services and Markets Act 2000.

38. For instance, most of the key amendments such as the Market Abuse Regulations 2001 as amended by Regulation 10 of the Market Abuse Regulations 2005, to include all financial instruments as stated in Article 1(3) the EU Market Abuse Directive and to include all regulated markets as defined in Article 1(13) of the Investment Services Directive, were only introduced after the year 2000. See, Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, [1993] OJ L 141/27 (the Investment Services Directive).

39. See Recital 12 of the Preamble to the EU Market Abuse Directive. Also, European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 3.

40. For a general overview, see the report by the Financial Services Authority, 'The FSA: Measurement of market cleanliness', (copy on file with the author).

On the other hand, apart from distinguishing corporate insiders⁴¹ and primary insiders⁴² from secondary insiders,⁴³ the new EU Market Abuse Regulation has now extended the pool of primary insiders to include any person who possesses inside information as a result of being an emission allowance market participant.⁴⁴ Moreover, the new EU Market Abuse Regulation now clearly prohibits any person from engaging in, and/or attempting to engage in insider dealing and market manipulation practices.⁴⁵ Furthermore, the prohibition of market abuse under the new EU Market Abuse Regulation is now expressly applicable to financial instruments traded on, and/or admitted to trading on MTFs, OTFs and other related trading platforms.⁴⁶

Likewise, the new EU Market Abuse Regulation clearly describes what constitutes legitimate behaviour,⁴⁷ unlawful disclosure of inside information,⁴⁸ accepted market practices⁴⁹ and market soundings.⁵⁰ These changes are probably aimed at ensuring that the new EU Market Abuse Regulation aligns with recent market developments such as the new trading platforms and technological practices such as algorithmic trading and high frequency trading (HFT).

Against this background, it is submitted that the relevant policy makers in the UK should consider amending their market abuse laws in line with the key provisions of the new EU Market Abuse Regulation as summarized above. Nonetheless, Brexit poses the biggest challenge to the amendment or enactment of such laws by UK policy makers. In other words, after the UK's withdrawal from the EU, it is not certain whether the UK will enact market abuse laws that are compatible with the requirements of the new EU Market Abuse Regulation.⁵¹ Additionally, it is not clear whether the EU would require the UK to continue implementing the EU market abuse laws to enable UK-based financial institutions to have access to the single market benefits either through bilateral trade agreements or through a customs union membership.

A. Selected flaws of the EU Market Abuse Directive and its enforcement

As highlighted above,⁵² there are some flaws that might have contributed to the inconsistent implementation of the EU Market Abuse Directive and the combating of market abuse in the UK and other EU Member States. For instance, the provisions of the EU Market Abuse were

41. Article 8(5) of the new EU Market Abuse Regulation read together with Articles 3, 4 and 8 of the new Criminal Sanctions Market Abuse Directive.

42. Article 8(4) of the new EU Market Abuse Regulation read with together with Articles 3 and 4 of the new Criminal Sanctions Market Abuse Directive.

43. Article 8(4) read together with Article 8(5) of the new EU Market Abuse Regulation. See also, Articles 3 and 4 of the new Criminal Sanctions Market Abuse Directive.

44. Article 8(4)(a) and 8(4)(b) of the new EU Market Abuse Regulation read together with Articles 3(3)(a) and (b); 4 of the new Criminal Sanctions Market Abuse Directive.

45. Articles 8, 12, 14, 15 and 16 of the new EU Market Abuse Regulation read together with Articles 3, 4, 5, 6, 7, 8 and 9 of the new Criminal Sanctions Market Abuse Directive.

46. Articles 2 and 3 of the new EU Market Abuse Regulation.

47. Article 9 of the new EU Market Abuse Regulation.

48. Article 10 of the new EU Market Abuse Regulation.

49. Article 13 of the new EU Market Abuse Regulation.

50. Article 11 of the new EU Market Abuse Regulation.

51. A. Tuson, 'Brexit and the Market Abuse Regulation', *Berwin Leighton Paisner* (2016), <http://www.blplaw.com/expert-legal-insights/articles/brexit-and-the-market-abuse-regulation>.

52. See the related discussion in Section 2 above.

mainly limited to market manipulation and insider trading in financial instruments⁵³ that were admitted to trading on regulated markets⁵⁴ in the EU or for which a request for admission to trading on such markets had been made, irrespective of whether the transaction itself actually took place on those markets. Thus, unlike the position under the new EU Market Abuse Regulation,⁵⁵ market abuse activities involving financial instruments traded on, and/or admitted to trading on MTFs, OTFs and other related trading platforms, were not expressly prohibited under the previous EU Market Abuse Directive. This could have impeded the effective prevention of market abuse practices across the UK and other EU financial markets.

Moreover, with regard to insider trading, the EU Market Abuse Directive's prohibition further applied to financial instruments not admitted to trading on a regulated market in a Member State, but whose value depended on the financial instruments admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such a market had been made.⁵⁶ However, due to the significant increase in the volume of and/or the varied nature of transactions traded on the MTFs,⁵⁷ OTFs and the over the counter markets (outside the regulated markets) and the entry into force of the Markets in Financial Instruments Directive, some EU Member States, such as the UK, extended the application of the EU Market Abuse Directive to certain non-regulated markets.⁵⁸ While this was a positive move towards the curbing of market abuse in all the EU financial markets and other trading platforms, it could also have created confusion and different approaches regarding the implementation of the EU Market Abuse Directive throughout the Member States. For example, the Markets in Financial Instruments Directive, unlike the EU Market Abuse Directive, applied to a much broader spectrum of financial instruments that were traded on the regulated markets as well as on the MTFs.⁵⁹ In other words, unlike the new EU Market Abuse Regulation,⁶⁰ the EU Market Abuse Directive did not apply to other financial instruments⁶¹ such as derivatives and credit risk transfers instruments, spot commodity contracts,

53. See, Articles 1(3) and 9 of the EU Market Abuse Directive. See further, European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 4-5.

54. Articles 1(4) and 9 of the EU Market Abuse Directive. See also, European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 4-5.

55. See Articles 2 and 3 of the new EU Market Abuse Regulation and the related remarks in Section 2 above.

56. See Article 9 together with Articles 2, 3 and 4 of the EU Market Abuse Directive. Notably, a related provision is now contained in Article 2(1)(d) and 2(3) read together with Article 2(1)(a), 2(1)(b), 2(1)(c), 2(2) and 2(4) of the new EU Market Abuse Regulation, which outlines the scope of application of the Regulation.

57. See generally, Articles 4(15) and 26(2) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC repealing Council Directive 93/22/EEC, [2004] OJ L 145/1 (the Markets in Financial Instruments Directive).

58. This is also the case for example, with the Alternext in France and in unofficial markets in Germany, Spain and Luxembourg.

59. See generally, Article 26(2) of the Markets in Financial Instruments Directive. See also, European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 4-7; and the European Securities Markets Expert Group (ESME), 'Report on market abuse EU legal framework and its implementation by member states: A first evaluation', http://ec.europa.eu/internal_market/securities/docs/esme/mad_070706_en.pdf, p. 10, 16-18, 20.

60. See Article 2 read together with Article 3 of the new EU Market Abuse Regulation. See further, Article 4(1)(15) read together with Article 1 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, [2014] OJ L 173/349, (the new MiFID).

61. See, Article 4(1)(15) of the new MiFID.

emission allowances, broker crossing systems and credit default swaps that were traded outside the regulated markets.⁶² Furthermore, the UK and other EU Member States developed various and different interpretations as regards the actual types of financial instruments that could be covered in terms of the EU Market Abuse Directive, especially considering the fact that the Markets in Financial Instruments Directive defined financial instruments to include, inter alia, credit default swaps, climatic derivatives, contract for differences and emission allowances.⁶³ This clearly indicates that the EU Market Abuse Directive was, in this regard, flawed and inconsistently enforced in the UK's financial markets and throughout the EU Member States.⁶⁴ In light of this, some EU Member States proposed that the scope of application of the EU Market Abuse Directive in relation to the financial instruments currently traded in the EU financial markets should be broadened to cover the financial instruments as stipulated under the Markets in Financial Instruments Directive.⁶⁵ Eventually, the new EU Market Abuse Regulation, the new MiFID and the new Criminal Sanctions Market Abuse Directive were adopted in 2014.

Consequently, it is submitted that the provisions of the new EU Market Abuse Regulation, the new MiFID and the new Criminal Sanctions Market Abuse Directive should be carefully transposed into the relevant domestic anti-market abuse laws in the EU Member States, not only to enable them to be applicable to all the financial instruments that are traded outside the regulated markets, but also to ensure that adequate practical measures are put in place to promote their uniform application by the Member States to avoid balkanization and/or other potential over-regulation problems.

There was also discord among the EU Member States regarding the interpretation of the definition of inside information for commodity derivatives purposes. This was potentially caused by the fact that the definition of inside information for commodity derivatives⁶⁶ did not expressly apply to emission allowances, spot commodity contracts and derivative contracts.⁶⁷ Moreover, market participants and regulatory bodies in the UK and other EU Member States took divergent approaches in relation to the operation and interpretation of the general definition of inside information for the purposes of the EU Market Abuse Directive.⁶⁸ This was caused by the fact that the EU Market Abuse Directive's general definition of inside information did not expressly provide whether it was required that the offenders should have the knowledge of the inside

62. Article 1(3) of the EU Market Abuse Directive.

63. See Commission Regulation (EC) No. 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (Text with EEA relevance), [2006] OJ L 241/1 (the MiFID Implementing Regulation).

64. Particularly regarding the meaning of, and/or what constitutes financial instruments for the purposes of Article 1(3) of the EU Market Abuse Directive. For a general overview, see L. Burn, 'On keeping donkeys in stables: Does the market need better governance and control rather than more regulation?', 4 *Capital Markets Law Journal* (2009), p. 54, 58-68.

65. See European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 4-7.

66. Article 1(1) of the EU Market Abuse Directive.

67. It must be noted that this status quo is set to be changed by Article 2 and Article 3 of the new EU Market Abuse Regulation.

68. Article 1(1) of the EU Market Abuse Directive; see also Article 1 of the Directive on the Public Disclosure of Inside Information, which deals with the definition and public disclosure of inside information and the definition of market manipulation. See related analysis on the definition of inside information as adopted in the UK above.

information which they possess and/or the intention to commit market abuse offences before they can incur any liability.⁶⁹ As a result, some countries, such as the UK, advocated that it was not necessary to prove the intention on the part of the offenders while other countries, like Spain, argued that only proof of the intention or use of inside information on the part of the market abuse offenders would suffice.⁷⁰

Furthermore, the EU Market Abuse Directive's general definition of inside information did not clearly distinguish between inside information for the purposes of determining when (actual time) issuers had an obligation to make such information public and inside information as it is applied to the obligation on the part of such issuers to stop committing market abuse offences.⁷¹ In this regard, it is suggested that the new EU Market Abuse Regulation's provisions on the disclosure and definition of inside information⁷² should be welcomed in the UK and the entire EU, as they provide more clarity on the interpretation and use of inside information across the EU Member States and enable issuers and other relevant persons to execute their mandatory disclosure obligations effectively without intentionally or erroneously committing market abuse offences.

The dissemination of inside information was another complex and problematic matter in the UK and other EU Member States, especially with regard to the requirements for the prompt and/or deferred disclosure obligation which were imposed on the issuers.⁷³ The mandatory duty on the part of the issuers of financial instruments to inform the public as soon as possible of any inside information which specifically concerns the said issuers⁷⁴ as well as the deferred disclosure of inside information only in certain conditions,⁷⁵ are positive steps that were taken towards combatting market abuse activities in the EU financial markets.

69. Article 1(1) of the EU Market Abuse Directive. This flaw is retained in Article 7(1)(a) read together with Articles 10, 8 and 12 of the new EU Market Abuse Regulation.

70. This debate is worsened by the controversial decision that was employed in Case C-45/08 *Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank, Financie-en Assurantiwezen*, EU: C:2009:806, where the court held that Article 1(1) read together with Articles 2, 3, 4 and 5 of the EU Market Abuse Directive merely prohibited insiders from using inside information to commit market abuse offences and therefore proof of intention on the part of offenders was not required. See also, Shearman and Sterling LLP, 'Twice as MAD: Legislative proposals to amend the European regulation of market abuse', *Financial Institutions Advisory and Financial Regulatory Client Publication* (2011), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2011/12/Twice-as-MAD-Legislative-Proposals-to-Amend-the-/Files/View-full-memo-Twice-as-MAD-Legislative-Proposal/FileAttachment/TwiceasMADLegislativeProposalstoAmendtheEuropean.pdf>, p. 3-4.

71. Article 1(1) of the EU Market Abuse Directive; European Securities Markets Expert Group (ESME), 'Report on market abuse EU legal framework and its implementation by member states: A first evaluation', p. 5-7. This gap is now addressed by Article 7(5) and (4) of the new EU Market Abuse Regulation which now, inter alia, empowers the European Securities and Markets Authority (ESMA) to issue guidelines on, and/or to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be made public in accordance with legal or regulatory provisions in the EU or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets.

72. See Article 7 read together with Article 10 of the new EU Market Abuse Regulation.

73. Article 6(1) and (2) of the EU Market Abuse Directive. See also, Article 3 of the Directive on the Public Disclosure of Inside Information. Seemingly, some of the problems associated with the deferred and/or delayed disclosure of inside information are now addressed in Article 17 of the new EU Market Abuse Regulation. See further, Articles 7, 9 and 10 of the new EU Market Abuse Regulation.

74. Article 6(1) of the EU Market Abuse Directive.

75. Article 6(2) of the EU Market Abuse Directive.

However, national regulatory bodies in some EU Member States, such as the UK, were struggling to enforce the aforementioned issuer's mandatory duty of disclosure consistently.⁷⁶ In particular, the challenge was around the specific conditions under which the disclosure of inside information could be immediately disclosed and requirements which were to be met by issuers to ensure that their deferred disclosure would not mislead the public and that the confidentiality of the inside information in question was preserved.⁷⁷ It appears as if this issuer's mandatory duty of disclosure employed the same broad definition of inside information that was used for the purposes of the insider trading prohibition under the EU Market Abuse Directive.⁷⁸ Accordingly, different approaches were adopted in the UK and the other EU Member States.⁷⁹ In view of the flaws stated above, it was submitted that the new EU Market Abuse Regulation⁸⁰ should be amended to provide a specific definition of inside information for the purposes of the issuers' prompt and/or delayed disclosure obligation. Such definition should provide clear guidelines on the conditions under which price-sensitive information may be required to be deferred or promptly disclosed to the public for the purposes of combating market abuse activities across the EU Member States without imputing undue pressure on the issuers.

EU Member States also took varying approaches regarding the definition and prohibition on insider trading and market manipulation.⁸¹ For instance, the UK extended the prohibition on insider trading to any insider who actually traded or attempted to trade in the qualifying investments on the basis of the non-public inside information he knowingly possessed.⁸² On the other hand, some countries have interpreted the EU Market Abuse Directive's insider trading prohibition to be applicable whenever a person in possession of inside information traded or attempted to trade in the financial instruments to which such information relates.⁸³ With regard to the prohibition on market manipulation, attempted market manipulation was not expressly outlawed in the EU Market Abuse Directive.⁸⁴ This forced the UK and several other EU Member States to adopt the definition of market manipulation which was similar to that contained in the EU Market Abuse

76. See European Securities Markets Expert Group (ESME), 'Report on market abuse EU legal framework and its implementation by member states: A first evaluation', p. 7-10. See also the related comments in European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 9-11.

77. See, European Securities Markets Expert Group (ESME), 'Report on market abuse EU legal framework and its implementation by member states: A first evaluation', p. 7-10. This gap is set to be addressed by Article 17 of the new EU Market Abuse Regulation which now allows the ESMA to issue some relevant guidelines and to establish a non-exhaustive indicative list of the legitimate interests of issuers as referred to in Article 17(4)(a), and of situations in which delay of disclosure of inside information is likely to mislead the public as referred to in Article 17(4)(b) read together with Article 17(4)(5) of new EU Market Abuse Regulation.

78. Article 1(1) of the EU Market Abuse Directive.

79. For example, in Spain issuers are required to seek permission before they can defer or delay any disclosure of inside information from the regulatory authorities. On the other hand, some EU Member States like France do not require issuers to seek any formal permission to delay or defer the disclosure of inside information from the regulatory authorities, provided that such delay is necessary to protect or maintain the confidentiality of the financial transactions in question. See, European Securities Markets Expert Group (ESME), 'Report on market abuse EU legal framework and its implementation by member states: A first evaluation', p. 8.

80. See, Article 7 read together with Articles 9, 10 and 17 of the new EU Market Abuse Regulation.

81. Articles 1(2), 2, 3, 4 and 5 of the EU Market Abuse Directive.

82. See related remarks in Section 2 above. See also, J. Welch et al., *British Institute of International and Comparative Law City Research Series* No. 8 (2005), p. 9-11, 24-25 and 27.

83. For example in Spain, see, *ibid.*, p. 9-12, 66-69.

84. Articles 1(2) and 5 of the EU Market Abuse Directive and related comments in European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 15-16.

Directive although it was somewhat restricted because it did not cover attempted market manipulation practices. Notably, this shortcoming is now addressed in the new EU Market Abuse Regulation.⁸⁵

Additionally, different interpretations were adopted in the UK and other EU Member States, especially with regard to what constitutes accepted market practices as opposed to prohibited market manipulation practices, for the purposes of the EU Market Abuse Directive.⁸⁶ Nonetheless, this flaw is now addressed in the new EU Market Abuse Regulation.⁸⁷ Accordingly, it is hoped that the new EU Market Abuse Regulation's provisions on accepted market practices⁸⁸ and/or conduct that will be uniformly regarded as accepted market practices will be carefully transposed into the relevant national market abuse laws in the UK. Such provisions should also be carefully enforced throughout the EU Member States to avoid unjustifiably imputing market abuse liability upon the issuers who deal in the financial instruments that are traded in more than one country (dual listed issuers).

Notwithstanding some general interpretation problems, the requirement that issuers or their agents must draw up and update their insider lists,⁸⁹ report suspicious transactions⁹⁰ and the right of the regulatory bodies to access telephone and existing data traffic records⁹¹ were fairly utilized in the UK and in other EU Member States to detect and combat market abuse activities.⁹² Nevertheless, the managers of the issuers and other relevant persons' transaction reporting and/or disclosure to the regulatory authorities, of any information pertaining to their own transactions, which related to the said issuers' financial instruments or derivatives⁹³ caused unnecessary administrative burden on the part of such managers and other regulatory authorities in other countries.⁹⁴ In this regard, it is submitted that the relevant provisions of the new EU Market Abuse Regulation should be welcomed in the UK and other EU countries as they increase the threshold for transactions that must be reported by issuers, managers of issuers and/or their agents to prevent the risk of

85. See, Articles 12 and 15 on the new EU Market Abuse Regulation, which are now expressly discouraging attempted market manipulation activities. See further, Articles 5 and 6 of the new Criminal Sanctions Market Abuse Directive.

86. Articles 1(2)(a) and (5) of the EU Market Abuse Directive; see also, the Committee of European Securities Commissions Regulators (CESR), 'Report on Accepted Market Practices', http://www.cesr-eu.org/data/document/04_505b.pdf. European Securities Markets Expert Group (ESME), 'Report on market abuse EU legal framework and its implementation by member states: A first evaluation', p. 16; and European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 15-16. Consequently, very few EU Member States, namely France, Spain, Austria and Portugal, have to date successfully formulated such accepted market practices.

87. See, Article 13 of the new EU Market Abuse Regulation, which sets out the criterion for determining accepted market practices. See further, Articles 12, 15 and 9 of the new EU Market Abuse Regulation.

88. See, Article 13 read together with Articles 12, 15 and 9 of the new EU Market Abuse Regulation.

89. Article 6(3) of the EU Market Abuse Directive; see also, Article 5 of the Accepted Market Practices Directive.

90. See Article 6(9) of the EU Market Abuse Directive. See also, Article 7(11) of the Accepted Market Practices Directive.

91. Article 12(2)(d) of the EU Market Abuse Directive. Similar provisions are also provided in the new EU Market Abuse Regulation, see Article 4 on the notifications and list of financial instruments; Article 16 on prevention and detection of market abuse; Article 18 on drawing insider's lists; Article 19 on the managers' transactions notifications and Article 23(2)(h) on the access to existing data traffic records.

92. See, CESR, 'The 3rd set of CESR guidance and information on the common operation of the MAD to the market consultation paper', CESR (2009), https://www.esma.europa.eu/sites/default/files/library/2015/11/09_220.pdf; CESR, 'CESR-Pol statistics shared with DG market services report', CESR (copy on file with the author).

93. Article 6(4) of the EU Market Abuse Directive. See also, Article 6 of the Accepted Market Practices Directive.

94. See, European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 13-14.

the regulatory bodies negatively interfering with the proper execution of their duties.⁹⁵ It is further submitted that the relevant provisions of the new EU Market Abuse Regulation will provide greater clarity on the issuers' obligation to draw up lists of their insiders (employees) in order to minimize the risk of imposing excessive administrative burden, particularly on large multinational companies.⁹⁶

Seemingly, with regard to the exemption of buy-back programmes and stabilization activities, the UK followed the EU Market Abuse Directive approach.⁹⁷ Nonetheless, a wide range of approaches (measures) were adopted by some EU Member States on whether short selling should be prohibited.⁹⁸ It is submitted that the relevant provisions of the new EU Market Abuse Regulation⁹⁹ should be carefully amended to provide a uniform prohibition on short-selling as well as more elaborate guidelines on share buy-back programmes and stabilization activities that may be exempted from the market abuse prohibition by the EU Member States.

As discussed above, it is evident that the implementation of the EU Market Abuse Directive in the UK was relatively successful. Precisely, levels 1, 2 and 3 of the Lamfalussy process were successfully implemented by almost all the EU Member States. The Lamfalussy process are enforcement approaches that were aimed at the development of the financial service industry regulations in the EU. The Lamfalussy process enforcement approaches were developed in March 2001 and named after the chair of the EU advisory committee that created it, Alexandre Lamfalussy. However, divergent approaches and some inconsistencies still existed, especially with regard to the interpretation and enforcement of some provisions of the EU Market Abuse Directive and the imposition of market abuse penalties by other EU Member States.¹⁰⁰ This consequently culminated in the drafting of various proposals aimed at repealing the EU Market Abuse Directive in 2011.¹⁰¹ To this end, the European Commission¹⁰² isolated some gaps¹⁰³ that were embedded in the EU Market Abuse Directive, including inter alia:

95. Article 19 of the new EU Market Abuse Regulation.

96. Article 18 of the new EU Market Abuse Regulation.

97. Article 8 of the EU Market Abuse Directive. See also, Regulation (EC) No. 2273/2003 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 L 336/33, (the Regulation on Share Buy-backs and Stabilizations). Strikingly, related provisions for exemptions for buy-back programmes and stabilization are also stipulated in the new EU Market Abuse Regulation, see Article 5 read together with Article 6 of the new EU Market Abuse Regulation.

98. European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)', p. 17.

99. See Article 5 read together with Article 6 of the new Market Abuse Regulation.

100. See European Securities Markets Expert Group (ESME), 'Report on market abuse EU legal framework and its implementation by member states: A first evaluation', p. 3. Also, E.J. Swan, *Market Abuse Regulation* (Oxford University Press, 2006), p. 111-113.

101. See the Commission Proposal for a Regulation of the European Parliament and of the Council of 20 October 2011 on Insider Dealing and Market Manipulation (Market Abuse), COM(2011) 651 final (the Market Abuse Regulation Proposal), which will be directly effective in the EU Member States from two years after the date when it is passed or when it enters into force, on a par with national laws and the Commission Proposal for a Directive of the European Parliament and of the Council of 20 October 2011 on Criminal Sanctions for Insider Dealing and Market Manipulation (Market Abuse), COM(2011) 654 final (the Criminal Sanctions Market Abuse Directive Proposal) which will require separate national implementing legislation in each EU Member State within two years of its entry into force.

102. See generally the Market Abuse Regulation Proposal, p. 2-75; and the Criminal Sanctions Market Abuse Directive Proposal, p. 2-14.

103. See the European Commission, Market Abuse Regulation Proposal's Explanatory Memorandum, p. 2-13; and the Criminal Sanctions Market Abuse Directive Proposal's Explanatory Memorandum, p. 2-6; also see related

- (a) gaps in the regulation of new markets, trading platforms (including MTFs and OTFs) and over the counter (OTC) instruments;
- (b) gaps in the regulation of commodities and commodity derivatives;
- (c) regulators lacking certain information and powers;
- (d) scope of the EU Market Abuse Directive mainly restricted to financial instruments traded on regulated markets;
- (e) sanctions either inadequate or less dissuasive for market abuse deterrence purposes;
- (f) lack of clarity on certain key concepts giving rise to legal uncertainty; and
- (g) excessive administrative burdens for issuers whose financial instruments are admitted to trading on small and medium-sized growth markets.

Accordingly, the Commission's key proposals to combat the gaps stated above were eventually adopted into the new EU Market Abuse Regulation and the new Criminal Sanctions Market Abuse Directive in 2014.¹⁰⁴ In light of this and preceding the Brexit outcome, the Market Abuse Regulations 2005 and the Financial Services and Markets Act 2000's civil market abuse prohibition¹⁰⁵ were repealed by the Market Abuse Regulations 2016¹⁰⁶ to give effect to the new EU Market Abuse Regulation and to ensure compatibility with its provisions, as well as the provisions of the new Criminal Sanctions Market Abuse Directive.¹⁰⁷ However, it must be noted that the new EU Market Abuse Regulation is directly applicable in all the EU Member States. Thus, unlike the new Criminal Sanctions Market Abuse Directive, the new EU Market Abuse Regulation does not require any transposition into domestic law in order to implement its provisions in the UK and/or other EU Member States. This could suggest that both the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA)¹⁰⁸ are obliged to enforce the provisions of the new EU Market Abuse Regulation until the UK's actual departure from the EU. Put differently, the UK remains a member of the EU which must continue to abide by its legislation until it has formally and legally finalized its withdrawal from the EU.¹⁰⁹

discussions by the High-Level Group on Financial Supervision in the EU, 'Report of the high-level group on financial supervision in the EU', http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, p. 23; Commission Communication of 8 December 2010 on Reinforcing sanctioning regimes in the financial sector, COM(2010) 716 final; Commission Communication of 23 February 2011 on Review of the small business Act for Europe, COM(2011) 78 final; Commission Communication of 4 March 2009 on Driving economic recovery, COM(2009) 114 final; and Commission Communication of 3 July 2009 on Ensuring efficient, safe and sound derivatives markets, COM(2009) 332 final.

104. See related remarks in Section 1 and Section 2 above.

105. In other words, parts 6 and 8 of the Financial Services and Markets Act 2000 were repealed.

106. Market Abuse Regulations 2016, SI 2016/680 (the Market Abuse Regulations 2016).

107. Morgan Lewis, 'UK Market Abuse Regime Extends its Reach: Implications for Market Participants', *Morgan Lewis* (2016), <https://www.morganlewis.com/pubs/uk-market-abuse-regime-extends-its-reach-implications-for-market-participants>.

108. These regulatory bodies replaced the FSA in accordance with the Financial Services Act 2012 (c 21).

109. These related sentiments were echoed by the Financial Conduct Authority (FCA) as follows: '[f]irms must continue to abide by their obligations under UK law, including those derived from EU law and continue with implementation plans for legislation that is still to come into effect'. See FCA, 'Statement on European Union Referendum Result', <https://www.fca.org.uk/news/statements/statement-european-union-referendum-result>. The UK's formal withdrawal from the EU must be finalized according to Article 50 of the Treaty on European Union. See Greenberg Traurig Maher, 'Brexit: Consequences for Capital Markets', *GTLaw* (2016), <http://www.gtlaw.com/News-Events/Publications/Alerts/196851/Brexit-Consequences-for-Capital-Markets>, p. 2-5.

3. Selected aspects of the new EU Anti-Market Abuse framework

A. The adequacy of the new EU Market Abuse Regulation and related proposals

The new EU Market Abuse Regulation was, *inter alia*, initially introduced by the European Commission's Market Abuse Regulation Proposal to extend the scope of the EU Market Abuse Directive¹¹⁰ to cover a wide range of:

- (a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;¹¹¹
- (b) financial instruments traded on MTFs or other new types of OTFs in at least one member state;¹¹² and
- (c) other behaviour or transactions involving financial instruments whose value relate to or depend on the financial instruments traded on a regulated market, MTFs or OTFs, irrespective of whether the behaviour or transactions actually take place on such a regulated market, MTFs or OTFs.¹¹³

As stated earlier,¹¹⁴ the Market Abuse Regulation Proposal was eventually adopted as the new EU Market Abuse Regulation.¹¹⁵ Notably, under the new EU Market Abuse Regulation, the prohibition on market abuse is now expressly applicable to actions and omissions, in the EU and in a third country, as regards to the financial instruments traded on a regulated market, MTFs or other new types of OTFs.¹¹⁶ This is aimed at combating market abuse activities involving credit default swaps, climatic derivatives, contract for differences, derivatives and credit risk transfers instruments, spot commodity contracts, emission allowances and broker crossing systems traded in new markets, platforms (including MTFs and OTFs) and OTC markets.¹¹⁷ The author

110. Article 1(3) read together with Article 1(1) of the Market Abuse Directive.

111. Article 2(1)(a) of the Market Abuse Regulation Proposal.

112. Article 2(1)(b) of the Market Abuse Regulation Proposal.

113. Article 2(1)(c) read together with (d) and sub-paragraphs (2), (3) and (4) of the Market Abuse Regulation Proposal.

114. See related comments in Section 1, Section 2 and Section 2.A above.

115. Article 2(1)(d) and 2(3) read together with Article 2(1)(a), 2(1)(b), 2(1)(c), 2(2) and 2(4) of the new EU Market Abuse Regulation, which outlines the Regulation's scope of application.

116. Article 2(4) read with Article 2(1), 2(2) and 2(3) of the new EU Market Abuse Regulation.

117. See, the Commission Proposal for a Directive of the European Parliament and of the Council of 20 October 2011 on Markets in Financial Instruments Repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), COM(2011) 656 final (the Markets in Financial Instruments Directive Proposal), which also, *inter alia*, suggested amendments to the organisational requirements for trading venues, authorization and ongoing obligations applicable to data services providers and powers of regulators to enable them to combat market abuse involving a wide range of financial instruments in new markets and trading platforms, see further the Markets in Financial Instruments Directive Proposal's Explanatory Memorandum, p. 1-11; and Articles 16 to 20, 32 to 34, 53 to 54, 27; 59 and 60 of the Markets in Financial Instruments Directive Proposal. See also, Commission Proposal for a Regulation of the European Parliament and of the Council of 20 October 2011 on Markets in Financial Instruments and amending Regulation [EMIR] on OTC Derivatives, Central Counterparties and Trade Repositories, COM(2011) 652 final (the Markets in Financial Instruments Regulation Proposal), which introduced new requirements for the disclosure of trade transparency data to the public and transaction data to competent authorities, mandatory trading of derivatives on organized venues, specific supervisory actions regarding financial instruments and positions in derivatives and the provision of services by third-country firms without a branch. See also, the Markets in Financial Instruments Regulation Proposal's Explanatory Memorandum, p. 2-13; Articles 1, 3 to 6, 13 to 20 and 21 to 27 of the Markets in Financial Instruments Regulation Proposal; and Shearman and Sterling, 'A Changing Landscape: The Markets in

acknowledges and supports the fact that these amendments are necessary to prevent market abuse and regulatory arbitrage in OTC markets and/or other trading platforms.¹¹⁸ Nonetheless, it is suggested that the new EU Market Abuse Regulation should be further reviewed so that it provides additional practical measures or guidelines regarding the uniform application of its extended scope in the UK and other EU Member States to avoid balkanization and other potential overregulation problems.

In relation to this, it is further submitted that the new EU Market Abuse Regulation's extended scope should be carefully revised to reduce, as much as possible, the risk of creating new administrative burdens for transaction reporting and/or cross-border enforcement-related problems for regulators and other relevant stakeholders in the EU Member States as well as the UK. Notwithstanding these concerns, it is submitted that adopting a similar and adequate extended scope of the market abuse ban in South Africa¹¹⁹ could, if consistently enforced, enable its relevant regulatory authorities to combat market abuse challenges posed by high frequency trading and other related illicit practices that are generally associated with the new trading platforms.

In order to ensure legal certainty, provide adequate information for investors and remedy the gaps in the regulation of commodities and commodity derivatives, the Market Abuse Regulation Proposal enacted a new definition of inside information for commodity derivatives¹²⁰ to enable the regulators to have powers to request relevant information on spot commodity markets.¹²¹ The same status quo is set to be maintained under the new EU Market Abuse Regulation.¹²² This allows the regulators to combat market abuse in spot commodity derivatives or related spot commodity contracts.¹²³ However, it remains to be seen whether this new definition of inside information for commodity derivatives will be successfully utilized by regulators to curb market abuse without discouraging legitimate derivative and spot commodity contracts transactions.¹²⁴ It is submitted that the new EU Market Abuse Regulation should be reviewed to ensure that it provides specific

Financial Instruments Directive II Legislative Proposal', *Financial Institutions Advisory and Financial Regulatory Client Publication* (2011), www.shearman.com/~media/Files/NewsInsights/Publications/2011/10/A-Changing-Landscape-The-MiFID-II-Legislative-Pr_/Files/View-full-memo-A-Changing-Landscape-The-MiFID-II_/FileAttachment/FIA102011AChangingLandscapeTheMiFIDIIILegislative_.pdf, p. 1, 1-14. Notably, the aforesaid proposals were adopted in 2014. Consequently, the related regulatory aspects on markets in financial instruments are now provided for in Article 1 read together with Article 4(1)(15) of the new MiFID.

118. See the definitions of MTFs and OTCs, in Article 2(1)(6) and 2(1)(7) of the Markets in Financial Instruments Regulation Proposal respectively. Similar definitions are now provided in Articles 4(1)(22) and 4(1)(23) of the new MiFID.

119. See, Sections 78, 80, 81 and 82 of the Financial Markets Act 2000; and H. Chitimira *Enforcement of Market Abuse Provisions*, p. 258-304, 421-496.

120. Article 6(1)(b) read together with Article 2(3) of the Market Abuse Regulation Proposal; however, this definition does not clearly provide whether an issuer or market participant's own, bona fide, privileged measures and strategies for trading should be regarded as inside information for market abuse purposes.

121. Article 17(2)(c) and (3) read together with Article 16 of the Market Abuse Regulation Proposal.

122. Article 7(1)(b) read together with Articles 2 and 3 of the new EU Market Abuse Regulation.

123. Articles 8 and 10 of the Market Abuse Regulation Proposal; see also, Article 7(1)(b) read together with Articles 2 and 3 of the new EU Market Abuse Regulation.

124. Cadwalader, Wickersham and Taft LLP, 'The proposed revision of the market abuse directive', LexisNexis (2011), <https://www.lexisnexis.com/legalnewsroom/securities/b/securities/archive/2011/10/06/cadwalader-clients-amp-friends-memo-the-proposed-revision-of-the-market-abuse-directive.aspx?Redirected=true>, p. 2-3; Freshfields Bruckhaus Deringer, 'European market abuse news', *Better Regulation* (2011), <http://www.betterregulation.com/external/31909.pdf>, p. 2-3.

guidelines on how regulators in the EU Member States as well as the UK can oversee the regulation of spot commodity markets and derivative markets without imposing undue excessive pressure on the issuers or other relevant market participants. Moreover, the Market Abuse Regulation Proposal did not expressly apply to insider trading relating to underlying derivative and spot commodity contracts transactions¹²⁵ and wholesale energy products admitted to trading in the EU Member States' trading platforms.¹²⁶ This position remains unchanged under the new EU Market Abuse Regulation.¹²⁷ Seemingly, the new EU Market Abuse Regulation targets cross-market manipulation between derivative markets and spot commodity markets.¹²⁸ The enactment of the Wholesale Energy Market Integrity and Transparency Regulation is a positive step towards combating market abuse in the physical commodities markets across the EU Member States and the UK.¹²⁹ Be that as it may, it is submitted that the Wholesale Energy Market Integrity and Transparency Regulation should be amended so that it may provide a clear roadmap on its application in the EU Member States as well as in the UK and how it will dovetail with the new EU Market Abuse Regulation, and the new MiFID, to prevent potential negative effects of overregulation and/or double jeopardy on the part of the market abuse offenders.

Despite these shortcomings, it is submitted that the market abuse laws in the UK and relevant provisions of the Financial Markets Act 2000¹³⁰ should be amended in line with the new EU Market Abuse Regulation and the Wholesale Energy Market Integrity and Transparency Regulation to provide a specific definition of inside information for commodity derivatives, spot commodity derivatives and related spot commodity contracts to curb insider trading and cross-market manipulation in both the UK and the South African physical (non-financial markets) commodities markets. In relation to this, another option is enacting separate, adequate and specific commodity derivatives regulations or legislation that targets market abuse activities involving commodity derivatives, spot commodity derivatives and related spot commodity contracts in both the UK and the South African commodities markets.

125. Article 2(3) read together with Articles 8 and 10 of the Market Abuse Regulation Proposal; C. Bates 'Market abuse: European Commission proposes new EU regime', *Clifford Chance Client Briefing* (2011), https://www.cliffordchance.com/briefings/2011/10/market_abuse_europeancommissionproposesnewe.html, p. 3-4.

126. Such products are covered by Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, [2011] OJ L 326/1 (the Wholesale Energy Market Integrity and Transparency Regulation). See, Article 3 read together with Article 4 of the Wholesale Energy Market Integrity and Transparency Regulation. See further, Cleary Gottlieb, 'EU Regulation on Energy Market Integrity and Transparency', *Cleary Gottlieb* (2011), <https://www.clearygottlieb.com/news-and-insights/publication-listing/eu-regulation-on-energy-market-integrity-and-transparency14>, p. 1-4; and Agency for the Cooperation of Energy Regulators (ACER), 'Guidance on the application of the definitions set out in article 2 of regulation (EU) No 1227/27 of the European parliament and of the council of 25 October 2011 on wholesale energy market integrity and transparency', 1st Edition, Slovenia (20 December 2011), p. 1, 6-24. (copy on file with the author).

127. See Article 8 read together with Articles 2, 3, 9, 10, 14 and 17 of the new EU Market Abuse Regulation.

128. For example, instances where a person concludes derivative transactions on derivative markets in order to manipulate the price of related spot commodity contracts transactions that are concluded on spot commodity markets or engaging in spot commodity contracts transactions for the purposes of manipulating the price of related commodity derivatives that are traded on derivative markets. For further analysis see, T.A. Katz and S. Millar, 'Amendments to the market abuse directive-10 key points', *Orrick European Financial Markets Alert* (2011), <https://www.orrick.com/api/content/downloadattachment? id=f1f92424-6228-46c7-b85d-d950c3e8276e>, p.1-2.

129. See the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 7.

130. See Sections 78, 80, 81 and 82 of the Financial Markets Act 2000; see also, H. Chitimira, *Enforcement of Market Abuse Provisions*, p. 258-304, 421-496.

The Market Abuse Regulation Proposal introduced a new specific definition of inside information for emission allowances.¹³¹ Accordingly, a similar definition is now contained in the new EU Market Abuse Regulation.¹³² This definition of inside information for emission allowances is, inter alia, aimed at extending the market abuse prohibition to financial instruments covered under the Markets in Financial Instruments Directive Proposal,¹³³ and to those that are subsequently covered under the new MiFID.¹³⁴ It further addresses concerns that the scope of the EU Market Abuse Directive was mainly restricted to financial instruments traded on regulated markets.¹³⁵ The prohibition on emission allowances is also targeted at curbing market abuse activities in the spot secondary markets and the EU emission allowances markets.¹³⁶ Accordingly, emissions allowance markets participants who hold the relevant information suitable for ad-hoc and/or periodic disclosure will now have a duty to create insider lists, report managers' transactions and publicly disclose inside information.¹³⁷ Ostensibly, these obligations are not imposed on small participants (emitters) whose transactions do not significantly affect the market price of emission allowances in question and/or give rise to market abuse and issuers of emission allowances that holds responsibilities for development and implementation of EU's climate policies.¹³⁸ It is, however, submitted that the new EU Market Abuse Regulation should be enforced by the EU Member States and the UK in accordance with the new MiFID and the EU Emissions Trading System Directive¹³⁹ so that they may provide an optimal threshold for emissions or thermal input or a combination

131. Article 6(1)(c) of the Market Abuse Regulation Proposal. See also, the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 8-9.

132. Article 7(1)(c) of the new EU Market Abuse Regulation.

133. Section C of Annex 1 of the Markets in Financial Instruments Directive Proposal. See also, Articles 2(1)(8), 9, 17 and 20 of the Markets in Financial Instruments Regulation Proposal and the Markets in Financial Instruments Regulation Proposal's Explanatory Memorandum, p. 12.

134. Article 4(1)(15) read together with Article 1 of the new MiFID.

135. Article 1(3) of the EU Market Abuse Directive.

136. See the Markets in Financial Instruments Directive Proposal's Explanatory Memorandum, p. 11; the Markets in Financial Instruments Regulation Proposal's Explanatory Memorandum, p. 12; and Directive 2003/87 of the European Parliament and Council of 25 October 2003 on EU emissions trading system 2003/87/EC on establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L 275/32 (the EU Emissions Trading System Directive). This Directive has been amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, [2009] OJ L 140/63.

137. Articles 12, 13 and 14 of the Market Abuse Regulation Proposal. See also, the relevant provisions of the new EU Market Abuse Regulation such as Article 4 on the notifications and list of financial instruments; Article 16 on prevention and detection of market abuse; Article 18 on drawing insider's lists; Article 19 on the managers' transactions notifications; Article 23(2)(h) on the access to existing data traffic records; Article 10 on unlawful disclosure of inside information and Article 17 on the requirements for public disclosure of inside information.

138. Articles 12(2), (3) and (8), 13(2) and (3) and 14(3) of the Market Abuse Regulation Proposal. See also, Articles 18(6) and 19 read together with Article 2 of the new EU Market Abuse Regulation; and Shearman and Sterling, 'A Changing Landscape: The Markets in Financial Instruments Directive II Legislative Proposal', *Financial Institutions Advisory and Financial Regulatory Client Publication* (2011), www.shearman.com/~media/Files/NewsInsights/Publications/2011/10/A-Changing-Landscape-The-MiFID-II-Legislative-Pr___Files/View-full-memo-A-Changing-Landscape-The-MiFID-II___FileAttachment/FIA102011AChangingLandscapeTheMiFIDIILegislative_.pdf, p. 8-9; and C. Bates 'Market abuse: European Commission proposes new EU regime', *Clifford Chance Client Briefing* (2011), p. 3.

139. Another option is to put all the provisions dealing with emission allowances in a single rulebook or legislation to minimize problems associated with the overlapping of related provisions and to efficiently discourage market abuse activities in emission allowances markets.

thereof, to enhance the effective combating of market abuse in spot carbon markets, and to prevent the potential risk of smaller emission allowances participants unjustifiably circumventing their market abuse liability.¹⁴⁰

Additionally, the Market Abuse Regulation Proposal provided a new broad definition of market manipulation to cover all actual manipulative and attempted manipulative conduct involving strategies such as algorithmic trading (including high frequency trading) and related activities like quote stuffing, layering and spoofing of spot commodity derivatives or contracts and other financial instruments.¹⁴¹ The same conduct is now outlawed as market manipulation under the new EU Market Abuse Regulation.¹⁴² This suggests that cancelling or amending pending transactions by any person who has price-sensitive inside information is now prohibited and consequently, the possibility of such person relying on a defence based on accepted market practices (subject to a one year transitional period for previously notified practices) is removed.¹⁴³

Additionally, a number of instances that are deemed to constitute market manipulation are enumerated in order to enable regulators to enforce market manipulation more consistently. The enumeration thus addresses the lack of clarity and the ensuing legal uncertainty surrounding the definitions of key concepts under the EU Market Abuse Directive, such as the elements of the attempted insider trading, actual and/or attempted market manipulation offences.¹⁴⁴ In view of this, it is submitted that the EU Member States and the UK should consider amending their market abuse laws in line with the new EU Market Abuse Regulation¹⁴⁵ to enact adequate, separate and specific provisions for both attempted insider trading and attempted market manipulation offences to enhance market integrity and improve the combating of market abuse practices across the EU and the UK's financial markets.

The Market Abuse Regulation Proposal gave regulatory bodies in the EU Member States the power to enter private premises, search and seize documents after having obtained permission from the relevant courts, where a reasonable suspicion exists that such documents are relevant to an ongoing market abuse investigation.¹⁴⁶ This position is set to be maintained under the new EU Market Abuse Regulation.¹⁴⁷ The regulatory bodies are also given powers to request existing telephone and data traffic records held by telecommunication operators if a reasonable suspicion exists that such records are required in an ongoing market abuse investigation.¹⁴⁸ For the purposes of this and other related functions, the regulatory bodies are obliged to cooperate with the ESMA, other relevant authorities and with each other.¹⁴⁹ The regulatory bodies' supervisory and

140. Not giving less regard to the stated shortcoming, the adoption of a similar prohibition on emission allowances should be considered in South Africa to discourage market abuse activities in the spot secondary markets and/or related emission allowances markets in line with the Kyoto Protocol.

141. Articles 8 and 10 of the Market Abuse Regulation Proposal.

142. See, Articles 12 and 15 read together with Articles 9 and 13 of the new EU Market Abuse Regulation.

143. Articles 8 and 10 of the Market Abuse Regulation Proposal. See also, Articles 12 and 15 read together with Articles 9 and 13 of the new EU Market Abuse Regulation.

144. See the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 8.

145. See Articles 12 and 15 read together with Articles 9 and 13 of the new EU Market Abuse Regulation.

146. Article 17(2)(e) read together with Articles 16 and 18 to 20 of the Market Abuse Regulation Proposal.

147. Article 23(2)(e) read together with Articles 24, 25, 26, 27, 28 and 29 of the new EU Market Abuse Regulation.

148. Article 23(2)(g) and (h) read together with Articles 24, 25, 26, 27, 28 and 29 of the new EU Market Abuse Regulation. See also, Article 17(2)(f) read together with Articles 16 and 18 to 20 of the Market Abuse Regulation Proposal.

149. See Articles 23 and 24 read together with Articles 25, 26, 27, 28 and 29 of the new EU Market Abuse Regulation. See also, Articles 18 to 20 of the Market Abuse Regulation Proposal.

sanctioning powers were revamped; for example, such bodies are now able to impose upon the market abuse offenders civil or administrative pecuniary sanctions of not less than the profit made or loss avoided from the market abuse transactions in question and/or a maximum fine of not less than twice the value of any such profit gained or loss avoided.¹⁵⁰ As a result, the regulatory bodies may impose a maximum fine of not less than €5 million on natural persons¹⁵¹ and civil or administrative pecuniary sanctions of up to €15 million or 15% of the total annual turnover in the preceding business year, on legal persons.¹⁵² The regulatory bodies may further impose other additional higher sanctions upon the market abuse offenders.¹⁵³ The EU Member States are also required to put in place adequate mechanisms to encourage whistle-blowers to report suspected market abuse activities to the regulatory bodies and/or other relevant authorities without the fear of being victimized.¹⁵⁴

All these new developments are, among other things, targeted at addressing the fears that the regulators were lacking certain information and powers under the EU Market Abuse Directive, especially with regard to spot commodity markets and over the counter markets.¹⁵⁵ It is, however, submitted that the new regulators' investigatory powers and whistle-blower immunity provisions should be utilized carefully and uniformly in the EU Member States and the UK to minimize the risk of discouraging or deterring potential investors, which is an effect generally associated with overregulation. Put differently, it is submitted that the relevant market abuse laws in the UK should be amended in accordance with the new EU Market Abuse Regulation to provide specific immunity provisions for market abuse whistle-blowers for the purposes of encouraging all the persons to report market abuse activities to the FCA and/or other relevant enforcement authorities in UK.¹⁵⁶

The new EU Market Abuse Regulation stipulates that the precise data to be included in insider lists should be defined in delegated acts and implementing technical standards adopted by the European Commission.¹⁵⁷ However, issuers whose financial instruments are admitted to trading on a small and medium-sized growth market and issuers who have not requested or approved admission of their financial instruments to trading on a regulated market, MTFs and/or OTFs are

150. Article 30(2)(h), (i) and (j) read together with Article 31 of the new EU Market Abuse Regulation. See also, Article 26(1)(k) of the Market Abuse Regulation Proposal.

151. Article 30(2)(i) read together with Article 31 of the new EU Market Abuse Regulation. See also, Article 26(1)(l) of the Market Abuse Regulation Proposal.

152. Article 30(2)(j) read together with Article 31 of the new EU Market Abuse Regulation. See also, Article 26(1)(m) of the Market Abuse Regulation Proposal.

153. Article 30(3) read together with Article 31 of the new EU Market Abuse Regulation; see further, Article 26(2) read together with Article 27 of the Market Abuse Regulation Proposal.

154. Article 32 read together with Article 33 of the new EU Market Abuse Regulation; see further, Article 29 of the Market Abuse Regulation Proposal.

155. See the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 10-13.

156. On the other hand, in relation to this, it is further submitted that although Section 159 of the Companies Act 71 of 2008; the Protected Disclosures Act 26 of 2000; Section 9 of the South African Constitution, 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 can be employed to protect shareholders, directors and other employees from occupational reprisals, the relevant provisions of the Financial Markets Act should be amended to provide specific provisions that can be used to encourage and/or protect market abuse whistle-blowers from such reprisals in South Africa.

157. Article 18(9) read together with Article 35 of the new EU Market Abuse Regulation; see further, Article 13(4) and (6) of the Market Abuse Regulation Proposal and the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 10.

exempted from drawing up insider lists.¹⁵⁸ This is aimed, inter alia, at removing heterogeneous differences at national level that caused excessive administrative burdens on issuers and improving the investigation of market abuse activities by the competent authorities. Nonetheless, it is suggested that the new EU Market Abuse Regulation should be reviewed to provide adequate measures or provisions on the content of insider lists and/or conditions under which issuers will have an obligation to draw up such lists. In other words, if not carefully enforced, the fact that the duty to provide adequate measures on the content of insider lists and conditions under which issuers are required to draw up such insider lists is solely and merely vested with the Commission has the potential to lead to a duplication of the existing problems associated with excessive administrative burdens being imposed particularly on multinational companies and/or the heterogeneous application of the provisions on insider's lists across the EU Member States and in the UK.¹⁵⁹

Any transaction made by a person executing managerial responsibilities on behalf of the issuer or whereby the manager lends or pledges financial instruments is now required to be disclosed to the regulators and the public.¹⁶⁰ The new EU Market Abuse Regulation has also stipulated that managers' transactions less than €20,000 per calendar year may not be reported.¹⁶¹ This clarifies the scope of reporting obligations in relation to managers' transactions and increases the deterring effect on such managers from wilfully engaging in market abuse activities.

Inside information relating to issuers of financial instruments whose financial instruments are admitted to trading on a small and medium-sized growth market may be posted by the trading venue¹⁶² on its website and/or in accordance with a standardized content and format defined in the implementing technical standards adopted by the European Commission.¹⁶³ Such issuers also benefit from the new threshold for the reporting of managers' transactions stated above. This is done to ensure that the disclosure requirements for issuers whose financial instruments are admitted to trading on small and medium-sized growth markets are proportionate in order to remove excessive administrative burdens for such issuers. Moreover, such issuers, like any other issuers, will be required to seek permission from the competent authorities if they want to delay the prompt

158. Article 18(6) read together with Articles 2, 5 and 6 of the new EU Market Abuse Regulation. See also, Article 13(2) and (3) of the Market Abuse Regulation Proposal and the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 10.

159. On the one hand, despite these concerns, it is submitted that the drawing of insider lists by issuers and other relevant persons could, if assiduously adopted, enhance the prevention and combating of market abuse practices in South Africa.

160. Article 19 read with together with Articles 7(1)(d), 10, 16, 17 and 23 of the new EU Market Abuse Regulation; see further, Article 14 of the Market Abuse Regulation Proposal and the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 10. On the other hand, it is submitted that a similar provision should be introduced in South Africa to deter managers, directors and other relevant persons from committing market abuse offences.

161. Article 19(9) read together with Article 19(8) of the new EU Market Abuse Regulation; see further, Article 14(3) of the Market Abuse Regulation Proposal and the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 10.

162. This refers to a system or facility for trading as defined in Article 3(1)(10) of the new EU Market Abuse Regulation. See also, Article 5(5) of the Market Abuse Regulation Proposal.

163. Article 18(9) read together with Articles 7, 10, 17 and 19 of the new EU Market Abuse Regulation; see further, Article 12(7) read together with sub-paragraph (1) of the Market Abuse Regulation Proposal and the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 9-10. See also, Linklaters, 'EU "Gets tough" on market abuse', *Linklaters* (2011), <http://www.linklaters.com/Insights/Publication1005Newsletter/UK-Corporate-Update-27-October-2011/Pages/EU-gets-tough-on-market-abuse.aspx>, p. 1-8; and Gide Loyrette Nouel, 'Financial regulation', *The Brief* (2011), p. 1, 3 (copy on file with the author).

disclosure of inside information.¹⁶⁴ However, it remains to be seen whether this provision for the delayed disclosure of inside information will be homogeneously implemented in the EU Member States as well as in the UK and whether it will prevent market abuse or whether it will be exploited by other devious issuers who might deliberately delay the disclosure of inside information to perpetrate market abuse activities and then circumvent their liability.¹⁶⁵ Nevertheless, unlike the former position under the EU Market Abuse Directive, it is hoped that the new EU Market Abuse Regulation will be consistently employed across the EU financial markets since its provisions are directly applicable in all Member States. It is also important to note that the new EU Market Abuse Regulation would have applied directly to the UK and its financial markets if it did not withdraw from the EU through the Brexit referendum.

B. The adequacy of the new Criminal Sanctions Market Abuse Directive and related proposals

The Criminal Sanctions Market Abuse Directive Proposal introduced new criminal sanctions for market abuse¹⁶⁶ to address concerns that the EU Market Abuse Directive's market abuse sanctions were either inadequate or less dissuasive for deterrence purposes.¹⁶⁷ In light of this, it should be noted that similar criminal penalties for market abuse are now contained in the new Criminal Sanctions Market Abuse Directive.¹⁶⁸ This also follows from the Commission's submission that criminal sanctions, especially imprisonment, could increase the dissuasiveness and/or deterrent effect of the market abuse sanctions across the EU Member States.¹⁶⁹ Consequently, the new Criminal Sanctions Market Abuse Directive requires the EU Member States to impose 'effective, proportionate and dissuasive' criminal sanctions upon any person who intentionally engage or attempts to engage in insider trading or market manipulation activities.¹⁷⁰

164. See Article 17(6) read together with sub-paragraphs (4), (5), (10) and (11) and Articles 9, 10 and 23 of the new EU Market Abuse Regulation. See also, Article 12(4) and (5) read together with sub-paragraph (9) of the Market Abuse Regulation Proposal; the Market Abuse Regulation Proposal's Explanatory Memorandum, p. 9-10 and related remarks in Section 2.A above.

165. On the other hand, despite this concern, it is suggested that a similar mandatory prompt disclosure obligation should be carefully adopted in South Africa to enhance the combating of market abuse in regulated markets, OTC markets and/or other small and medium-sized growth markets.

166. Articles 1 to 8 of the Criminal Sanctions Market Abuse Directive Proposal; these provisions do not apply to buy backs and stabilization programmes, monetary policy and debt management activities and emission allowances activities conducted in pursuit of climate policy, see Article 1(2) of the Criminal Sanctions Market Abuse Directive Proposal. The same status quo is maintained in Article 1(3) of the new Criminal Sanctions Market Abuse Directive.

167. The Criminal Sanctions Market Abuse Directive Proposal's Explanatory Memorandum, p. 2-6.

168. Articles 7, 8 and 9 read together with Article 1 of the Criminal Sanctions Market Abuse Directive.

169. European Commission, 'Towards an EU criminal policy-Ensuring the effective implementation of EU policies through criminal law', COM(2011) 573 final, http://ec.europa.eu/internal_market/securities/abuse/12112008_conference_en.htm; European Commission, 'Call for evidence: Review of Directive 2003/6/EC on insider trading and market manipulation (Market Abuse Directive)'; European Commission, 'Consultation on the review of the market abuse directive', http://ec.europa.eu/internal_market/consultations/2010/mad_en.htm; and the Criminal Sanctions Market Abuse Directive Proposal's Explanatory Memorandum, p. 2-3.

170. Articles 7, 8 and 9 read together with Article 1 of the new Criminal Sanctions Market Abuse Directive; see further, Articles 3 and 4 read together with Article 6 the Criminal Sanctions Market Abuse Directive Proposal.

This might also have been targeted at clarifying the concerns raised in *Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank, Financie-en Assurantiewezen*,¹⁷¹ on whether it was required to prove the intention of the accused person involved who used inside information in his possession to engage in market abuse practices. Criminal sanctions can also be imposed upon any person who incites, aids and abets or attempts to incite, aid and/or abet another person to commit insider trading and market manipulation offences.¹⁷² This implies that legal persons can now incur criminal liability for insider trading and market manipulation.¹⁷³ In this regard, it is submitted that the relevant market abuse laws in the EU Member States and the UK should be amended in line with the new Criminal Sanctions Market Abuse Directive to enact provisions for separate and specific criminal sanctions that can be imposed upon any juristic person or individual who commits or attempts to commit insider trading or market manipulation offences in the EU. It is further submitted that the relevant market abuse laws in the EU Member States and the UK should be amended in line with the new Criminal Sanctions Market Abuse Directive to enact provisions for separate and specific criminal sanctions that can be levied against any person (including juristic persons) who incites, aids and abets or attempts to incite, aid and abet another person to commit market abuse offences in the EU and the UK's financial markets.

After the entry into force of the new Criminal Sanctions Market Abuse Directive, the EU Member States are given two years to transpose its provisions into their respective national laws¹⁷⁴ while the Commission is given four years to report to the European Parliament and the Council on the application and effectiveness of the criminal sanctions.¹⁷⁵

Nevertheless, it is submitted that the new Criminal Sanctions Market Abuse Directive should be amended in order to clearly provide whether intention¹⁷⁶ on the part of the offenders is required or must be proved before they can incur any liability. Accordingly, it is submitted that this ambiguity could, if not properly addressed, give rise to the ineffective enforcement of the new Criminal Sanctions Market Abuse Directive's provisions in the EU. It is also hoped that the provisions of the new Criminal Sanctions Market Abuse Directive will be adequately and timeously transposed into the relevant national laws in the EU Member States to ensure that such laws clearly provide separate and distinct criminal sanctions for natural and juristic persons that will be homogeneously enforced across the EU. Furthermore, it is hoped that the UK will carefully amend its market abuse

171. In this case, the court held, inter alia, that the EU Market Abuse Directive's insider trading prohibition applied to anyone who merely dealt in securities or financial instruments while in possession of inside information even if such information did not influence his trading decision. In other words, as earlier stated, the court held that there was no need to prove the intention of the offenders in question for them to incur market abuse liability; see, Articles 1(1), 2, 3 and 4 of the EU Market Abuse Directive; Gide Loyrette Novel, 'Market abuse directive II: New regulations and criminal sanctions for market Abuse', *The Brief Financial Regulation* (2011), p. 3-4 (copy on file with the author); and C. Bates 'Market abuse: European Commission proposes new EU regime', *Clifford Chance Client Briefing* (2011), p. 2.

172. Article 6 read together with Articles 7, 8 and 9 of the new Criminal Sanctions Market Abuse Directive; see further, Article 5 read together with Article 6 of the Criminal Sanctions Market Abuse Directive Proposal.

173. Articles 8 and 9 read together with Articles 3, 4, 5 and 6 of the new Criminal Sanctions Market Abuse Directive; see further, Articles 7 and 8 of the Criminal Sanctions Market Abuse Directive Proposal.

174. Generally, see Article 13 read together with Articles 12 and 14 of the new Criminal Sanctions Market Abuse Directive. See also, Article 10 of the Criminal Sanctions Market Abuse Directive Proposal.

175. Article 12 of the new Criminal Sanctions Market Abuse Directive; see further, Article 9 of the Criminal Sanctions Market Abuse Directive Proposal.

176. Articles 3, 4, 5 and 6 read together with Articles 7, 8 and 9 of the new Criminal Sanctions Market Abuse Directive; see further, Articles 3 and 4 of the Criminal Sanctions Market Abuse Directive Proposal for other related provisions.

laws in accordance with the new Criminal Sanctions Market Abuse Directive in order to enact such separate and distinct criminal sanctions for natural and legal persons in order to increase deterrence on the part of the offenders.

C. Brexit and its implications for future market abuse regulation in the UK

The actual impact of the Brexit outcome on the financial markets and regulation of market abuse in the UK is, at the time of writing, still uncertain.¹⁷⁷ As stated earlier,¹⁷⁸ the Brexit referendum itself is not legally binding and has no immediate legislative impact until the UK has finalized its withdrawal from the EU. To date the UK has not yet formally and legally withdrawn from the EU. Accordingly, it is submitted that the UK should decide whether to align its market abuse laws with the new Criminal Sanctions Market Abuse Directive and the new EU Market Abuse Regulation or revert to its market abuse laws as they were before the Brexit referendum and/or adopt any other relevant measures in order to effectively combat market abuse activities. There are number of options that could be utilized by the UK with regard to its market abuse regulation after Brexit. For example, the UK may opt to join the European Free Trade Association (EFTA), which offers some trade benefits to some European countries such as Iceland, Liechtenstein, Norway and Switzerland. Nonetheless, the EFTA Member States have restricted or no direct influence over the EU law making processes. Thus, if the UK decides to abide by the EU market abuse laws as a member of EFTA, it will have little or no significant input on the enactment and/or amendment of such laws in the future.

The UK can also choose to become a member of the European Economic Area (EEA), which enables states to implement the relevant EU laws through the decisions that are made by the EEA Council.¹⁷⁹ In this regard, very few changes would be made to the UK market abuse laws since the EU financial services and/or market abuse legislation is applicable across the EEA states. Thus, if the UK chooses the EEA membership, bilateral agreements or to become a customs union member, then its market abuse laws will have to comply with the new Criminal Sanctions Market Abuse Directive, the new EU Market Abuse Regulation and other relevant EU laws.¹⁸⁰

This suggests that the current UK anti-market abuse legal framework will need to be maintained and enforced in accordance with the new Criminal Sanctions Market Abuse Directive and the new EU Market Abuse Regulation. If this approach is consistently and effectively enforced, it will enable the banks, companies and other relevant stakeholders in the UK to have access to the European markets and to indirectly benefit from the relevant EU laws. On the other hand, if the UK opts not to join the EEA, the impact on issuers of equity or debt securities as well as the enforcement of the relevant market abuse laws would depend on whether the regulatory bodies in the UK adopt different approaches to enforce such laws or opt to retain the anti-market abuse laws as they were prior to the Brexit referendum outcome. In other words, the impact of the Brexit referendum on the enforcement of the UK market abuse laws will also depend on whether the UK

177. Morgan Lewis, 'UK Market Abuse Regime Extends its Reach: Implications for Market Participants', <https://www.morganlewis.com/pubs/uk-market-abuse-regime-extends-its-reach-implications-for-market-participants>.

178. See, Sections 1, 2, 2.A. and 3.A. above.

179. Greenberg Traurig Maher, 'Brexit: Consequences for Capital Markets', *GTLaw* (2016), <http://www.gtlaw.com/News-Events/Publications/Alerts/196851/Brexit-Consequences-for-Capital-Markets>, p. 2-5.

180. Global Investigations Review, 'The impact of Brexit on cross-border investigations', *GIR* (2016), <http://globalinvestigationsreview.com/article/1038242/the-impact-of-brexit-on-cross-border-investigations>, p. 4-5.

continues to enact market abuse laws and enforcement approaches that are equivalent and/or consistent with the EU market abuse laws.¹⁸¹ Moreover, if the UK opts to become part of the EEA, it would not be subject to the directives from the European System of Financial Supervision (ESFS). However, it is submitted that the UK should not abandon the EU market abuse regulatory policies as this could make its financial markets susceptible to rampant market abuse activities in the future.¹⁸²

It is also submitted that the UK as an EEA member may choose to abide with the new EU Market Abuse Regulation and the European Market Infrastructure Regulation (EMIR). This could enable the UK to continue combating market abuse practices in accordance with the relevant EU laws. Nevertheless, the main challenge of this approach is that the EMIR is not yet applicable in some EEA states. Thus, if the UK does not enact laws that are equivalent or related to the EMIR and the new EU Market Abuse Regulation, these regulations will not be able to positively influence the combating of market abuse in the UK. In light of this, it is submitted that the UK could follow the example of Switzerland, which is not a member of the EU but, nevertheless, complies with and implements the new MiFID, the EMIR, new EU Market Abuse Regulation and other related EU market abuse laws.¹⁸³

The UK may, as an EEA member, choose to adopt the 'passporting system and home member state' method with any other likeminded EU Member State.¹⁸⁴ The passporting system allows the EU Member States to have their regulatory bodies approve a prospectus or certain regulatory rules that will be employed between such states on the basis of a notification system (passporting) and without the need for additional approval in any other EEA host states.¹⁸⁵ If adopted, this approach could enable the UK to enforce and comply with the EU market abuse laws that are employed in likeminded EU Member States. Despite this, it still needs to be determined whether the prospectuses, rules and/or market abuse laws that were made in accordance with a third country or the UK's rules and/or laws could be approved for use by a likeminded EU home member state across the EU on the basis of the passporting system. In this regard, it is submitted that the European Commission may decide whether a third country's laws are equivalent to the EU laws and allow the relevant EU home Member State to approve a non-EU prospectus or market abuse laws that were enacted in accordance with international standards and/or deemed equivalent to the requirements of the EU Prospectus Directive or the EU market abuse laws.¹⁸⁶

Lastly, the UK may choose to enter into bilateral agreements with other likeminded EU Member States. Thus, if the UK opts to adopt bilateral agreements in lieu of becoming a member of the EEA, the passporting system would only be applicable after its formal withdrawal from the EU has

181. See, SIA Partners (Banking and Insurance), 'Brexit and the Impact on the UK's Regulatory Framework', *SIA* (2016), <http://en.finance.sia-partners.com/brexit-and-impact-uks-regulatory-framework/>, p. 1-4.

182. *Ibid.*, p. 1-4.

183. F. Cook, 'What would a potential UK exit from the EU mean for regulation?', *GFT Blog* (2016) <https://blog.gft.com/blog/2016/04/07/what-would-a-potential-uk-exit-from-the-eu-mean-for-regulation/>, p. 1-2.

184. Greenberg Traurig Maher, 'Brexit: Consequences for Capital Markets', *GTLaw* (2016), <http://www.gtlaw.com/News-Events/Publications/Alerts/196851/Brexit-Consequences-for-Capital-Markets>, p. 2-3.

185. The passporting system is usually employed to enforce key capital markets-related directives such as the EU Prospectus and Transparency Directives. Greenberg Traurig Maher, 'Brexit: Consequences for Capital Markets', *GTLaw* (2016), <http://www.gtlaw.com/News-Events/Publications/Alerts/196851/Brexit-Consequences-for-Capital-Markets>, p. 2-3.

186. *Ibid.*, p. 3-4.

been finalized. Consequently, the UK could voluntarily opt to continue incorporating the EU anti-market abuse laws into its own laws until it has finalized its withdrawal from the EU.¹⁸⁷

4. Concluding remarks

As highlighted above,¹⁸⁸ it is clear that the practical implementation and enforcement of the EU Market Abuse Directive was vested in the Member States. In some instances, this has resulted in the different interpretation of the requirements of the EU Market Abuse Directive, especially with regard to the definition of ‘inside information’, ‘insider’ and the ‘disclosure of inside information’.¹⁸⁹ Put differently, the fact that the UK enacted a specific definition of inside information in relation to professional intermediaries to, inter alia, curb front running while other EU Member States¹⁹⁰ did not have such definitions is a case in point. Moreover, the EU Market Abuse Directive’s regulatory framework contained a considerable number of other flaws. For instance, as pointed out earlier, such flaws include, inter alia, the failure on the part of the EU Market Abuse Directive to provide the specific types (whether civil, criminal or administrative sanctions) of market abuse penalties that were commonly applicable in the EU Member States and the UK. In addition, there were various disparities that were found in relation to the interpretation and implementation of some of the provisions of the EU Market Abuse Directive in the UK and other EU Member States. In relation to this, the author chose to analyze and demonstrate the implementation of the EU Market Abuse Directive in the UK. As indicated earlier, the UK was considered because it is generally regarded as one of the major economies in the EU.¹⁹¹ Accordingly, it was demonstrated that although the UK implemented most of the provisions of the EU Market Abuse Directive, it had sometimes inconsistently applied heterogeneous enforcement approaches to combat market abuse in its financial markets. In relation to the aforementioned gaps, some key proposals were introduced through the Criminal Sanctions Market Abuse Directive Proposal and the Market Abuse Regulation Proposal in a bid to address the flaws contained in the EU Market Abuse Directive. These proposals were later adopted into the new EU Market Abuse Regulation and the new Criminal Sanctions Market Abuse Directive in 2014.

Given this background, it is submitted that the provisions of the new EU Market Abuse Regulation, the new MiFID and the new Criminal Sanctions Market Abuse Directive should be carefully enforced in the EU, not only to enable them to be applicable to all the financial instruments that are traded outside the regulated markets but also to ensure that adequate practical measures are put in place to promote their uniform application by the Member States to avoid balkanization and/or other potential overregulation problems. It is further suggested that the new EU Market Abuse Regulation’s provisions on the disclosure and definition of inside information

187. Ibid., p. 3; see further, F. Reed and A. Dokuchaeva, ‘Brexit impact on market abuse regulation and MiFID II’, *Factset Research Systems* (2016), <http://www.factset.com/websitefiles/PDFs/eventfiles/brexit-impact-on-market-abuse-regulation-and-mifid-ii>, p. 1, 4.

188. See the related discussions in Sections 2, 2.A., 3.A. and 3.B. above. Likewise, the implementation and enforcement of the subsequent provisions of the new EU Market Abuse Regulation rests with the Member States.

189. See generally M. Luchtman, ‘EU influence on law enforcement and international cooperation in the field of insider dealing’, 2 *Utrecht Law Review* (2006), p. 136-141.

190. For instance, Spain and the Netherlands do not have specific definitions of inside information in relation to professional intermediaries.

191. J. Welch et al., ‘Comparative implementation of the EU Directives (I)–Insider dealing and market abuse’, *British Institute of International and Comparative Law City Research Series* No. 8 (2005), p. 6-83.

should be welcomed in the entire EU as they provide more clarity on the use and interpretation of inside information across the EU Member States to enable issuers and other relevant persons to execute their mandatory disclosure obligations effectively without intentionally or erroneously committing market abuse offences. Likewise, it is submitted that the UK should consider embracing the same approach despite its purported withdrawal from the EU.

Furthermore, it is submitted that the new EU Market Abuse Regulation should be amended to provide a specific definition of inside information for the purposes of the issuers' prompt and/or delayed disclosure obligation. Such definition should provide clear guidelines on the conditions under which price-sensitive information may be required to be deferred or promptly disclosed to the public for the purposes of combating market abuse activities across the EU Member States, without imputing undue pressure on the issuers. In other words, it is submitted that the obligation for issuers to seek permission from the competent authorities if they want to delay the disclosure of inside information might be very difficult to implement homogeneously throughout the EU Member States as well as in the UK and might be ineffective in preventing exploitation of said rule by other unscrupulous issuers.

Moreover, it remains to be seen whether the new definition of inside information for commodity derivatives will be successfully utilized by regulators to curb market abuse without discouraging legitimate derivative and spot commodity contracts transactions. Consequently, it is submitted that the new EU Market Abuse Regulation should be reviewed to ensure that it provides specific guidelines on how regulators in the EU Member States can oversee the regulation of spot commodity markets and derivative markets without imposing undue excessive pressure on the issuers or other relevant market participants. This review could also help the UK if it opts to continue abiding by the EU market abuse laws in the future.

Additionally, it is hoped that the new EU Market Abuse Regulation's provisions on accepted market practices and/or conduct that will be uniformly regarded as accepted market practices will be carefully enforced across the EU Member States and in the UK to avoid unjustifiably imputing market abuse liability upon the issuers who deal in the financial instruments that are traded in more than one country (dual listed issuers).¹⁹² It is also submitted that the relevant provisions of the new EU Market Abuse Regulation should be carefully amended to provide a uniform prohibition on short selling as well as more elaborate guidelines on share buy-back programmes and stabilization activities that may be exempted from the market abuse prohibition by the EU Member States.

It is further submitted that the extended scope of the new EU Market Abuse Regulation should be carefully revised to reduce, as much as possible, the risk of creating new administrative burdens for transaction reporting and/or cross-border enforcement-related problems for regulators and other relevant stakeholders in the EU Member States. This could also benefit the UK if it chooses to continue enforcing the EU market abuse laws after its final withdrawal from the EU. Furthermore, it is submitted that the new regulators' investigatory powers and whistle-blower immunity provisions should be utilized carefully and uniformly in the EU Member States and in the UK to minimize the risk of discouraging or deterring potential investors, which is generally associated with overregulation.

Additionally, the new EU Market Abuse Regulation should be enforced in the EU Member States in accordance with the new MiFID and the EU Emissions Trading System Directive so that

192. J. Welch et al., 'Comparative implementation of the EU Directives (I)–Insider dealing and market abuse', *British Institute of International and Comparative Law City Research Series* No. 8 (2005), p. 6-83.

they may provide an optimal threshold for emissions or thermal input or a combination thereof, to enhance the effective combating of market abuse in spot carbon markets, and to prevent the potential risk of smaller emission allowances participants of circumventing their market abuse liability unjustifiably. The same approach could also benefit the UK if it elects to continue complying with the EU market abuse laws.

Furthermore, the new Criminal Sanctions Market Abuse Directive should be amended in order to clearly provide whether intention on the part of the offenders is required or must be proven before they can incur any liability. It is also submitted that the relevant market abuse laws in the EU Member States should be amended in line with the new Criminal Sanctions Market Abuse Directive in order to enact provisions for separate and specific criminal sanctions that can be levied against any person (including legal persons) inciting, aiding and abetting or attempting to incite, aid and abet another person to commit market abuse offences in the EU financial markets. Likewise, it will be prudent for the UK to amend its market abuse laws in line with the new Criminal Sanctions Market Abuse Directive if it elects to abide by the EU market abuse laws in the future, or when its actual withdrawal from the EU is finalized.

In a nutshell, as discussed in this article, it is hoped that the new EU Market Abuse Regulation, the new MiFID and the new Criminal Sanctions Market Abuse Directive will promote the homogeneous implementation of the market abuse prohibition throughout the EU Member States. It is also important to note that the mere outcome of the Brexit referendum does not automatically render obsolete the application of all EU law in the UK. The application of such laws in the UK will continue until its formal withdrawal from the EU has been finalized. In light of this, it is submitted that the UK should continue to comply with the EU market abuse laws, even after its exit from the EU is finalized.

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