EXTRA-JUDICIAL ENFORCEMENT OF SECURITIES REGULATION AND THE PUBLIC INTEREST THEORY: A SOUTH AFRICAN PERSPECTIVE

Herbert Kawadza*

Senior Lecturer, School of Law, University of the Witwatersrand, South Africa.

1. INTRODUCTION

A fundamental, though not universal proposition in economic and legal scholarship holds that the quality of governing regulation and its enforcement are crucial factors in the quest for robust securities markets.[1] In pursuit of this agenda South Africa has implemented strategies geared towards strengthening the competitiveness of its financial markets through *inter alia*, stringent and proactive regulation, supervision and enforcement.[2] Much as these endeavours would generally be welcomed in certain quarters[3] there is nonetheless a disconcerting perspective hypothesising that such regulatory arrangements only serve narrow interests of certain groups.[4] This article seeks to discuss the South African securities markets regulator; the Financial Services Board (hereafter the FSB)'s enforcement trend in light of the public interest theory. It seeks to build on the early research that has been undertaken by scholars

*LLB Hons (Zim): LLM (Lon); PGCE (Manchester); PhD (Manchester).

[1] Coffee "Law and The Market: The Impact of Enforcement" 2007 *University of Pennsylvania Law Review* 229; Carvajal and Elliott "The Challenge of Enforcement in Securities Markets: Mission Impossible?" http://ssrn.com/abstract=1457591(accessed 24-01-2014); Coase "The Problem of Social Cost" 1960 *Journal of Law and Economics* 1; Jordan "Producer Protection, Prior Market Structure and the Effects of Government Regulation" 1972 *Journal of Law and Economics* 151; Posner "Taxation by Regulation" 1971 *The Bell Journal of Economics and Management Science* 22-50; La Porta, Lopez-de-Silanes, Schleifer and Vishny "Legal Determinants of External Finance" 1997 *Journal of Finance* 1131; Stigler "The Theory of Economic Regulation" 1971 *The Bell Journal of Economics and Management Science* 3.

[2] National Treasury Policy Document "A Safer Financial Sector to Serve South Africa" http://www.oecd.org/dataoecd/21/13/48464023.pdf (last accessed 24-01-2014).

[3] See generally La Porta, Lopez-de-Silanes, Schleifer and Vishny "Legal Determinants of External Finance" 1997 *Journal of Finance* 1131; Coffee "Law and The Market: The Impact of Enforcement" 2007 *University of Pennsylvania Law Review* 229; Carvajal and Elliott "Strengths and Weaknesses in Securities Market Regulation: A Global Analysis" http://www.imf.org/external/pubs/ft/wp/2007/wp07259.pdf (last accessed 26-01-2014); Carvajal and Elliott "The Challenge of Enforcement in Securities Markets: Mission Impossible?" http://ssrn.com/abstract=1457591 (last accessed 24-01-2014).

[4] It is argued that regulatory processes are usually captured by influential sectors and is often subjected to interest-group-domination. As such the legal process is skewed towards serving the narrow interests, such as profit and political influence of the well-organized industry groups at the expense of social and public goals. For a discussion of these interests see generally Peltzman "Toward a More General Theory of Regulation" 1976 *Journal of Law and Economics* 211; Becker "A Theory of Competition among Pressure Groups for Political Influence" 1983 *Quarterly Journal of Economics* 371; Stigler *The Citizen and the State: Essays on Regulation* (1975); Stigler "The Theory of Economic Regulation" 1971 *Bell Journal of Economics and Management Science* 3; Spiller "Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed" 1990 *Journal of Law and Economics* 65; Croley *Regulation And Public Interests: The Possibility Of Good Regulatory Governance* (2008) 9.

such as Chitimira[5], Osode[6], Cassim[7], Botha[8], Jooste[9], Bhana[10], Mayburgh and Davis[11] who also sought to analyse and have identified gaps in the securities markets regulation and its enforcement in South Africa. On the backdrop of such scholarship, this article seeks to reconsider the regulator's enforcement style from a public interest perspective.

Accomplishing the objective of this article depends on the practicality of mechanisms aimed at evaluating enforcement trends. That undertaking has however been a subject of scholarly debate.[12] Some researchers argue that enforcement can be discerned from an analysis of first generation measures or enforcement inputs (such as the volume of staff and its resources) and outputs (in the form of actions brought and penalties imposed).[13] Similarly, other scholars show that enforcement effectiveness can be measured by a combination of indicators ranging *inter alia*, from the quality the legal framework to the number of cases and their resolution

[5] See for instance Chitimira "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *Potchefstroom Electronic Law Journal* 937; Chitimira and Lawack "Overview of the Role-players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa" 2013 *Obiter* 200; Chitimira "Overview of Selected Role-players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108; Chitimira "Overview of Problems Associated with Ineffective Enforcement of Market Abuse Provisions in South Africa" 2014 *Mediterranean Journal of Social Scienc*es 478; Chitimira "Selected Challenges in the South African Anti-market Abuse Enforcement Framework in Relation to Some Aspects of the Financial Markets" 2014 *Obiter* 584; Chitimira "Overview of the Market Abuse Regulation under the Financial Markets Act 19 of 2012" 2014 *Obiter* 254.

[6] Osode "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239.

[7] Cassim "An Analysis of Market Manipulation Under the Securities Services Act 36 of 2004 (Part 2) 2008 *South African Mercantile Law Journal* 177; Cassim "An Analysis of Market Manipulation Under the Securities Services Act 36 of 2004 (Part 1)" 2008 *South African Mercantile Law Journal* 33.

[8] Botha "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *South African Mercantile Law Journal* 1; Botha "Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?" 1990 *South African Law Journal* 504.

[9] Jooste "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437; Osode "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688.

[10] Bhana "Take-Over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *South African Journal of Business Management* 198.

[11] See for instance Myburgh and Davis "The Impact of South Africa's Insider Trading Regime" https://www.fsb.co.za/Departments/marketAbuse/Documents/REP%20Genesis_200408%2004.pdf . See also Van Deventer "Anti-Market Abuse Legislation in South Africa" http://www.fsb.co.za/public/marketabuse/FSBReport.pdf (last accessed 11-06-2015).

[12] Elffers, Heijden and Hezemans "Explaining Regulatory Non-Compliance: A Survey Study of Rule Transgression for Two Dutch Instrumental Laws, Applying the Randomized Response Method" 2003 *Journal of Quantitative Criminology* 409; Ramirez "Just in Crime: Guiding Economic Crime Reform after the Sarbanes-Oxley Act of 2002" 2003 *Loyola University Chicago Law Journal* 359.

[13] See for instance Coffee "Law and the Market: The Impact of Enforcement" 2007 *University of Pennsylvania Law Review* 229 ; Hail and Leuz, International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?" 2006 *Journal of Accounting Research* 485; La Porta, Lopez-de-Silanes, Shleifer, and Vishny "Law and Finance" 1998 *Journal of Political Economy* 1113.

timeframes.[14] What is incontestable however is that all the existing techniques are far from perfect; they are fraught with inherent weaknesses which diminish their ability to provide a suitable foundation upon which a comprehensive evaluation of any enforcement framework can be accomplished.[15] That these mechanisms are not infallible is explicable; appraising enforcement is a challenging exercise and no conclusive mechanism exists through which the success of regulatory systems in terms of contribution to fair, liquid and stable markets can be achieved.[16]

On that admission, it is worth pointing out that this article relies on first generation measures; mainly enforcement actions brought and penalties imposed by the FSB as revealed in its annual reports will be preferred. In essence this article constitutes and should be understood as a policy discussion developed primarily from an analysis of the regulator's enforcement trends manifested by its public statements and the stated annual reports.

This article is structured as follows. The present section is the introduction and sets out the background and objectives of this article. In section 2 this article briefly outlines the essence of the public interest theory, what it entails and how it fits into the scope of this discussion. Further, the contrasting school of thought is also highlighted. Section 3 introduces the FSB's enforcement trend and starts by giving a historical background to the regulation and enforcement of securities violations, from the 1970s when the first attempts to curtail insider dealing were made, to the current enforcement mechanisms. Section 4 builds on that and seeks to demonstrate how the regulator's enforcement style appears to be inconsistent with public interests and Section 5 proffers some possible remedies that could tilt that enforcement style towards the attainment of public interests. Section 6 is the conclusion.

2 THE PUBLIC INTEREST THEORY

[14] La Porta, Lopez-de-Silanes, Shleifer and Vishny "What Works in Securities Laws?" 2006 *Journal of Finance* 1; Klein "Minimum Criteria for a Professional Environmental Enforcement Process" http://www.lim-info.nl/professionalisering (last accessed 02-02-2014); Carvajal and Elliott "The Challenge of Enforcement in Securities Markets: Mission Impossible?" http://ssrn.com/abstract=1457591 (last accessed 03-02-2014).

[15] Coffee "Law and the Market: The Impact of Enforcement" 2007 *University of Pennsylvania Law Review* 229.

[16]Carvajal and Elliott "The Challenge of Enforcement in Securities Markets: Mission Impossible?" http://ssrn.com/abstract=1457591 (last accessed 26-01-2014).

Public interest scholarship, while recognising that regulation is necessary and beneficial, and in contrast to the other schools of thought,[17] argues that regulation is meant for attaining public good but that the regulatory process may in some cases come with certain costs and burdens.[18] That cynical averment is premised on the observation that "[regulatory] agencies are so subject to influence by the industries they regulate that their decisions tend to advance or protect industry interests and neglect those of the non-industry public."[19] The assumption is therefore that notwithstanding the enforcement style chosen, the proposed or implemented regulation will always exist and be enforced to express the regulators and regulatees' subjective interests. The hypothesis is that even though regulatory agencies are established for legitimate public purposes, they are however managed to an extent that they achieve market outcomes at the expense of public interests.[20] The corollary is that the sanctions that the regulator might select might for far-reaching consequences whose ultimate effects might be the defeat of public interests. It is argued that in order to secure and preserve their various narrow interests; certain groups exchange economic and political resources for what are basically regulatory rents.[21]

In recognition of this cost, capital markets scholars appeal to "policy makers, regulators and the judiciary to enact, enforce and interpret capital market regulation through a clearer lens

[17]The public interest theory contrasts with the Economic Theory of Regulation (also known as the 'Chicago theory of Regulation') initiated by George Stigler (see Stigler "The Theory of Economic Regulation" 1971 *Bell Journal Of Economics And Management Science* 3-21) and advanced by Posner in that unlike the public interest theory, the Economic Theory of Regulation argues that regulation is aimed at protecting the interests of groups. For a comprehensive discussion of the differences see for instance Posner "Theories of Economic Regulation" 1974 *Bell Journal of Economics* 335; Hantke-Domas "The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?" 2003 *European Journal of Law and Economics* 165; Ogus *Regulation: Legal Form and Economic Theory* (2004) Chp 3; Peltzman, Levine and Noll "The Economic Theory of Regulation after a Decade of Deregulation" 1989 *Brookings Papers on Economic Activity. Microeconomics* 1.

[18] Wiener and Alemanno "Comparing Regulatory Oversight Bodies Across the Atlantic: The Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU" in Ackerman and Lindseth (eds) *Comparative Administrative Law* (2010) 309; Kolko *Railroads and Regulation 1877–1916* (1965); Norton, Ackerman and Hassler *Clean Coal/Dirty Air* (1981); Wiener "Better Regulation in Europe" 2006 *Current Legal Problems* 447.

[19] Quirk *Industry Influence in Federal Regulatory Agencies* (1981) 4. See also note 4 above.

[20] Croley *Regulation and Public Interests: The Possibility Of Good Regulatory Governance* (2008) 9; Stigler *The Citizen and the State: Essays on Regulation* (1975); Stigler, "The Theory of Economic Regulation" 1971 *Bell Journal of Economics and Management Science* 3; Spiller "Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed" 1990 *Journal of Law and Economics* 65.

[21] See generally Croley *Regulation and Public Interests: The Possibility Of Good Regulatory Governance* (2008) 9; Stigler *The Citizen and the State: Essays on Regulation* (1975); Stigler "The Theory of Economic Regulation" 1971 *Bell Journal of Economics and Management Science* 3; Spiller "Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed" 1990 *Journal of Law and Economics* 65.

refocused to assess regulatory efficiency issues… [to] enhance the efficient operation of markets, promote the efficient allocation of scarce capital, and improve long-term economic returns."[22] They argue that "to achieve these goals, capital market policy must be designed to serve the 'public interest' of a country rather than the interests of some market participants."[23] It is on this theory that this article will seek to discuss the FSB's enforcement culture.

3 FSB REGULATORY ENFORCEMENT TRENDS

South Africa's securities regulations are meant to be enforced through panoply of criminal, administrative, and judicial sanctions. Early attempts aimed at creating cleaner markets in South Africa can be traced as far back as the Companies Act Companies Act 61 of 1973 as well as the Financial Markets Control Act 55 of 1989. The inefficacy of these statutes in combating financial crime culminated in the enactment of the Insider Trading Act 135 of 1998 ('Insider Trading Act') which brought about immense institutional structure such as establishing the Insider Trading Directorate as a mechanism for investigating market abusive conduct under the FSB. Despite amounting to a greater improvement of the statutory regime, the Insider Trading Act' nonetheless proved to be ineffective as a tool of policing the now broader securities market in the new South African economy. It was accordingly repealed and the Securities Services Act 36 of 2004 ('Securities Services Act') came into effect and ushered a new regulatory framework which was arguably at par with international best practice.[24] More particularly the Securities Services Act was associated with a significantly more stringent enforcement regime which was characterised by higher criminal penalties and civil remedies.

Despite the much-lauded changes, the Securities Services Act retained the numerous gaps and flaws that had characterised the preceding statutes and was deemed to be inadequate to

[22] North and Buckley "A Fundamental Re-Examination of Efficiency in Capital Markets in Light of the Global Financial Crisis" 2010 *University of New South Wales Law Journal* 714 717.
[23] *Ibid*
[24] For an overview and discussion of the changes under the Securities Services Act see generally Cassim "An Analysis of Market Manipulation Under the Securities Services Act 36 of 2004 (Part 1)" 2008 *South African Mercantile Law Journal* 33; Botha "Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?" 1990 *South African Law Journal* 504; Jooste "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437; Chitimira "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *Potchefstroom Electronic Law Journal* 937; Osode "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239; Cassim "An Analysis of Market Manipulation Under the Securities Services Act 36 of 2004 (Part 2)" 2008 *South African Mercantile Law Journal* 177.

meet the challenges manifested by the recent financial crisis. South Africa heeded international calls and joined global regulators in reassessing its existing financial laws to ensure not only the reinforcement of the competitiveness of South African financial markets but also to avert the recurrence of the devastating causes and effects of the financial crises.[25] That was to be achieved through *inter alia*, stringent and proactive regulation, supervision and enforcement of securities legislation.[26] To that end the Financial Markets Act 19 of 2012 ('the FMA, 2012') repealed Securities Services Act and introduced a new regulatory and enforcement paradigm.

More specifically, section 82(1) of FMA, 2012 provides that any contravention of the insider dealing prohibition shall be subjected to administrative sanction. An analysis of data from the FSB's publicly available annual reports demonstrates the regulator's tacit preference for stringent supervision and an enforcement culture which is accomplished largely through *ex ante* strategies; hence high incidences of market abuse are reported which however, are ultimately not subjected to the enforcement process. To put this assertion into perspective, a summary of the statistics shows that as far back as 1999 up to 2010, a total of 40 cases of market abuse have been referred to the regulator's enforcement committee.[27] Of those cases, 17 were resolved through settlement and the remaining 23 through the administrative process. As yet no insider trading case has been prosecuted before the South African courts and consequently no precedent exists in that regard. There are a number of plausible explanations for this state of affairs; one supposition is that possibly on account of their less burdensome

[25] See generally Véron "Financial Reform after the Crisis: An Early Assessment" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986922 (last accessed 21 July 2014); Kawai and Prasad 2011 *Financial Market Regulation and Reforms in Emerging Markets* 2; Botha and Makina "Financial Regulation and Supervision: Theory and Practice in South Africa" 2011 *International Business & Economics Research Journal* 27; RA Prentice "Permanently Reviving the Temporary Insider" 2011 *The Journal of Corporation Law* 343; Merlin "Financial Supervision in Europe After the Crisis" http://www.suerf.org/download/studies/study20122.pdf (last accessed 29 July 2014) Chitimira "Overview of the Market Abuse Regulation under the Financial Markets Act 19 of 2012" 2014 *Obiter* 254. .

[26] See for instance the National Treasury Policy Document "A Safer Financial Sector to Serve South Africa" http://www.oecd.org/dataoecd/21/13/48464023.pdf (last accessed 24-01-2014); National Treasury "Reviewing The Regulation Of Financial Markets In South Africa: Policy Document Explaining the Financial Markets Bill, 2011" Http://Www.Treasury.Gov.Za/Public%20comments/FMB/FMB%20policy%20document.Pdf (last accessed 29 July 2014); Botha and Makina "Financial Regulation and Supervision: Theory and Practice in South Africa" 2011 *International Business & Economics Research Journal* 27.

[27] See in particular FSB "Annual Report 2008" ftp://ftp.fsb.co.za/public/documents/AReport2008.pdf (last accessed 14-02-2014). See also FSB Annual Reports 1999-10 https://www.fsb.co.za/Departments/communications/publications/Pages/fSBAnnualReports.aspx (last accessed 14-02-2014).

standard of proof, the regulator regards administrative penalties as easier to obtain than traditional criminal penalties.[28]

Further, there are a numerous economic considerations which shape this approach; the common understanding is that civil and administrative remedies enable investors to recover losses that would not otherwise be recoverable due to the operation of extensive disclaimers in the investment contracts which the investors imprudently enter into.[29] As with criminal sanctions, extra-judicial penalties are grounded on fear. This arises especially from their retributive capabilities. That attribute is deemed to be as effective as criminal law but is advantageous in that it is less burdensome in terms of detecting, investigating, prosecuting and sentencing. The monetary sanctions that are imposed through the extra-judicial process are equally said to be effective especially when it is considered that corporate bodies detest parting with their hard-earned profits even when they are proceeds of crime.[30] As such dispossession of personal wealth from investment professionals and corporate executives is regarded as an equally severe punishment.[31] Further, the economies of scale associated with the standard daily function of the enforcement agencies mean that the costs involved in the civil enforcement are low.[32] Equally plausible is the fact that since the regulator's resources are limited, it thus seeks to generate compliance through higher levels of cooperation and finds it convenient to resolve difficult problems without costly formal litigation.[33] I shall develop these arguments further in the ensuing sections.

4 ASSESSING THE PUBLIC INTEREST IMPACT OF FSB ENFORCEMENT

From a private interest perspective, the FSB's preferred enforcement culture can be lauded as having enabled the regulator to maintain competitive markets. However, an offshoot of this

[28] For a discussion of the advantages associated with administrative sanctions over criminal and civil alternatives see for instance Harrison and Ryder *The Law Relating to Financial Crime in the United Kingdom* (2013)1-40; Singh *Banking Regulation of UK And US Financial Markets* (2007) 117-123. See also Avgouleas *The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis* (2005) 458.

[29] Rozenes "Prosecuting Regulatory Offenders" in Peter Grabosky and John Braithwaite eds.,(1993) *Business Regulation and Australia's Future* (1993) 249; Macror "Regulatory Justice: Making Sanctions Effective" http://www.bis.gov.uk/files/file44593.pdf (last accessed 13/04/14).

[30] Bergh and Visscher "Optimal Enforcement of Safety Law" http://ssrn.com/abstract=1115257 (last accessed 15-02-2014); Shavell "Liability for Harm versus Regulation of Safety" 1984 *Journal of Legal Studies* 357.

[31] King "Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-Conviction Based Asset Forfeiture" 2012 *International Journal of Evidence and Proof* 337; Avgouleas *The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis* (2005) Ch. 8.

[32] See Singh *Banking Regulation of UK and US Financial Markets* (2007) 117.

[33] Avgouleas *The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis* (2005) 458; Singh *Banking Regulation of UK and US Financial Markets* (2007) 117.

proclivity towards civil and administrative solutions has been an abjuration of other enforcement tools. For instance, despite the existence of a criminal sanctions regime with stiffer penalties, that option has not been fully exploited as the bulk of disciplinary actions are settled rather than fully litigated.[34] This is not entirely the FSB's fault but rather of the National Prosecuting Authority (NPA) which is charged with instituting criminal actions[35] referred to it by the regulator. The consequence is that in as much as the law unequivocally declares that all market abuse violations are subject to severe criminal sanctions, the sad reality is that "[i]f the effectiveness of legislation which makes certain conducts an offence is measured in terms of the number of successful prosecutions for that offence, then the regulation prohibiting insider trading [in South Africa] has failed."[36] This is demonstrated by data concerning the enforcement of insider dealing; an offence that has been in existence since 1973[37] but in respect of which hitherto, the National Prosecuting Authority is yet to attain a conviction for its violation.[38] This situation is undoubtedly disconcerting as it implies that a 'show-case' or exemplary conviction in South Africa is still lacking. This has negative connotations especially as it has been contended that there is always a symbolic value to every first conviction; "...the first incidence of law enforcement (operationalized as the first successful or unsuccessful prosecution…) sends a positive signal to the market, much stronger than only the introduction of the law."[39]

While the dominant economic theory of punishment recommends grounding the statutory enforcement regime on civil sanctions, -- with criminal law sanctions standing in as a *ultimum remedium* or 'heavy club' reserved for egregious cases[40] -- the question however, is whether up to now the South African regulatory system has not encountered any market abuse case 'sufficiently blameworthy' to warrant the imposition of that decisive 'heavy club' sanction. The avoidance and paucity of criminal enforcement on the part of the South Africa

[34] See the FSB's enforcement trend from its Annual Reports, 2000-2010 https://www.fsb.co.za/Departments/communications/publications/Pages/fSBAnnualReports.aspx (last accessed 27-02-2014).
[35] See NPA at http://www.npa.gov.za/ReadContent380.aspx (last accessed 27-02-2014).
[36] Luiz "Insider Trading Regulation-If at First You Don't Succeed..." 1991 *South African Mercantile Law Journal* 136.
[37] Section 233 of the Companies Act No. 61 of 1973.
[38] See Jooste "Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437; Zyl "South Africa Insider Trading Regulation and Enforcement" 1994 *Company Law* 92.
[39] Cerps, Mathersb and Pajustec "Securities Laws Enforcement in Transition Economies" (2006) 10 https://iweb.cerge-ei.cz/pdf/gdn/RRCV_100_paper_01.pdf (last accessed 27-02-2014).
[40] Faure and Visser "Law and Economics of Environmental Crime: A Survey" http://www.hertig.ethz.ch/LE_2004_files/Papers/Faure_Environmental_Crime.pdf (last accessed 7-03-2014).

regime can arguably be characterised as treacherous and unwelcome to the public interests as it arguably amounts to an admission by both the regulator and the justice system that they find market abuse cases too difficult to prosecute.[41] That may constitute a morally reprehensible acknowledgment that those who can craft complex financial deception are at a greater advantage than their less sophisticated criminal counterparts. That is to say, those who can cover up their criminal conduct behind intricate corporate measures to the extent of making it difficult for the FSB to detect the offence, and for the NPA to prosecute and obtain a conviction are at an advantage over the less experienced and typically poorer criminals who do not enjoy any such benefit. There is however, some form of self-consolation on the part of the South African regulator as evidenced by the contention that:

"Although, to date, there has never been a successful prosecution for insider trading in South Africa, it is argued that the mere thought of a payment [of the fine] will prevent insider trading, even if the elusive conviction never materializes."[42]

Below is a discussion of some of the civil and administrative sanctions commonly used by the FSB and their possible implications.

4 1 Settlement

Since the South African regulator's enforcement endeavours are hampered by limitation of resources, it has pragmatically sought to generate compliance through higher levels of co-operation.[43] What seems to underpin the predilection for co-operation seems to be considerations such as limitations linked to the traditional enforcement options such as civil sanctions as well as the usual absence of external pressures for assertive enforcement. Where however, it sought to execute penalties, the regulator has often found itself having to settle out of court, a mechanism through which, until the coming into effect of s. 82 of the FMA

[41] Rozenes "Corporate Misconduct and the Criminal Justice System" www.law.gov.au/cdpp/speeches/Speechco.htm (last accessed 07-03-2014); Levi "Fraudulent Justice? Sentencing the Business Criminal" in Carlen and Cook (eds) *Paying for Crime* (1989) 86.

[42] *Monday Blues* Sunday Times, 11 April 2004.

[43] This is because the regulator is not enforcement led and encouraging cooperation with the firms and individuals in the financial sector serves to cut costs that usually come with supervision and enforcement. This approach extends to its preference for administrative processes in resolving market abuse cases. See the FSB's enforcement trend from its Annual Reports, 2000-2010 https://www.fsb.co.za/Departments/communications/publications/Pages/fSBAnnualReports.aspx (accessed 09-03-2014). See also s.82 of the FMA 2012 which provides that administrative process will be utilised by the regulator and has discontinued the Directorate of Market Abuse power to concurrently institute civil proceedings and impose civil sanctions for infractions of the insider dealing prohibition.

2012, civil sanctions have been imposed on a regular basis.[44] Other compelling considerations for the popularity of settlement hinge on some attractive aspects stretching from the fact that settling out of court resolves issues expeditiously and is not constrained by excessive litigation costs or lengthy court trials which are often exacerbated by backlogs.[45] In addition, there is need for the FSB to maintain positive and stable working relationships and settling is one way of accomplishing this.[46] The assumption therefore seems to be that the benefits of settling exceed the costs involved.

Further, as stated before, for want of judicial involvement in the enforcement process no corpus or precedent relating to market abuse offences exists. Accordingly, South African courts have yet to develop a coherent doctrine governing market conduct. A distinct advantage of adjudication over settlement is that it discharges the public interest through *res judicata* or the creation of precedent. This in turn avoids the necessity of revisiting the application and interpretation of every law thereby making it possible to have a reasonable expectation of the legal implications of the given situation and by so doing it provides certainty in areas of law.[47] As the FSB annual reports demonstrate, settlements between the FSB and the market offenders are made on a "without admitting or denying"[48] liability basis. This is said to suit the respondent or defendant as they continue to maintain the appearance of innocence despite paying a fine. It has been shown that:

> "Firms settling regulatory actions can keep aspects of their internal wrongdoing out of the public eye by resolving matters before full-blown trial. They can be expected to leverage their greater knowledge of what went wrong, and to try to settle before all the facts emerge, precisely to avoid a more thorough investigation. This reduces public, regulatory, and judicial learning about violation patterns more generally."[49]

Furthermore, as the court in *SEC v. Vitesse Semiconductor Corporation* noted:

> The defendant is free to proclaim that he has never remotely admitted the terrible wrongs alleged by the S.E.C. but, by gosh, he had better be careful not to deny them either . . . Only

[44] FSB Annual Reports 2009-2010b https://www.fsb.co.za/Departments/communications/publications/Pages/fSBAnnualReports.aspx (last accessed 09-03-2014).
[45] FSB Annual Report 2008 ftp://ftp.fsb.co.za/public/documents/AReport2008.pdf (last accessed 12-03-2014).
[46] NUCNET "GE Hitachi Settlement Will Maintain 'Positive Working Relationship' With NRC" http://www.nucnet.org/all-the-news/2014/01/27/ge-hitachi-settlement-will-maintain-positive-working-relationship-with-nrc (last accessed 17-03-2014).
[47] Johnson "SEC Settlement: Agency Self-Interest or Public Interest" 2007 *Fordham Journal of Corporate and Financial Law* 627.
[48] See e.g. *DMA v Mr M. J. I. Brown and Ors*. Case No: 12/2008; *DMA v Labat Africa Ltd. and Anor,* Case No: 10/2009).
[49] Ford "Toward a New Model for Securities Law Enforcement" 2005 *Administrative Law Review* 757 777.

one thing is left certain: the public will never know whether the S.E.C.'s charges are true . . ."[50]

Thus a potentially effective outcome through which the investing public could identify and brand offenders -- thereby shaming them --- is neutralised. In addition, the public are deprived of a chance of making an informed decision about which companies and individuals to transact business with. It follows therefore that by consenting to judgment on a non-admission of guilt basis the FSB prejudices public interest whilst benefiting the defendant who suffers less reputation and economic harm. This is a disconcerting policy especially where there are serious allegations of market abuse and criminal charges.[51]

By virtue of their informational advantage, the offending firms are relatively in a better position to assess the likely penalty range than the agency. Thus firms can resolve matters even before the often under-resourced and overworked regulatory agency such as the FSB has had a full sense of the intensity of the violation.[52] As such by consenting early and settling out of court, the offending firm avoids having to face the seriousness of their governance problems. It is no wonder therefore that corporations and individuals, despite being penalised for market abuse violations, rarely admit liability for the offences in issue.[53] It is also reasonable to submit that consideration such as risk aversion and internal cost savings which form the core of arguments for the settlements option expose the enforcement agency's interest.

In sum, the risk is that since the administrative settlement occurs in a distorted environment where the regulator is under pressure to resolve cases; there is a likelihood that the parties' incentives might end up being aligned thus compounding the problem. Such a hypothesis is credible as these two parties have a universal interest in the expeditious resolution of the problem and both appreciate that allocating blame plays a central role. To that end, their

[50] Civil Action No, 10 Civ. 9239.

[51] See for instance Erp "The Impact of "Naming And Shaming" on Business Reputations an Empirical Study In the Field Of Financial Regulation" http://regulation.upf.edu/utrecht-08-papers/verp.pdf (last accessed 13-06-14); Rozenes "Corporate Misconduct and the Criminal Justice System" www.law.gov.au/cdpp/speeches/Speechco.htm (accessed 07-03-2014); Levi "Fraudulent Justice? Sentencing the Business Criminal" in Carlen and Cook (eds) *Paying for Crime* (1989) 86.

[52] Bok "Against Settlement" 1984 *Yale Law Journal* 1073; Ford "Toward a New Model for Securities Law Enforcement" 2005 *Administrative Law Review* 757.

[53] Johnson 'SEC Settlement: Agency Self-Interest or Public Interest' 2007 *Fordham Journal of Corporate and Financial Law* 627.

common aspiration to resolve the matter expeditiously may become a higher priority than deep corporate governance reform or due process for individuals. This has the ultimate effect of entrenching the insiders' market abusive culture.[54] For this reason a distinction between public interest and the interest of the regulatory agency is appropriate and required.[55]

4 2 Disgorgement

Disgorgement, as in other jurisdictions, is a sanction that the South African regulator aggressively makes use of.[56] An express statutory authority empowering the Enforcement Committee to seek disgorgement is provided under s. 82 of the FMA, 2012. However, in view of the fact that privately instituted actions are not part of the South African enforcement regime, South Africa has, in the case of market abuse, pioneered an effective scheme whereby after the regulator has recovered its costs, part of the fine and profit disgorged from the offender are distributed by the FSB to persons who would have been prejudiced through insider trading.[57] Disgorgement complements the common law remedies of rescission and restitution[58] but unlike these two, disgorgement is not limited to compelling the restoration of the *status quo* but allows the FSB to order repayment of profits made, that could have been made or the loss avoided through insider trading.[59] These payments not only reimburse victims of market abuse but also enhance confidence in South African financial markets.

Although quite effective as a remedy, it can be argued that disgorgement as it is in South Africa is undermined by the fact that the firms responsible for the violation hardly ever have to contribute to any of the disgorged amount as 50 percent or more of the settlement payment usually comes from insurance, and thus is not borne directly by either individual or entity defendants. Likewise, individual defendants do not bear the burden of personally paying as the directors' and officers' liability policies provide the primary source of insurance funding and these policies are paid for by the corporation. As such the disgorged proceeds would not

[54] Ford "Toward a New Model for Securities Law Enforcement" 2005 *Administrative L-aw Review* 757.
[55] Johnson "SEC Settlement: Agency Self-Interest or Public Interest" 2007 *Fordham Journal of Corporate and Financial Law* 627.
[56] See FSB Annual Reports 1999-10 https://www.fsb.co.za/Departments/communications/publications/Pages/fSBAnnualReports.aspx (last accessed 29-03-2014).
[57] s.82 (4) of the FMA 2012 and FSA Annual Reports 2009-2010 at https://www.fsb.co.za/Departments/communications/publications/Pages/fSBAnnualReports.aspx (last accessed 29-03-2014).
[58] Zimmermann and Visser *Southern Cross: Civil law and Common Law in South Africa* (1996).
[59] s. 82 of the FMA 2012

in any sense represent a direct payment by the individual defendants. Furthermore, disgorgement as a penalty may be ineffective as the disgorged amount can be easily absorbed by a large company and become a part of doing business. For instance, the pecuniary penalty can be factored into the operating risks or to overhead costs provisions of the penalised company. Alternatively, the amount can be simply passed on as a financial cost to third parties such as shareholders, and customers, thereby transmitting responsibility away from management. This might have an additional effect of leading to inequality and discrimination as this sanction is likely to have a greater impact upon small firms whose businesses are generally more exposed to monetary penalties. These considerations are clearly a setback to public yearning for the punishment of the offenders and accounts for the assertion that disgorgement has little deterrence on market abuse[60] hence the existence of other options in the FSB's enforcement tool-box.[61]

4 3 Public Disclosure ('Naming and Shaming')

Since the FSB is disinclined from the imposition of conventional sanctions on all detected illegal conduct, as part of its risk-based approach the agency makes extensive use of the one of the lightest forms of regulatory enforcement – disclosure.[62] In embracing this strategy~~'s~~ the South African regulator seems to be swayed by the generally accepted assumption that any firm's status and reputation are essential assets whose loss can potentially surpass the effect of the greatest fine that a court could impose.[63] The rationale is that; "it is not the severity of the sanction in financial terms, but the amount of public shame that it invokes, which is the most important motivator of compliance."[64] Through the disclosure of enforcement activities such as and mostly sanctions imposed, or disclosure by way of a statement exhorting the public or other firms to avoid doing business with the wrongdoer, the FSB not only seeks to imbue discipline among market participants but also endeavours to indirectly communicate guidance with its regulatees. This also increases the transparency of

[60] Romano "The Shareholder Suit: Litigation without Foundation?" 1991 *Journal of Law and Economics* 55.
[61] Macrory "Regulatory Justice: Making Sanctions Effective" http://www.bis.gov.uk/files/file44593.pdf (last accessed 12-04-2014).
[62] See the FSB's enforcement trend at from its Annual Reports, 2000-2010 https://www.fsb.co.za/Departments/communications/publications/Pages/fSBAnnualReports.aspx (last accessed 15-03-2014).
[63] Macrory "Regulatory Justice: Making Sanctions Effective" http://www.bis.gov.uk/files/file44593.pdf (last accessed 19-03-2014).
[64] Erp "The Impact of 'Naming and Shaming' on Business Reputations an Empirical Study in the Field of Financial Regulation" http://regulation.upf.edu/utrecht-08-papers/verp.pdf (last accessed 19-04-2014). (Used with permission).

regulatory activities. As such s.84 (2) of the FMA empowers the regulator, "if the disclosure is in the public interest", to publicise disciplinary decisions of the enforcement committee.

As such, it is not unreasonable to assert that the FSB seems to assume that alleged or actual public announcement of odious market conduct, even for a brief period, is associated with significant economic consequences on the offender. Such negative consequences as evinced in other jurisdictions include loss of consumer confidence and decline market share and equity value.[65] For instance, upon the enactment of the Insider Trading Act 135 of 1998 identities of market offenders were extensively publicised in six cases. What emerged from such disclosure is that where the cases involved a senior executive, company share prices fell by 8-20 percent within a week and in one case the company's falling share price compelled it to dump its takeover strategy which in turn led to it being eventually taken over by another company.[66]

In recognition of the fact that disclosure is only effective when the information about offenders actually reaches the relevant public, the South African enforcement regime publishes its public warnings on the consumer pages of the FSB's website in a "warning list" that is in addition to clearly visible press releases on the news pages of the regulator's website. What makes disclosure appropriate in the South African context is that it shifts power from the regulator to the consumer and empowers consumers to influence company behaviour. Thus unlike other enforcement mechanisms, reputational sanctions are perceived as effective strategies that contribute to transparency and to the reinforcement of investor trust in the markets.[67]

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[65] Karpoff and Lott "The Reputational Penalty Firms Bear from Committing Criminal Fraud" 1993 *Journal of Law and Economics* 757; Fisse and Braithwaite *The Impact of Publicity on Corporate Offenders* (1983) 246; Skeel "Shaming in Corporate Law" 2001 *University of Pennsylvania Law Review* 1811 .

[66] Malherbe and Segal "Corporate governance in South Africa" Discussion paper, Policy Dialogue Meeting on Corporate Governance in Developing Countries and Emerging Markets http://www.oecd.org/dataoecd/9/19/2443999.pdf (last accessed 20-04-2014).

[67] For what might be justification for this approach in South Africa see generally Milhaupt "Reputational Sanctions in China's Securities Market" 2008 *Columbia Law Review* 929 ; Armour, Mayer and Polo "Regulatory Sanctions and Reputational Damage in Financial Markets" https://econresearch.uchicago.edu/sites/econresearch.uchicago.edu/files/paper.pdf (last accessed 19-04-2014) ; Erp "The Impact of 'Naming and Shaming' on Business Reputations an Empirical Study in the Field of Financial Regulation" http://regulation.upf.edu/utrecht-08-papers/verp.pdf (last accessed 19-04-2014); Erp "Reputational Sanctions in Private and Public Regulation" 2008 *Erasmus Law Review* 145; Kahan and Posner "Shaming White Collar Criminals: A proposal for Reform of The Federal Sentencing Guidelines" 1999 *Journal of Law and Economics* 365.

Nonetheless reputational sanctions have been linked to an unintended consequence of enticing the disgraced firms and individuals to go underground.[68] It has been shown that it is still possible for impertinent and belligerent firms to circumvent and overcome negative publicity and induce gullible clients to invest with them.[69] Furthermore, it has also been argued that where disclosure has been made against a firm, in some cases investors do not show any revulsion or strong reaction against their financial services provider.[70] It is therefore hoped that in the South African context the prominence of naming and shaming as an enforcement tool is a manifestation of its efficacy and that it has contributed to the visibility and prestige of the FSB. It is also hoped that this has accordingly had the effect of imbuing the FSB with a powerful image it requires in order to justify the costliness of its regulatory techniques to the stakeholders.[71]

5 POSSIBLE REFORMS

It is therefore clear that South Africa's preference for extra-enforcement strategies to attain compliance in the securities markets is associated with gaps which are at inconsistent with public interests.[72] Scholars have made suggestions as to how this could be remedied and to support such scholarship, this article argues that the following features of the enforcement regime could enhance the creation of an enforcement culture that embraces public interest considerations.

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[68]See for instance Karpoff and Lott "The Reputational Penalty Firms Bear from Committing Criminal Fraud" 1993 *Journal of Law and Economics* 757; Fisse and Braithwaite *The Impact of Publicity on Corporate Offenders* (1983) 246; Skeel "Shaming in Corporate Law" 2001 *University of Pennsylvania Law Review* 1811
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[68] Karpoff and Lott "The Reputational Penalty Firms Bear from Committing Criminal Fraud" 1993 Journal of Law and Economics 757; Fisse and Braithwaite The Impact of Publicity on Corporate Offenders (1983) 246; Skeel "Shaming in Corporate Law" 2001 *University of Pennsylvania Law Review* 1811

[69] Fisse and Braithwaite *The Impact of Publicity on Corporate Offenders* (1983) 246; Skeel "Shaming in Corporate Law" 2001 *University of Pennsylvania Law Review* 1811; Karpoff and Lott "The Reputational Penalty Firms Bear from Committing Criminal Fraud" 1993 *Journal of Law and Economics* 757.

[70] Parker "The 'Compliance' Trap: the Moral Message in Responsive Regulatory Enforcement" 2006 *Law and Society Review* 591.

[71] Parker "The 'Compliance' Trap: the Moral Message in Responsive Regulatory Enforcement" 2006 *Law and Society Review* 591.

[72] See Osode "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688; Chitimira and Lawack Overview of the Role-players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa" 2013 *Obiter* 200; Chitimira "Overview of Selected Role-players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108; Chitimira "Overview of Problems Associated with Ineffective Enforcement of Market Abuse Provisions in South Africa" 2014 *Mediterranean Journal of Social Scienc*es 478; Chitimira "Selected Challenges in the South African Anti-market Abuse Enforcement Framework in Relation to Some Aspects of the Financial Markets" 2014 *Obiter* 584; Chitimira "Overview of the Market Abuse Regulation under the Financial Markets Act 19 of 2012" 2014 *Obiter* 254.

5 1 Judicial involvement

Judicial participation through 'corporate law sermons'[73] in South Africa could play a significant role in the development of a corpus of capital markets jurisprudence and as such, assist in shaping industry norms. It is suggested that successful enforcement actions in courts have the potential of encouraging compliance and stimulate enforcement endeavours thereby facilitating a consensual understanding of sanctionable market conduct.[74] Further, it is argued that bringing cases before the courts could prompt judicial commentaries which, while operating as parallel arrangement of scrutiny and oversight, would help "define norms for good boardroom behavior which provide valuable guidance to directors faced with difficult decisions. Second, the fear of being criticized in a judicial opinion may encourage directors to exercise greater diligence and care in the performance of their duties."[75]

That obviously cannot happen unless cases are brought before the judiciary for adjudication. So far the South African preference for out of court settlement has excluded that possibility and has instead reduced the function of the judiciary in market-abuse cases to that of rubber-stamping the agreed terms. As stated above there are advantages that come with settling cases out of court especially in an environment where courts are overburdened and lack specialised judges. Likewise for a regulator that is resource constrained the option of expeditiously resolving cases without having to incur costs of suit makes sense. Nonetheless this has meant that there is no precedent that has been created by the judiciary, among the disadvantages stated above. A proactive judicial approach is therefore a necessity. There is precedent to that effect in the USA where the judiciary is taking a hardline stance by challenging the

[73] Rock "Saints and Sinners: How does Delaware Corporate Law Work?" 1997 *University of California, Los Angeles Law Review* 1009.
[74] Steinberg "Emerging Capital Markets: Proposals and Recommendations for Implementation" 1996 *International Lawyer* 715.
[75] Miller "A Modest Proposal for Fixing Delaware's Broken Duty of Care" 2009 *New York University Law and Economics Working Papers.* Paper 196 1 8.

boilerplate language used to resolve securities cases and is showing an increased willingness to block settlements reached between offenders and the regulator.[76]

5 2 Specialised courts

Connected to judicial engagement in market-based disputes is the need to establish specific courts with expertise in financial services or corporate law in South Africa. In an environment where there are specialist courts resolving cases from family law to employment law-related cases, it is not easy to understand the unavailability of a court dedicated to financial cases. A specialised court, manned by experts with unique perspective in complex financial instruments would have several advantages over conventional courts which are unnecessarily slow, expensive and unpredictable. Furthermore specialist courts would spawn specialised personnel who would stay abreast of developments in the financial markets.[77] Additional judicial involvement can take the form of judicial inquiries as proposed by Miller.[78] These could take the shape of an inquisitorial style of judging aimed at making factual findings in market abuse allegations.With their sophistication and ability to probe deeper than extra-judicial bodies such as the FSB, judges would offer a supplementary resolution mechanism and lessen the proclivity towards administrative enforcement and thus enable the creation of a specialised body of law from high-quality cutting edge market-related judgments.[79] In addition utilising both the specialised courts and extra-territorial powers where local courts can rely on foreign courts to try people who violate South African securities regulations while domiciled elsewhere.

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[76]See for instance *Securities and Exchange Commission v. Citigroup* 827 F. Supp. 2d 328, 335 (S.D.N.Y. Nov. 28, 2011. In this case the United States District Court for Southern District of New York refused to approve an out of court settlement between the Securities Exchanges Commission (SEC) and Citigroup Global markets and instead ordered that the case be set for trial. By so-doing judge Rokoff broke the tradition which had seen the courts simply rubber-stamping administrative settlements between the SEC and market offenders. Similarly, in *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304 (S.D.N.Y. 2011) Judge Rokoff questioned the wisdom of the long-running consent judgment practice of the Securities and Exchange Commission. For a discussion of this emerging trend see Macchiarola "Hallowed by History, But Not by Reason": Judge Rakoff's Critique of the Securities and Exchange Commission's Consent Judgment Practice" 2011 *CUNY Law Review* 51. See also Weissmann "Why Populist Hero Judge Rakoff Could Help Wall Street Win" The Atlantic, Dec. 2011; Farrell Note: A Role for the Judiciary in Reforming Executive Compensation: The Implications of Securities and Exchange Commission v. Bank of America" 2010 *Cornell Law Review* 169.

[77] For a comprehensive discussion of the need for specialized chambers for securities see OECD "Corporate Governance Corporate Governance in Asia 2011 Progress and Challenges: Progress and Challenges" https://books.google.co.za/books?id=CcjVgNBrG7wC&dq=need+for+specialised+court+securities+markets&source=gbs_navlinks_s (last accessed 11-06-15); Raina and Bakker *Non-bank Financial Institutions and Capital Markets in Turkey* (2003) 107.

[78] Miller "A Modest Proposal for Fixing Delaware's Broken Duty of Care" 2009 *New York University Law and Economics Working Papers.* Paper 196 1.

[79] Ibid.

6 CONCLUSION

The Governor of the Bank of England, in an apparent reinforcement of the need for markets that are crafted and regulated to serve -- not private groups but the public – recently restated that "[m]arkets are not ends in themselves, but powerful means for prosperity and security for all. As such they need to retain the consent of society – a social licence – to be allowed to operate, innovate and grow."[80] In line with that, and by building on prior research undertaken in this area, this article has attempted to fulfil two aspects of research on regulation; firstly, it sought to increase debate and knowledge about institutional behaviour and secondly, it is hoped that by exposing procedural imperfections this article will help political actors and the investing public to influence capital markets regulatory policies in South Africa.

On the basis of the public interest theory of regulation, this article has attempted to demonstrate, through an examination of past and present enforcement culture preferred by the FSB tends to promote or protect the interests of the private groups and not those of the public.[81] By questioning the South African regulator's institutionalization of extrajudicial enforcement mechanisms, it has sought to demonstrate how the regulator's narrow interests have the potential to defeat wider public interests.

It is also hoped that proposals envisaged above will have a significant impact on meeting the investing expectations of the investing public. That however, should not be taken to say that the entire enforcement landscape should be transformed to meet the public interest agenda. This rather paradoxical averment is premised on the fact that the public interest proposition itself is not without blemishes. For instance it is maintained that costly impediments arising from enforcing market agreements is linked to a risk where resources "will tend to be consumed in 'cat and mouse' games between regulator and regulated bodies and will be taken up by institutional structures designed to try and prevent regulation reflecting narrow sectional interests."[82]

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[80] Carney "Building Real Markets For The Good Of The People" Speech given at the Lord Mayor's Banquet for Bankers and Merchants of the City of London at the Mansion House, London, 10 June 2015 http://www.bankofengland.co.uk/publications/Pages/speeches/2015/821.aspx (last accessed 1 August 2014).

[81] See also Osode "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688.

[82] James "Regulation Inside Government: Public Interest Justifications and Regulatory Failures" 2000 *Public Administration* 327.

Furthermore it is feared that regulators will always find ways of pursuing their individual institutional interests and try to save resources by adopting strategies involving collaboration with the regulated players with the aim of attaining voluntary compliance. As a consequence, it is argued that implemented in isolation, regulatory and enforcement reforms based on the public interest theory would not be adequate. It is therefore suggested that such reforms would only work more effectively if they are combined with other types of control mechanisms.[83] Such an amalgamation would be indispensable especially as an analysis of both the private and public interest theories demonstrates that "neither theory has been refined to the point where it can generate hypotheses sufficiently precise to be verified empirically."[84]

[83] *Ibid* at 334.
[84] Posner "Theories of Economic Regulation" 1974 *Bell Journal of Economics* 335 357.