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NON-CRIMINALIZATION OF EXTRA-TERRITORIAL OF MARKET MISCONDUCT AS A CONSTRAINT ON CROSS-BORDER SECURITIES TRADING

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By Samamba, Lennox Trivedi*[1]
samambalennoxtrivedi19@gmail.com
Solwezi Municipal Council
Solwezi, Zambia

This Article examines the impact of increasing participation of foreign issuers, investors, intermediaries and other service providers on local stock markets on investor protection. It is first in a series of two related articles on regulation of extra-territorial market misconduct.[2] The scope of this article is limited to trade in listed securities across international borders in eastern and southern Africa. It does not therefore cover aspects of private cross-border trade in private equity.

1.0. EFFECTIVE SECURITIES MARKET REGULATION, STOCK MARKET INTEGRITY AND INVESTOR CONFIDENCE.

Securities regulation has its roots in investor or consumer protection and as such, breaches of securities laws and regulations have been seen to impact only the individual investors affected by the particular transgression.[3]

Many enforcement matters fall into this category, such as cases that deal with misappropriation of client funds, provision of unsuitable advice by a securities firm, or fraud.[4] However, many aspects of securities regulation have an impact beyond particular investors, and the breach of requirements can affect market cleanliness and undermine

[1] Mr Samamba, Lennox Trivedi, LLB (UNZA), MBL (USyd), Dip. Arbitration Law and Practice (CIArb), Fin & Corp Gov (Oxon), AHCZ. Currently reading for PhD/LLD in International Trade and Investment in Securities (UNILUS); Formerly lecturer in Corporate and Business Law at Copper-belt University-Zambia. Email: satril@gmail.com or samambalennox5@gmail.com ; Cell: +260 961 077798; +260 955 609920
[2] The sequel to this article is entitled 'Extra-territorial Criminalization of Market Misconduct—The Challenge of Enforcement,' 2017
[3] Ana Carvajal and Jennifer Elliot, 'The Challenge of Enforcement in Securities Markets: Mission Impossible? International Monetary Fund Working Paper (2009), WP/09/168, at p. 6
[4] Ibid

investor confidence.[5] An argument is made insider dealing and other forms of market misconduct committed wholly outside a particular jurisdiction within the COMESA region in so far as they negatively affect the liquidity and development of the stock market, affect the cleanliness and integrity of the entire stock market and erode investor confidence. There is thus, need for extra-territorial criminalization of improper market practices committed within the COMESA region. There is also need to require foreign intermediaries to register with the local securities exchange commission coupled with increased mutual cooperation between the exchange commission of the host state and that of the home state. An argument is made that such measures if put in place, are likely to ensure, preserve and enhance stock market cleanliness, integrity and investor confidence.

Market confidence is critical to the growth of the base of market participants. Some of the factors that determine market confidence include (a) comprehensiveness of the law i.e. how much a particular securities/property law reflects the needs and realities of market participants, (b) how efficiently a particular securities/property law assigns rights, duties and liabilities to market participants at minimum cost, (c) how much a particular securities/property law protects the rights and interests of markets participants, and (d) how much a particular securities law ensures stock market integrity and investor confidence by: (i) criminalizing market misconduct as a means of protecting and promoting the integrity of the market, (ii) providing for effective prosecution for those crimes, and (iii) ensuring effective enforcement of punishment upon conviction for those crimes.

As a means of ensuring and enhancing confidence in the cross-border securities market in eastern and southern Africa, the following measures are proposed, namely:

a) Making provision for strong protection of interests of investors against adverse claims of third parties through the application of the bona fide purchaser rule and elaborate rules as to perfection and priority of securities traded across international borders in the region;[6]
b) Reducing transaction costs for acquiring listed securities across international borders within the COMESA region;[7]
c) Making legal provision for cross-border cross-listing of securities within the region at minimum cost;[8]

[5] Ibid
[6] These matters are the province of the substantive property law that applies to proprietary aspects of a cross-border securities transaction. Expeditious identification of such property law at minimum cost is therefore, importance for the said purposes.
[7] Complete removal of exchange controls in the region and the adoption of a more effective rule than *lex situs*—the Hague Securities Convention 2006—as a conflict of laws rule for determining the substantive property law applicable to proprietary aspects of cross-border securities transactions, are hereby proposed to this effect, respectively.
[8] In order to achieve this end, proposals are made for the enactment at regional level and implementation at national level of a protocol that exempts foreign issuers have duly complied with disclosure obligations for listing purposes in their home countries from further compliance for in another COMESA country for cross-border cross-listing purposes.

d) Adequate and prompt compensation—out of the Compensation Fund—of registered market participants who suffer loss as a result of default on the part of stock market intermediaries;
e) Extra-territorial criminalization and effective enforcement of improper market practices committed wholly or partly outside a particular jurisdiction within the COMESA region.

Relationship Between Quality of Investor Protection and Capitalization & Strength of Securities Markets

Empirical evidence provides a link between the quality of a country's investor protection and the strength and attractiveness of its securities market.[9] Further empirical evidence links the quality of investor protection to capitalization of securities market.[10] Empirical evidence further links the quality of investor protection and strength of securities markets in a particular country to its economic growth.[11]

It is therefore, hoped that implementation of proposals for reform herein made will in the short-run improve investor protection, improve the strength of securities markets in the mid-run, and in the long run spur economic growth.

1.1.NON-CRIMINALIZATION OF EXTRA-TERRITORIAL IMPROPER MARKET PRACTICES AS A CONSTRAINT ON THE GROWTH OF CROSS-BORDER TRADE IN SECURITIES.

Defining Market Misconduct

The Zambian Securities Act No. 41 of 2016 defines 'market misconduct' as including:

> "(a) the use or disclosure of price-sensitive information contrary to the Act;
> (b) engaging in improper trading practices as provided in Part XVIII of the Act;
> (c) failure to comply with any provision of this Act; and
> (d) a conviction of an offence under the Act."[12]

Thus, the definition given above is merely illustrative and not exhaustive of what sought of conduct might constitute market misconduct. Thus, market misconduct might be broadly defined as "any conduct on the part of market players which may be classified as stain on the

[9] See, Bernard Black, 'The Legal and Institutional Pre-Conditions for Strong Securities Markets,' UCLA Law Review, Vol. 48 of 2001, 781
[10] Raphael La Porta et al, 'Legal Determinants of External Finance,' Journal of Finance, Vol. 52 of 1997, 1131
[11] Levine R. and Zevos S., 'Stock Markets, Banks and Economic Development,' American Economic Review, Vol. 88 of 1998, 537
[12] See, definition of the phrase in section 2 of the Zambian Securities Act 2016

integrity of the securities market as a whole and is likely to dampen the confidence of market players."

The Impact of Technology on Foreign Participation on Securities Markets

Technological advancement—internet, telecommunication and automation of securities trading systems of stock markets—has made it possible for persons resident outside a particular jurisdiction to buy or sell securities listed in that jurisdiction to buyers or sellers resident in other jurisdiction. The cross-border buying and selling of listed securities may be done by investors either on their own account or through local or foreign intermediaries.

There is a growing tendency among securities markets in eastern and southern Africa, and elsewhere, to have foreign intermediaries—whether remote or physically located in their jurisdiction—to conduct their intermediary services on these bourses. It is also possible for an issuer to cross-list their securities in other jurisdictions within the region. In the event that a foreign issuer or intermediary is located outside the jurisdiction, regulatory authority and oversight—which is traditionally territorial—may be limited.

The extra-territorial location of the foreign issuer or intermediary, limited regulatory oversight and the ease with which information is disseminated via internet or mobile phones and other media make it even easier for these foreign players and other foreign-based market participants to engage in improper market practices—such as insider dealing, market manipulation, price rigging or other fraudulent acts—which have the capability of harming the entire market.[13] The need to have the activities of foreign-based intermediaries regulated cannot be over-emphasized at least in relation to emerging and pre-emerging (frontier) stock markets. As the International Organization for Securities Commissions (2005) observes:

> "It is [very] important for emerging markets to exercise maximum regulatory authority over foreign intermediaries to minimize risk of fraud and market manipulation because, given their structure and stage of development of their disclosure standards, emerging markets are highly susceptible to such practices."[14]

[13] The jurisdiction of the Securities and Exchange Commission is territorial—it is limited to Zambia.
[14] The International Organization of Securities Commissions, 'Report on Cross-border Activities of Market Intermediaries in Emerging Markets,' 2005, at p. 10. Protection of the domestic stock market may be achieved through (i) requiring foreign intermediaries to register with the local securities and exchange commission (ii) extra-territorial criminalization of improper market practices committed outside the jurisdiction coupled with (ii) increased mutual cooperation between the securities exchange commission of the home country and that of the host state. Proposals have been made for implementation of these measures aimed as a means of protecting the local stock markets from improper market practices of foreign intermediaries.

Information technology has had a substantial impact on the investment process and the market place in general.[15] As Choi (1998) observes:

> "Through the internet, the possibility of securities transactions taking place across multiple jurisdictions is increased many times."[16]

An argument is made that unless those offences committed wholly outside the jurisdiction—but having harmful effect on the local stock market and investors thereof—are criminalized and effective enforcement ensured, the participation of foreign investors and external intermediaries on local bourses is likely to hurt the very rapid growth of cross-border trade in securities that comes with use of the internet and other forms of technology. Proposals are made for criminalization of market misconduct committed wholly outside on COMESA country but having harmful effects in other jurisdictions within the region.

On additional regulatory challenges of curbing insider dealing as posed by the advent of the internet, Choi (1998) observes:

> "Policing insider trading in [international] markets is a complicated matter characterized by both legal and practical challenges. These problems multiply when the insider trading activity occurs over the internet."[17]

1.1.1.CONSTRAINT RELATING TO NON-CRIMINALIZATION EXTRA-TERRITORIAL IMPROPER MARKET PRACTICES: SETTING THE ENQUIRY INTO CONTEXT

The enquiry may be set into context by way of the following scenario:

> A is a director of finance in XCo—a company incorporated under the laws of Uganda. XCo provides auditing and financial consultancy services to YCo—a company incorporated according to the laws of Kenya. YCo has listed its equity securities on Nairobi Stock Exchange (NSE) and cross-listed them on the Lusaka Stock Exchange. At 9AM, XCo emails to YCo a gloomy

[15] Kenneth W. Brakebill, 'The Application of Securities Laws in Cyberspace: Jurisdictional and Regulatory Problems Posed by Internet Securities Transactions,' Hastings Commerce & Enterprise Law Journal, Vol. 18 of 1996, at p. 904
[16] Stephen J. Choi, 'Gatekeepers and the Internet: Rethinking Regulation of Small Business Capital Formation,' Small and Emerging Business Law Journal,' Vol. 2, No. 27 of 1998, at p. 40
[17] Ibid.

financial forecast of YCo's financial performance for the next six months. An emergency board meeting is called by YCo's directors at 11AM and a decision is made to decline payment of a dividend. Before the board decision could be made public and disseminated to NSE, LuSE and the investing public, at 11:30AM, A calls B his childhood friend holding a substantial portion of YCo equity securities and gives him the news. At 11:35AM, B instructs his LuSE broker to sell the three outstanding orders. The LuSE broker proceeds to sell the orders which are executed at 11:38AM, 11: 41AM and 11: 45, respectively essentially disposing of B's entire position in YCo securities to C, D and E. At 14:30PM, the news on YCo of posted on NSE website, LuSE website and published in the Financial Times of Kenya and the Financial Times of Zambia. At 15:00PM the price of YCo securities plummets to the detriment of C, D and E. B is is resident in Zimbabwe, while C and D are resident in Zambia. E is resident in Malawi. Can A and B be effectively prosecuted in Zambia for insider trading? What civil remedy is available to C, D and E against A and B?

The relevant sections which deal with insider trading under the Zambian Securities Act 20016 are sections 138, 139 and 2 in so far as it defines an 'insider'. The sections provide as follows:

> s. 138. Subject to the other provisions of this Part insider dealing is prohibited.
> s. 139. (1) An insider shall not, directly or indirectly, counsel, procure or otherwise advise any person to buy, sell, or otherwise transact in registered securities, if the person has price-sensitive information until such information is publicly disclosed.
> (2) A person shall not deal, counsel or procure another person to deal in securities of a company of which that person has any knowledge that—
> *(a)* is not publicly available; and
> *(b)* would, if it were publicly available, materially affect the price of the securities.

s. 2. " insider " means a person who—
(a) is connected with a listed company in one or more of the following capacities:
(i) director of the company or of a related company;
(ii) officer of the company or of a related company;
(iii) employee of the company or of a related company;
(iv). independent contractor of the company who is involved in a professional or business relationship with the company;
(i) shareholder of the company or any person who has or can be considered to have a relationship with the company or shareholder;
(vi) member of the audit committee of the company;
(b). has inside information where the person knows that the direct or indirect source of the information was a person specified in paragraph *(a)*;
(c). obtains inside information from a person specified in paragraph *(b)*; and
(d). by virtue of having been connected with the company in any other way, possesses unpublished price-sensitive information in relation to the securities of the company;

s. 140. (1) A person who contravenes section *one hundred and thirty-eight* or *one hundred and thirty-nine* commits an offence and shall be liable, on conviction, to a fine as specified in section *one hundred and forty-one* or to imprisonment for a period not exceeding five years, or to both.

s. 141. (1) Where the Tribunal finds, on application by the Commission, that a person has engaged in insider dealing, the Tribunal may make an order requiring that person to pay to the Commission, an amount determined by the Tribunal.
(2) The maximum amount that may be ordered to be paid in terms of subsection (1) shall be an amount equal to the amount determined by the Tribunal to be the amount of three times the profit that may have been realised or loss avoided by the offender due to the offence, or in the case of a company, ten percent of the annual turnover of the company, whichever is more.
(3) The Tribunal shall, in making an order in terms of this section have due regard to any administrative penalty already imposed in accordance with this Act.

Four positions may be distilled from the facts of the scenario in light of sections 138, 139 and 2 of the Zambian Securities Act 2016 are as follows:

a) A is an insider of YCo on account of section 2(b), (a) (iv) of the Zambian Securities Act 2016;
b) A has committed the offence of insider trading—as a tipper[18]—in Uganda;
c) B is an insider of YCo on account of section 2(a)(v) and (b) of the Zambian Securities Act 2016; and
d) B has committed the offence of insider trading—as a tippee[19]—in Zimbabwe.

In Zambia the commission of a socially abhorrent act does not warrant a trial and punishment of the individual committing the act in question. For the accused to be tried and punished, two conditions must be met, namely:

a) The act in question should be classified as an offence and penalty thereof prescribed in a written law;[20]
b) The Zambian courts should have jurisdiction to hear and determine the case concerning such an offence.[21]

By sections 139(1) and 138 of the Zambian Securities Act 2016, paragraph (a) above has been satisfied. But do Zambian criminal courts have jurisdiction to hear, determine and punish for such an offence committed wholly outside the jurisdiction against a Zambian citizen or resident?

Sections 5 and 6 of the Zambian Penal Code stipulate:

5. "The jurisdiction of the Courts of Zambia for the purposes of this Code extends to every place [within] Zambia."

6(1). "Subject to sub-section (3)[22], a [citizen] of Zambia who does any act outside Zambia which, if wholly done in Zambia, would be an offence against this Code, may be tried and punished under this Code in the same manner as if such act had been wholly done in Zambia.

(2). When an act which, if wholly done within Zambia, would be an offence against this Code, is done partly within and partly outside

[18] A 'tipper' is a person who supplies information concerning a public company which is not publicly available and capable of materially affecting the securities of that company.
[19] A 'tippee' is a person who receives information of concerning a public company which is not publicly available and capable of materially affecting the price of the securities of that company and proceeds to trade in the securities of the company on account of that information.
[20] See, Article 18(8) of the Zambian Constitution
[21] See, sections 5 and 6 of the Zambian Penal Code Act
[22] Sub-section 3 relieves a Zambian citizen who has been tried and punished outside the country from a second trial and punishment under the Zambian systems.

> Zambia, any person who [within Zambia] does any part of such act
>
> may be tried and punished under this Code as if such act had been
>
> wholly done within Zambia.

What can be distilled from section 6 of the Zambian Penal Code is as follows:

a) The Zambian courts will have jurisdiction to hear, determine and punish for crimes committed wholly outside Zambia if those crimes be committed by Zambian citizens;
b) The Zambian courts will have jurisdiction to hear, determine and punish for crimes committed outside Zambia by non-citizens if those crimes be committed partly outside and partly inside Zambia.

The requirement that the offence be partly committed in Zambia for jurisdiction to assume finds expression in section 215 of the Zambian Securities Act 2016. The section provides that:

> s. 215(1) Where this Act or any rules and regulations made in accordance with this Act, provides that a person commits an offence where the person does a particular act, the offence is deemed to have been committed even where the act is done partly outside Zambia.
> (2) Where this Act or any regulations and rules, made in accordance with this Act, provides that a person commits an offence where the person does two or more particular acts, the offence is deemed to have been committed even if some of those acts are done outside Zambia.

Coming back to the scenario presented above, A and B both committed the offence of insider trading [wholly] outside Zambia and they are foreign nationals. It would therefore, follow that the Zambian courts have no jurisdiction to hear, determine and punish them for insider dealing committed wholly in foreign countries by foreign nationals.[23]

It is worth noting that most countries on eastern and southern Africa which are former British colonies and protectorates have similar provisions in their Penal Code Acts.[24] An argument is made that with the prevalence of such inadequate provisions, the commission of insider trading and other improper market practices with impunity by stock market participants who are resident outside Zambia is likely to increase. The negative impact of insider trading and other improper market practices on liquidity and development of stock markets cannot be

[23] The internet and information technologies have made possible the commission of improper market practices such as insider trading, market manipulation and rigging wholly outside the jurisdiction where the stock market is constituted. Information may easily be passed onto a tippee from the comfort of one's home via internet.
[24] See, sections 5 and 6 of the Ugandan Penal Code Act; section 5 and 6 of the Malawian Penal Code Act

overemphasized.[25] Such a state of affairs is likely hurt stock market integrity, dampen market confidence among participants and discourage both local and foreign investor participation as well as cross-border cross-listings. Overall, the growth of cross-border trade in securities in the region is likely to be constrained.

Proposals are therefore, made for region-wide harmonization of securities laws and extra-territorial criminalization of improper market practices committed wholly outside the jurisdiction.[26] For purposes of realizing this proposal, insertion of the following sections into the Zambian Penal Code is proposed.

5A." For purposes of enforcing offences under the Securities Act 2016, the jurisdiction of the Courts of Zambia shall extend to every place [within] the Common Market for Eastern and Southern African Community."

6A(1). "A person who commits an offence under any Part of the Securities Act 2016 wholly or partly outside Zambia but within the Common Market for Eastern and Southern Africa, shall be liable to be tried and punished as if the act had been committed wholly in Zambia provided the harmful act is injurious to the stock market and investors within Zambia.

(2). A person who commits an offence under any Part of the Securities Act 2016, wholly or partly inside Zambia which act has injurious effects on the Stock market and investors in a country within the Common Market for Eastern and Southern Africa, shall be liable to be tried and punished in Zambia as if such harmful act had been wholly committed in Zambia.

(3). Without prejudice to any civil remedy available to any injured party, a person who have been tried and punished or acquitted outside Zambia shall not be tried for the same offence in Zambia.

[25]For both theoretical support and empirical evidence on the negative effect of insider trading on liquidity and performance of stock markets, see (1) Laura Beny,(1999), op.cit, and (2) op.cit, Laura N. Beny,(2007), op.cit.
[26] Region-wide criminalization is targeted at satisfying the principle of 'double criminality' which is crucial to effective extradition at international law.

An argument is made that a provision of such character, though not extending jurisdiction of the Zambian courts to the rest of the world by restricting jurisdiction to the COMESA Region, is likely to deter and reduce the prevalence of insider dealing and other improper market practices in the COMESA region. A corollary argument is made that despite the enforcement challenges that are inherent in extra-territorial criminalization of acts, restricting the jurisdiction of courts to the COMESA Region is likely to buttress this challenge given the existing obligation on member states to create an enabling environment for foreign and cross-border trade in securities.[27] Thus the much needed cooperation for extra-territorial enforcement is likely to be received under such already-existing infrastructure.

In order to ensure effective protection of the interests of market participants and foster stock market integrity, proposals are made for vesting statutory power in the Zambian Securities and Exchange Commission to prosecute crimes committed under the Zambian Securities Act 2016.[28] The power to prosecute would immensely complement SEC's power to institute civil representative actions on behalf of all market participants who have suffered loss as result of improper market practices by an erring market participant. An argument is made that criminalization of extra-territorial improper market practices and the vesting of prosecutorial power in the Zambian SEC is likely to go a long way is realizing the mandate of the SEC to regulate both local and foreign operators and participants.[29] A further argument is made that the combination of the power to prosecute and institute civil representative actions against erring market participants is not only likely to ensure effective protection of the interests of market participants and promote market integrity but also go a long way in realizing the mandate of the Zambian SEC which is to:[30]

(i) [Make and enforce] rules for the conduct of stock market participants;
(ii) Ensure and promote high standards of investor protection and overall integrity of the market;
(iii) Take reasonable steps to safeguard the interests of persons who invest in securities; and
(iv) Suppress illegal, dishonourable and improper market practices in relation to dealings in securities;
(v) Encourage the development of securities markets in Zambia and increased use of such markets in Zambia and elsewhere;
(vi) To co-operate by sharing information and otherwise, with other supervisory bodies in Zambia and elsewhere;

[27] See, Articles 3(c) and 81(a) and (b) of the COMESA Treaty 1993.
[28] The Zambian Securities and Exchange Commission has no such power to impose fines on offenders. For example, in the event that a market participant is found guilty of insider dealing the Commission has to apply to the Securities Tribunal for Order compelling that offender to pay a fine to the tune determined by the Tribunal. The monies paid by offenders is to be used for investor protection and development of the market: see section 141(1) and (4) of the Zambian Securities Act 2016.
[29] See section 10(1) and (2) of the Zambian Securities Act 2016
[30] See, section 9(1), (2) (a)-(u), and of the Zambian Securities Act 2016

Under the Zambian Securities Act 2016 in its current state, the most that the SEC can do to a market participant who engages in illegal, dishonourable or improper market practices is to cancel or suspend their listing and suspend, revoke or cancel their operating licence.[31] This is in sharp contrast to the position in South Africa and Zimbabwe where the securities and exchange commissions have the power to fine the erring participant as well the power to institute civil class action on behalf of all affected market participants.[32]

Whereas it is important to have regulatory rules, it is even more important to ensure enforcement of those rules. Effective enforcement of regulatory rules is vehicle through which the underlying objective of the substantive securities rules is achieved. It is also crucial to the integrity of a stock market. As the Group of Twenty Countries (G-20) (2009) observes:

> "Achieving the objectives of the regulatory framework requires not only sound regulation but also effective enforcement. No matter how sound the rules are for regulating the conduct of market participants, if the system of enforcement is ineffective – or is perceived to be ineffective – the ability of the system to achieve the desired outcome is undermined. It is thus essential that participants are appropriately monitored, that offenders are vigorously prosecuted and that adequate penalties are imposed when rules are broken. A regulatory framework with strong monitoring, prosecution, and application of penalties provides the incentives for firms to follow the rules. This, in the end, adds to the framework's credibility and enhances investor confidence in the financial system"[33]

Constraints Relating To Inapplicability Of The Criminal Penalty For Insider Dealing

The available penalty for insider dealing under sections 140 and 141 is criminal in nature. An argument is made that the applicability of the this fine to foreign participants who commit insider dealing wholly inside their jurisdictions depends on existence of criminal liability—they must be tried, convicted and punished. A corollary argument is made that since Zambian courts have no jurisdiction to try, convict and punish for such extra-territorial offences, the fine does not apply to this category of offenders. An argument is made that in the face of increasing foreign participation on local stock markets, this negative feature is likely to incentivize insider dealing by foreign-based participants.

[31] See, section 11(2), (3) and (4) of the Zambian Securities Act 2016
[32] See, section 82 of the South African Financial Markets Act 2012, and sections 91, 92, 98 and 99 of the Zimbabwean Securities Act 2004
[33] G-20 Working Group 1, 'Enhancing Sound Regulation and Strengthening Transparency Final Report,' 25th March, 2009, at p. 45, www.g20.org/Documents/g20_wg1_010409.pdf. Visited at 23.45 hours/23/09/2016.

Constraints Relating To The Definition Of 'Insider' Of A Listed Issuer

The statutory definition of 'insider' given above is much broader than the one that existed under section 52 of the repealed Securities Act 1993. As such it is likely to enhance the efficacy of the insider dealing regime to curb the vice. However, a critical look at this definition reveals that it is not as broad as it seems.

Most of the introduced categories of tippee and information abusing insiders are connected to the traditional insiders—the directors, officers, employees, shareholder, auditor, etc. They are insiders on account of the said traditional insiders being recognized as such. There is thus, need to ensure that the scope of the traditional category is made much wider. Contrary to this notion, the recognition of this traditional category under the Zambian Securities Act 2016 has been restricted to 'listed companies'.[34] 'Listed company' is defined as company admitted to the official list of a licensed securities exchange.[35] 'Company' has been defined as a company incorporated under the Zambian Companies Act 1994.[36]

Such a definition obviously excludes foreign registered companies, and local and foreign cooperatives, other bodies corporate, collective investment schemes, trusts and association. These styles of issuers have been incorporated into the definition of 'company' under the LuSE Listing Rules of 2012.[37]

Let us suppose that a director, officer, employee, shareholder, or member of the audit committee of the excluded styles of issuers engages into insider dealing. The Zambian SEC commences misconduct proceedings against such an insider in the Capital Markets Tribunal. During the proceedings, would it not be open to the respondent to argue that they are not insiders for the purposes of Securities Act 2016—the class being limited to companies incorporated under the companies Act 1994? If they succeeded, would it not follow that tippee and information abusing insiders whose liability depends on the liability or categorization of traditional category are not liable as insiders? If tippees fall off too, would it not follow that those information abusers procured by tippees whose liability depends on the liability or categorization of tippees fall off too?

An argument is made that limiting the recognition of the traditional category as insiders to local 'companies', narrows the scope of the traditional category. Consequently, the efficacy of the anti-insider-dealing regime to curb the vice is likely to be compromised. As a possible solution to this negative feature, it is proposed that paragraph (a) of the definition of 'insider' in section 2 of the Zambian Securities Act 2016, be amended as follows:

[34] See, paragraph (a)(I)-(vi) in the definition of 'insider' in section 2 of the Zambian Securities Act 2016
[35] See, definition of the term in section 2 of the Zambian Securities Act 2016
[36] See, definition of the term under section 2 of the Zambian Securities Act 2016
[37] See, the definition section thereof

"**Insider** means a person who—

(a) is connected with a listed issuer in one or more of the following capacities:"

Such an amendment is likely to extend the scope of the traditional category of insiders to the excluded styles of insiders as identified above and enhance the efficacy of the anti-insider-dealing regime to curb the vice.

Developed jurisdictions such as Australia have avoided such shortcomings in the law by broadening the scope of the insider net to anyone who has inside information. Inside information is "information that is not generally available which if it were as such, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate."[38] A body corporate is a public or private entity. Against this backdrop, an 'entity' could a natural or juristic person. This is quite a broad classification of issuers. The insider is prohibited to, either as principal or agent, sell or purchase or, procure another person to purchase or sell any securities.[39] Thus, the concept of insider tipping and information abuse, have been tied to a very broad class of traditional insiders.

[38] See, section 1002G(1)(a)(b) of the Australian Corporations Act 2001. Information is generally available if it consists of readily observable matter: Section 1002B(2)(a) of the Corporations Act 2001. In R vs Firn [2001] NSWCCA 191, it was held that a matter was readily observable if it could be seen a large portion of the public even if unseen by the investing community. Readily observable does not mean readily available: Per Justice Mason P.

[39] By section 1002G(2)(a)(b) of the Corporations Act 2001

Mr Samamba, Lennox Trivedi, LLB (UNZA), MBL (USyd), Dip. Arbitration Law and Practice (CIArb), Fin & Corp Gov (Oxon), AHCZ. Currently reading for PhD/LLD in International Trade and Investment in Securities (UNILUS); Formerly lecturer in Corporate and Business Law at Copper-belt University-Zambia. Email: satril@gmail.com or samambalennox5@gmail.com ; Cell: +260 961 077798; +260 955 609920

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These matters are the province of the substantive property law that applies to proprietary aspects of a cross-border securities transaction. Expeditious identification of such property law at minimum cost is therefore, importance for the said purposes.

Complete removal of exchange controls in the region and the adoption of a more effective rule than lex situs—the Hague Securities Convention 2006—as a conflict of laws rule for determining the substantive property law applicable to proprietary aspects of cross-border securities transactions, are hereby proposed to this effect, respectively.

In order to achieve this end, proposals are made for the enactment at regional level and implementation at national level of a protocol that exempts foreign issuers have duly complied with disclosure obligations for listing purposes in their home countries from further compliance for in another COMESA country for cross-border cross-listing purposes.

See, Bernard Black, 'The Legal and Institutional Pre-Conditions for Strong Securities Markets,' UCLA Law Review, Vol. 48 of 2001, 781

Raphael La Porta et al, 'Legal Determinants of External Finance,' Journal of Finance, Vol. 52 of 1997, 1131

Levine R. and Zevos S., 'Stock Markets, Banks and Economic Development,' American Economic Review, Vol. 88 of 1998, 537

See, definition of the phrase in section 2 of the Zambian Securities Act 2016

The jurisdiction of the Securities and Exchange Commission is territorial—it is limited to Zambia.

The International Organization of Securities Commissions, 'Report on Cross-border Activities of Market Intermediaries in Emerging Markets,' 2005, at p. 10. Protection of the domestic stock market may be achieved through (i) requiring foreign intermediaries to register with the local securities and exchange commission (ii) extra-territorial criminalization of improper market practices committed outside the jurisdiction coupled with (ii) increased mutual cooperation between the securities exchange commission of the home country and that of the host state. Proposals have been made for implementation of these measures aimed as a means of protecting the local stock markets from improper market practices of foreign intermediaries.

Kenneth W. Brakebill, 'The Application of Securities Laws in Cyberspace: Jurisdictional and Regulatory Problems Posed by Internet Securities Transactions,' Hastings Commerce & Enterprise Law Journal, Vol. 18 of 1996, at p. 904

Stephen J. Choi, 'Gatekeepers and the Internet: Rethinking Regulation of Small Business Capital Formation,' Small and Emerging Business Law Journal,' Vol. 2, No. 27 of 1998, at p. 40

Ibid.

A 'tipper' is a person who supplies information concerning a public company which is not publicly available and capable of materially affecting the securities of that company.

A 'tippee' is a person who receives information of concerning a public company which is not publicly available and capable of materially affecting the price of the securities of that company and proceeds to trade in the securities of the company on account of that information.

See, Article 18(8) of the Zambian Constitution

See, sections 5 and 6 of the Zambian Penal Code Act

Sub-section 3 relieves a Zambian citizen who has been tried and punished outside the country from a second trial and punishment under the Zambian systems.

The internet and information technologies have made possible the commission of improper market practices such as insider trading, market manipulation and rigging wholly outside the jurisdiction where the stock market is constituted. Information may easily be passed onto a tippee from the comfort of one's home via internet.

See, sections 5 and 6 of the Ugandan Penal Code Act; section 5 and 6 of the Malawian Penal Code Act

For both theoretical support and empirical evidence on the negative effect of insider trading on liquidity and performance of stock markets, see (1) Laura Beny,(1999), op.cit, and (2) op.cit, Laura N. Beny,(2007), op.cit.

Region-wide criminalization is targeted at satisfying the principle of 'double criminality' which is crucial to effective extradition at international law.

See, Articles 3(c) and 81(a) and (b) of the COMESA Treaty 1993.

The Zambian Securities and Exchange Commission has no such power to impose fines on offenders. For example, in the event that a market participant is found guilty of insider dealing the Commission has to apply to the Securities Tribunal for Order compelling that offender to pay a fine to the tune determined by the Tribunal. The monies paid by offenders is to be used for investor protection and development of the market: see section 141(1) and (4) of the Zambian Securities Act 2016.

See section 10(1) and (2) of the Zambian Securities Act 2016

See, section 9(1), (2) (a)-(u), and of the Zambian Securities Act 2016

See, section 11(2), (3) and (4) of the Zambian Securities Act 2016

See, section 82 of the South African Financial Markets Act 2012, and sections 91, 92, 98 and 99 of the Zimbabwean Securities Act 2004

G-20 Working Group 1, 'Enhancing Sound Regulation and Strengthening Transparency Final Report,' 25th March, 2009, at p. 45, www.g20.org/Documents/g20_wg1_010409.pdf. Visited at 23.45 hours/23/09/2016.

See, paragraph (a)(I)-(vi) in the definition of 'insider' in section 2 of the Zambian Securities Act 2016

See, definition of the term in section 2 of the Zambian Securities Act 2016

See, definition of the term under section 2 of the Zambian Securities Act 2016

See, the definition section thereof

The use of 'entity' as opposed to 'company' is conveniently likely to claw in a good number of styles of issuers. Thus, local and foreign companies, cooperatives, other bodies cooperate, collective investment schemes, trusts and associations. Tying such a broad conception of 'insider' to a broad class of issuers is likely to enhance the efficacy of the Australian regime to curb insider dealing.

1.3. CONCLUSION

It has been shown in this Section that technological advancement has facilitated the participation of foreign investors and intermediaries on foreign bourse. It has also enhanced volumes of securities that can be traded across international boundaries in any given trading day.

It has been observed that there is limited regulatory oversight on activities of foreign issuers, intermediaries and investors alike. An argument has been made that the limited regulatory oversight—the jurisdiction of the Securities Exchange Commissions (SECs) and that of national criminal laws in the region are territorial—is likely to increase the likelihood of foreign intermediaries and investors engaging in unabated extra-territorial improper market practices. An argument has been made that since extra-territorial improper market practices have the potential of hurting the integrity of the cross-border securities market and dampen foreign investor confidence, there is urgent need for implementation of those measures which have been proposed for curbing such extra-territorial activities.

Proposals have been made for criminalization of extra-territorial improper market practices—committed outside the jurisdiction but having harmful effects on the local stock market.

An argument has been made that with extra-territorial criminalization of improper market practices, increased extradition treaties for effective extradition of offenders, and enhanced mutual legal assistance in such criminal matters, effective enforcement of extra-territorial improper market practices is likely to be achieved. A further argument has been made that with such effective enforcement of extra-territorial improper market practices which have the potential of hurting the integrity of the cross-border securities market, foreign investor confidence is likely to increase. Increased investor confidence is likely to incentivize more foreign investor participation. Ultimately, increasing investor participation is likely to lead to growth in cross-border trade in securities and, in the long run economic growth.

See, section 1002G(1)(a)(b) of the Australian Corporations Act 2001. Information is generally available if it consists of readily observable matter: Section 1002B(2)(a) of the Corporations Act 2001. In R vs Firn [2001] NSWCCA 191, it was held that a matter was readily observable if it could be seen a large portion of the public even if unseen by the investing community. Readily observable does not mean readily available: Per Justice Mason P.

By section 1002G(2)(a)(b) of the Corporations Act 2001