Vanderbilt Journal of Transnational Law

Volume 23
Issue 1 *Issue 1 - 1990*

Article 4

1990

A New Look at the European Economic Community Directive on Insider Trading

Amy E. Stutz

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vjtl

Part of the Antitrust and Trade Regulation Commons, European Law Commons, and the International Trade Law Commons

Recommended Citation
Amy E. Stutz, A New Look at the European Economic Community Directive on Insider Trading, 23 *Vanderbilt Law Review* 135 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss1/4

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

A New Look at the European Economic Community Directive on Insider Trading

ABSTRACT

On 13 November 1989, the European Council passed a directive on the regulation of insider trading. This legislation is designed to coordinate the various laws of the European Economic Community states and to encourage investor confidence in their securities markets. In analyzing the directive, the author proposes the United States experience in the regulation of insider trading as a model for the efforts of the EEC. Considering both the strengths and weaknesses of the United States experience, the author describes the United States shift in emphasis from the regulation of individuals to the regulation of institutions. This shift reflects the United States realization that no supervisory body can adequately regulate insider trading without the help of institutions. The EEC, confronted with a variety of marketplace configurations and a relative absence of strong regulatory bodies, could benefit from regulation of institutions as well. The author concludes that while the EEC has taken an important step toward regulating insider trading with its insider trading directive, the EEC could enhance its efforts to curtail insider trading by following the United States emphasis on the regulation of institutions and by the strengthening of penalties.

TABLE OF CONTENTS

I. INTRODUCTION 136
II. THE UNITED STATES EXPERIENCE IN INSIDER TRADING REGULATION 139
   A. *Rule 14e-3* 140
   B. *Section 16(b)* 140
   C. *Rule 10b-5* 141
   D. *Recent Enactments* 143
   E. *Penalties* 146
III. THE EEC INSIDER TRADING DIRECTIVE 147
   A. *Evolution of a Directive* 147
   B. *The EEC Insider Trading Directive* 148
   C. *Evolution of the EEC Directive on Insider Trading* 152
IV. INSIDER TRADING LAWS IN THE EEC MEMBER STATES 154
   A. *The United Kingdom* 155
   B. *France* 158

C. *West Germany* 161
D. *Denmark* 164
E. *The Netherlands* 164
F. *Belgium* 165
G. *Ireland* 165
H. *Portugal* 166
I. *Spain* 166
J. *Greece* 166
K. *Luxembourg* 167
L. *Italy* 167
V. ANALYSIS OF THE EEC INSIDER TRADING DIRECTIVE 167
A. *A Response to a Variety of Needs* 167
B. *Strengths of the Directive* 168
C. *Weaknesses of the Directive* 169
1. Surveillance 169
2. Penalties 171
VI. CONCLUSION 172

I. INTRODUCTION

The integrity of a securities market depends on equal access to market information.[1] Insider trading—which is the buying and selling of securities using material, nonpublic information[2]—is an abuse that directly undermines that integrity.[3] Although insider trading was not mentioned in the United States seemingly comprehensive securities laws of the 1930s, it is now a major concern for regulatory bodies in the United States and in Europe.[4] While the United States has responded aggressively to the problem,[5] European states have lagged behind; until 1988,

---

1. *See* Sorin, *The Regulation of Trading by Insiders and Obligations to Disclose in the United States*, 2 INT'L BUS. LAW. 81, 81 (1974); Huss & Leete, *Insider Trading Regulations: A Comparison of Judicial and Statutory Sanctions*, 25 AM. BUS. L.J. 301, 301 (1987). Huss and Leete argue that securities market regulation should be drafted with two goals in mind: (1) preserving a fair market; and (2) rewarding investors who make good investment decisions based on superior information legitimately obtained. *Id.*

2. *See* D. LANGEVOORT, INSIDER TRADING REGULATION 5 (1990).

3. *Id.* at 13-17. Professor Langevoort argues that the real justification for prohibiting insider trading is that insider trading is simply unfair. *Id.* Professor Manne, the best known critic of insider trading laws argues, however, that insider trading is desirable because it causes stock prices to reflect true market values. H. MANNE, INSIDER TRADING AND THE STOCK MARKET (1966).

4. *See Insider Trading in Securities Subject to Coordinated Attack in the Community*, [1985-1988 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,880 (May 21, 1987) (Press Release from the Commission of the European Communities, No. IP (87) 164 (Apr. 28, 1987)) [hereinafter Press Release].

5. In 1984, Congress enacted the Insider Trading Sanctions Act, which grants the

only three member states of the European Economic Community (EEC)[6] had laws regulating insider trading.[7]

Differences in insider trading laws among European states and recent insider trading scandals in international securities markets demonstrate the need for insider trading legislation within the EEC.[8] After two years of drafting, the European Council of Ministers[9] recently passed a directive designed to coordinate the insider trading laws of the member states of the EEC (EEC Insider Trading Directive or Directive).[10] This Directive, enacted on 13 November 1989, is part of the EEC's attempt to

---

Securities and Exchange Commission authority to seek civil penalties in amounts reaching three times the profit gained or loss avoided as a result of insider trading violations. *See infra* note 65 and accompanying text. Congress also increased the maximum fine for a criminal violation from $10,000 to $100,000. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (codified in scattered sections of 15 U.S.C.). In 1988, Congress expanded the Insider Trading Sanctions Act to hold liable broker-dealers, investment advisors, and others who fail to take the appropriate steps to prevent insider trading violations. At the same time, Congress increased the maximum criminal sentence to ten years and the maximum criminal fine to $1 million for individuals and $2.5 million for corporations. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.).

6. The EEC was established by the Treaty of Rome, *done* Mar. 25, 1957, 298 U.N.T.S. 11. The current member states of the European Economic Community are Belgium, Denmark, France, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, the United Kingdom, and West Germany. *Common Market in Profile*, 1 Common Mkt. Rep. (CCH) ¶ 101.07 (June 18, 1987); *see also* PRICE WATERHOUSE, EUROPEAN COMMUNITIES 2 (1987).

7. Before 1987, only Denmark, France, and the United Kingdom had insider trading laws. *Revised Insider Trading Draft is Ready For Ministerial Review*, 20 Sec. Reg. & L. Rep. (BNA) No. 39, at 1528 (Oct. 7, 1988). Many of the EEC states, however, recently enacted insider trading laws. *See infra* part III (discussing the EEC Insider Trading Directive) and *infra* part IV (discussing the current status of the insider trading law of each member state).

8. *See* Press Release, *supra* note 4. As of 1987, European Community Commission experts believed that the number of insider trading offenses in the EEC paralleled the growth in European stock market activity; in some stock exchanges, indexes had multiplied by more than one hundred percent a year. *European Community Commission Proposes Ban on Insider Trading*, 19 Sec. Reg. & L. Rep. (BNA) No. 18, at 636 (May 1, 1987). In the past two years, there have been a dozen insider trading scandals in four European states. *See* Forman, *London, Bonn Fight to Block EC Insider Law*, Wall St. J., June 1, 1989, at C19, col. 6.

9. The Council was established in 1957 by the Treaty of Rome. PRICE WATERHOUSE, *supra* note 6, at 6. The Council is responsible for enacting legislation and is comprised of members of each of the member state governments. *Id.* at 6-7.

10. *Council Directive of 13 November 1989 Coordinating Regulations on Insider Trading*, 32 O.J. EUR. COMM. (No. L 334) 30 (1989) [hereinafter *Directive*]. The Directive is reproduced in full below. *See infra* appendix.

create a common capital market[11] and is the focus of this Note.

A primary goal of the EEC Insider Trading Directive is to provide some uniformity to the insider trading laws of the member states. Commentators recognize this attempt and commend the Directive for providing such uniformity.[12] These commentators further recognize the need for stringent, harmonized penalties.[13] They overlook, however, the important issue of how to make the system workable. This Note proposes the use of United States successes and failures as a model to achieve that end. Although the Securities and Exchange Commission (SEC), the primary regulatory body of the United States securities markets, is a more comprehensive regulatory body than any European regulatory agency, the SEC has learned that it cannot fight the battle against insider trading alone.[14] With the growth of institutional involvement in the market, the SEC looks to the institutions themselves to provide some independent regulation.[15] The European states need to follow this lesson.

Part II of this Note discusses the United States approach to insider trading—an approach that has continuously grappled with and adapted to the problems of insider trading. Part III introduces the EEC Insider Trading Directive.[16] Part IV discusses the current status of insider trading regulation of each member state and explains the reach of state laws. Part V critically analyzes the EEC Insider Trading Directive, focusing on the Directive's definitions of insider and inside information, the restrictions placed on insider trading, and the scope of the Directive. This Note concludes that implementation of the Directive would constitute a significant step toward combating insider trading in the EEC. As the United States experience in regulating insider trading demonstrates, however, the current EEC Insider Trading Directive is not comprehensive enough. To combat insider trading effectively, the EEC—like the United States—should broaden the scope of its Directive to include regu-

---

11. The Treaty of Rome as amended by the Single European Act calls for a single barrier-free market by 1992. *See* Note, *Toward the Unification of European Capital Markets: The EEC's Proposed Directive on Insider Trading*, 11 FORDHAM INT'L L.J. 432, 433 (1988). The EEC is working to achieve a common capital market by establishing a customs union, allowing free movement of persons and capital, setting competition policies, and harmonizing state legislation. PRICE WATERHOUSE, *supra* note 6, at 2-3.

12. *See, e.g.*, Note, *supra* note 11; Note, *The Effects of the New EEC Draft Insider Trading Directive*, 18 GA. J. INT'L & COMP. L. 119, 120 (1988).

13. *See* Note, *supra* note 12, at 139-41; Note, *supra* note 11, at 449.

14. H.R. REP. NO. 910, 100th Cong., 2d Sess. 14-15 (1988) [hereinafter HOUSE REPORT], *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 6043, 6051-52.

15. *Id.* at 17-22, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6054-59.

16. *Directive*, *supra* note 10.

lation of institutions. The EEC also should reexamine and toughen the provision in the Directive regarding penalties for insider trading violations.

II. THE UNITED STATES EXPERIENCE IN INSIDER TRADING REGULATION

The United States is widely regarded as having the most comprehensive and expansive system of securities regulation in the world.[17] The SEC has regulated the United States securities markets for more than fifty years.[18] With the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, Congress created the laws that today govern insider trading in the United States.[19] Since that time, United States laws regulating insider trading have become more stringent in response to the continuing proliferation of insider trading and the need to adapt to the growing role of institutions in the marketplace. An analysis of the United States regulation of insider trading provides helpful insights for analyzing the EEC Directive.

The main source of federal regulation of insider trading in the United States is Rule 10b-5,[20] promulgated pursuant to the 1934 Act. This general provision prohibits fraud in connection with the purchase or sale of securities. Rule 14e-3, promulgated pursuant to the 1934 Act, and section 16(b) of the 1934 Act, also regulate insider trading.

---

17. Sommer, *United States*, in INTERNATIONAL SECURITIES LAW AND PRACTICE 279 (J. Robinson ed. 1985) [hereinafter INTERNATIONAL SECURITIES].

18. *See generally* Janvey, *SEC Investigation of Insider Trading*, 13 SEC. REG. L.J. 299 (1986).

19. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77aa (1988)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C.).

20. Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1989).

A. *Rule 14e-3*

Rule 14e-3 places broad restrictions on insider trading in the context of tender offers. This rule prohibits anyone possessing information relating to a tender offer from trading in the target company securities if (1) the bidder has taken a substantial step toward commencement of a tender offer; (2) the person possessing the information knows or has reason to know that the information came from the bidder or target company; and (3) the person possessing the information knows or has reason to know that the information is nonpublic.[21] Unlike an action under Rule 10b-5, there is no requirement in a Rule 14e-3 action that a fiduciary relationship exist between the trader or tipper and the target company's shareholders.[22]

B. *Section 16(b)*

Section 16(b)[23] of the 1934 Act imposes liability for insider trading by restricting "short swing" trading by certain insiders. Section 16(b) requires insiders—defined as officers, directors, or ten percent shareholders—to disgorge to the company any profits made on any sequence of purchase and sale transactions of securities within six months.[24] A violation of section 16(b) results in strict liability regardless of whether the insider actually traded on the basis of inside information.[25] Under section 16(b), profits are recoverable "irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased . . . for a period exceeding six months."[26] Because the SEC lacks authority to enforce section 16(b), only a corporation or a shareholder suing derivatively may bring a section 16(b) action.[27]

---

21. *Id.* § 240.14e-3. Rule 14e-3 also prohibits insiders of the bidder and the target company (and their tippees) from communicating material, nonpublic information relating to a tender offer to any person who is likely to violate this statute. *See* D. LANGEVOORT, *supra* note 2, at 195.

22. D. LANGEVOORT, *supra* note 2, at 196. For a comparison with the EEC proposal concerning tender offers, see Greenbaum, *Tender Offers in the European Community: The Playing Field Shrinks*, 22 VAND. J. TRANSNAT'L L. 923 (1989).

23. Securities Exchange Act of 1934, ch. 404, § 16(b), 48 Stat. 881, 896 (codified as amended at 15 U.S.C. § 78p(b) (1988)); *see* D. LANGEVOORT, *supra* note 2, at 311-36 (discussing the interpretive problems involved in section 16(b) cases).

24. 15 U.S.C. § 78p(b) (1988).

25. *See id.*

26. *Id.*

27. D. LANGEVOORT, *supra* note 2, at 343-44.

C. *Rule 10b-5*

As mentioned above, Rule 10b-5 is the primary tool of the SEC and private investors to enforce the insider trading prohibitions. An analysis of Rule 10b-5 provides both positive and negative lessons for the EEC. Rule 10b-5 is a general provision prohibiting "fraud or deceit upon any person, in connection with the purchase or sale of any security."[28] Although Rule 10b-5 does not specifically refer to insider trading, courts broadly construe this rule to prohibit trading while in possession of material, nonpublic information. Because the language of Rule 10b-5 is very general, the definition of insider trading liability has developed mainly through case law.

Case law demonstrates the strengths and weaknesses of Rule 10b-5. When the SEC promulgated Rule 10b-5 in 1934, the SEC intended the rule merely to deal with "fraud and deceit," not with insider trading violations.[29] Because the language of Rule 10b-5 is very general, United States courts began applying the rule to insider trading violations. The major strength of Rule 10b-5 is its broadness. United States courts expand the scope of the rule to reach noninsiders such as tippees and, in some situations, lawyers and accountants of corporations.[30] The weakness of Rule 10b-5, however, is found in its strength. Because of the general language of Rule 10b-5, United States courts have manipulated and expanded the reach of Rule 10b-5 substantially on an ad hoc basis.[31]

Case law under Rule 10b-5 initially developed the "disclose or abstain rule," which requires anyone possessing material, nonpublic information about a corporation to refrain from trading in the securities of that corporation or to disclose the information to the marketplace.[32] In certain situations, United States courts extend this duty to certain temporary insiders including underwriters, lawyers, accountants, and investment analysts.[33] Courts similarly extend insider trading liability to tippees—individuals who receive nonpublic information from an insider—if

---

28. 17 C.F.R. § 240.10b-5 (1989).

29. B. RIDER & H. FFRENCH, THE REGULATION OF INSIDER TRADING 72 (1979).

30. *See* Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983); *see also infra* notes 39-41 and accompanying text.

31. *See* Sorin, *supra* note 1, at 95.

32. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961); SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied sub nom.* Coates v. SEC, 394 U.S. 976 (1969). The *Texas Gulf Sulfur* case involved the duty of a corporation's officers, directors, and employees to disclose a mineral discovery to the sellers of the corporation's stock. *Id.* at 839-40.

33. *See supra* note 30 and accompanying text; *see also* Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974).

the tipper receives a personal benefit from the tip, and if the tippee knew or had reason to know that the tipper received this personal benefit.[34]

Despite the broad reach of Rule 10b-5 to insider trading violations, recent judicial decisions limit the disclose or abstain rule. In *Chiarella v. United States*,[35] the United States Supreme Court reversed the conviction of a financial printer who deciphered the code names of target companies in a tender offer and made a profit of $30,000; the Court held that the duty to disclose under Rule 10b-5 "does not arise from the mere possession of nonpublic market information."[36] The Supreme Court held that there is a duty to disclose only if a fiduciary relationship exists between the parties to the transaction.[37] The Court did not find this relationship existing between Chiarella and the sellers of the target company stock.[38]

The Court also limits Rule 10b-5 liability of tippees by making tippee liability derivative of a tipper's breach of a fiduciary duty. In *Dirks v. SEC*, Dirks, a securities analyst, received a tip from a former officer of Equity Funding of America (EFA) that the company's assets were overstated. Dirks—the tippee—disclosed the information to his clients.[39] The Court held that the former EFA officer—the tipper—did not breach the duty to disclose to the marketplace because he did not seek a personal gain by disclosing the information to Dirks.[40] Because the former EFA officer did not breach a fiduciary duty, the Court found that Dirks had no duty to abstain from using the information.[41]

Despite these judicial limitations on Rule 10b-5, United States courts have broadened the regulation of insider trading by using a misappropriation theory.[42] Although the United States Court of Appeals for the Second Circuit upheld the misappropriation theory,[43] the United States Supreme Court has not resolved the issue.[44] Chief Justice Burger first introduced the misappropriation theory in his dissent in *Chiarella*.[45]

---

34. *Dirks*, 463 U.S. at 659-61.
35. 445 U.S. 222 (1980); *see* D. LANGEVOORT, *supra* note 2, at 46-56.
36. *Chiarella*, 445 U.S. at 235.
37. *Id.* at 230.
38. *Id.* at 232-33.
39. 463 U.S. 646, 648-50 (1983).
40. *Id.* at 661-67. The former EFA officer was merely trying to expose fraud. *Id.* at 667.
41. *Id.* at 665-67.
42. *See infra* notes 45-50.
43. *See* United States v. Newman, 664 F.2d 12, 17-19 (2d Cir. 1981), *aff'd*, 722 F.2d 729 (2d Cir.), *cert. denied*, 464 U.S. 863 (1983).
44. United States v. Carpenter, 791 F.2d 1024, 1027-28 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987); *see supra* notes 49-50 and accompanying text (discussing *Carpenter*).
45. *Chiarella*, 445 U.S. at 240-45 (Burger, C.J., dissenting); *cf. supra* notes 35-37

Under this theory, a person who has misappropriated, or "stolen," non-public information has an absolute duty to disclose the information or abstain from trading.[46] For the misappropriation theory to apply, the inside information must come from a source with whom the trader has a relationship. This requisite relationship typically exists between an employee and employer, or an investment advisor and a client.[47] The United States Court of Appeals Second Circuit in *United States v. Newman* adopted this theory in holding that the use of confidential information by an employee breaches the employee's fiduciary duty to the employer and therefore constitutes fraud, triggering Rule 10b-5.[48]

The Supreme Court addressed the misappropriation theory in *Carpenter v. United States.*[49] In *Carpenter*, a *Wall Street Journal* reporter disclosed to his friends information concerning companies that was to appear later in his column, "Heard on the Street." The Supreme Court divided on the issue whether the reporter's misappropriation constituted a violation of Rule 10b-5 even though the reporter owed no fiduciary duty to the purchasers or shareholders of the securities.[50]

D. *Recent Enactments*

In 1984, Congress responded to increasing violations of insider trading by enacting the Insider Trading Sanctions Act (ITSA).[51] The ITSA grants the SEC authority to seek civil penalties in amounts reaching three times the profit gained or loss avoided from the unlawful purchase or sale of securities.[52] The ITSA also increases the maximum fine for a criminal violation from $10,000 to $100,000.[53]

Despite the stiffer penalties provided by the ITSA, the number of insider trading violations continues to increase, particularly in investment banking firms. For example, in March 1986, the SEC brought an action against Dennis Levine, former director of Drexel Burnham Lambert,

---

and accompanying text.

46. *Id.* at 240 (Burger, C.J., dissenting).

47. *See* D. LANGEVOORT, *supra* note 2, at 20-21.

48. *Newman*, 664 F.2d at 16-19. *Newman* involved misappropriation of information by employees of an investment banking firm.

49. 484 U.S. 19 (1987).

50. *Id.* at 22-24.

51. Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified as amended in scattered sections of 15 U.S.C.).

52. *Id.* § 2, 98 Stat. 1264 (codified as amended at 15 U.S.C. § 78u-1(a)(2) (1988)).

53. *Id.* § 3, 98 Stat. 1265 (codified as amended at 15 U.S.C. § 78ff(a) (1988)). Congress subsequently increased the fine ceiling to $1 million for individuals and $2.5 million for corporations. 15 U.S.C. § 78ff(a) (1988).

claiming that Levine made over $12 million by trading in securities of companies while in possession of inside information about tender offers and mergers.[54] In 1986, arbitrageur Ivan Boesky allegedly made more than $50 million in illicit profits by purchasing stock in corporations prior to the announcement of takeovers.[55] In June 1988, the SEC filed charges against Stephen Wang and Fred Lee in what is so far the second largest insider trading case.[56] Wang was a junior market analyst at the Morgan Stanley investment banking firm and Lee was an investor with trading accounts at Morgan Stanley. The SEC charged Lee with making over $19 million in illegal profits while in possession of material inside information Wang provided him.[57]

These scandals demonstrate that the problem of insider trading extends beyond a few individuals to large multipurpose institutions. Because these institutions play a variety of roles in the marketplace—as trader, broker-dealer, and issuer of stock—countless firm employees have access to inside information. Although Congress clearly did not anticipate these problems in 1934, the SEC and the United States courts attempt to stretch Rule 10b-5 to meet the increasing problems of insider trading. Even broad application of Rule 10b-5, however, does not create a sufficient deterrent effect on insider trading violations.[58] Congress recently responded to insider trading scandals by enacting the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA).[59] Congress designed the ITSFEA to encourage closer supervision of employees with access to material, nonpublic information.[60] Prior to the enactment of the ITSFEA, corporations and employers were directly lia-

---

54. SEC v. Levine, 881 F.2d 1165, 1168-69 (2d Cir. 1989). Levine received a two year prison sentence, a $362,000 fine, and was forced to disgorge $11.5 million in profits gained through the insider trade. *See Levine Sentence Seen in Line with Insider-Trading Penalties*, N.Y.L.J., Feb. 24, 1987, at 1, col. 3.

55. Boesky was required to disgorge the profits gained through the insider trades, to pay civil penalties totalling $100 million, and to abstain permanently from securities trading. Complaint for Injunctive and Other Equitable Relief, SEC v. Boesky, No. 86-8767 (S.D.N.Y. Nov. 14, 1986); *see* Wise, *Prosecutors, Defense Lawyers View Boesky Sentence as Fair*, N.J.L.J., Dec. 21, 1987, at 1, col. 3.

56. *SEC Charges Taiwanese Businessman in Second Largest Insider Trading Case*, 20 Sec. Reg. & L. Rep. (BNA) No. 26, at 1015 (July 1, 1988).

57. *Id.*; *see* SEC v. Wang, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,802 (S.D.N.Y. June 27, 1988). The action brought against Wang resulted in civil and criminal fines and a three year jail sentence.

58. *See, e.g.*, *supra* notes 54-57 and accompanying text.

59. Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.).

60. HOUSE REPORT, *supra* note 14, at 17-22, 1989 U.S. CODE CONG. & ADMIN. NEWS at 6054-59.

ble for insider trading only in situations in which the corporation itself was the trader or tipper. The ITSFEA extends liability to securities firms and other controlling persons who knowingly or recklessly fail to take appropriate steps to prevent insider trading violations by their employees.[61]

Pursuant to the ITSFEA, broker-dealers and investment advisors must not only adopt and distribute written policies to prevent insider trading, but they must also review, update, and enforce these policies.[62] The ITSFEA, however, does not set forth specific guidelines for broker-dealers or investment advisors to follow. Rather, the Act recognizes that policies depend on several factors including the kinds of trading and other activities in which the firm is engaged, the size of the firm, and the firm's organizational structure.[63] Although the Act allows institutions to mold their policies to fit their own structure, the Act provides a limit to this flexibility; if the SEC is dissatisfied with a particular set of policies, it has authority under the ITSFEA to require a firm to adopt specific policies or procedures.[64]

Under the ITSFEA, controlling persons may be liable for civil penalties as high as $1 million or three times the profit made from insider trading if the SEC can show the following:

> (A) such controlling person knew or recklessly disregarded the fact that . . . [its employee] was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred; or
> (B) such controlling person knowingly or recklessly failed to establish, maintain, or enforce . . . [its surveillance systems] and such failure substantially contributed to or permitted . . . the violation.[65]

Under the ITSFEA, controlling persons are not only employers but also any person with the power to influence or control the direction of the management, policies, or activities of another person in a company.[66] In short, by enacting the ITSFEA Congress attempts to force institutions to

61. *Id.* at 17, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6054.
62. *Id.* at 21, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6058.
63. *Id.* at 21-22, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6058-59.
64. *Id.* at 22, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6059.
65. 15 U.S.C. § 78u-1(b)(1) (1988).
66. HOUSE REPORT, *supra* note 14, at 17, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6054. The class of controlling persons consists of employers, officers, directors, parent companies, and majority shareholders. *See* Lavoie, *The Insider Trading and Securities Fraud Enforcement Act of 1989*, REV. SEC. & COMMODITIES REG., Jan. 11, 1989, at 36.

institute internal controls to regulate those individuals in the institutions and consequently to decrease the possibility of insider trading.

E. *Penalties*

Violation of the insider trading laws in the United States triggers a broad range of penalties. An insider who willfully violates securities laws is subject to criminal penalties including a maximum of ten years imprisonment and a fine of $1 million for individuals or $2.5 million for corporations.[67] Notably, the SEC cannot bring a criminal action for an insider trading violation; it can only recommend criminal prosecution to the Justice Department.[68] The SEC can bring a civil action against an insider and obtain an injunction against future securities trading, disgorgement of the profits gained through insider trading, and a fine not exceeding three times the profit gained or loss avoided as a result of the insider trading.[69] An investor may also bring a private lawsuit for damages against an insider.[70] The maximum amount of civil recovery by an investor is equal to the difference between the price at which the investor sold or purchased the shares and the market price of the stock at a reasonable time after the information was announced to the public, limited by the amount gained by the wrongdoer.[71]

Since the 1934 Act, Congress has attempted to provide the SEC with all the necessary resources for enforcing the laws against insider trading. Recently, however, Congress recognized the need to broaden the reach of its laws to control insider trading at both the individual and institutional levels.[72] Because insider trading violations increase as institutions expand their involvement in the marketplace, Congress now forces institutions to share the burden of regulation. By requiring institutions to establish internal controls and by holding them liable for failing to do so, Congress

---

67. 15 U.S.C. 78ff(a); *see supra* note 5.

68. *See* Janvey, *Criminal Prosecution of Insider Trading*, 15 SEC. REG. L.J. 136, 138-39 (1987).

69. 15 U.S.C. §§ 78u(d), 78u-1(a).

70. Poser, *Warning: Insider Trading Could be Hazardous to Your Bank*, BANKERS MONTHLY, Sept. 1988, at 21, 22. Only an actual purchaser or seller has standing to sue for a violation of the federal securities laws. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730-31 (1975).

71. Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 168-73 (2d Cir. 1980). This cap has taken away any incentives to bring class actions. *See* Banoff, *The Regulation of Insider Trading in the United States, United Kingdom, and Japan*, 9 MICH. Y.B. INT'L LEGAL STUD. 145, 153 (1988).

72. *See* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.).

makes regulators out of the very organizations that are most prone to abuse insider trading laws. Stringent penalties in the United States support this system of regulation.[73]

III. THE EEC INSIDER TRADING DIRECTIVE

A. *Evolution of a Directive*

A directive is the most common way that the EEC forces its member states to harmonize their laws.[74] Although directives legally bind EEC member states, they are sufficiently general to allow the member states to decide how to implement them.[75] Member states receive great flexibility in incorporating the provisions of directives into national legislation; once the Council of Ministers adopts a directive, member states usually are allowed two years to enact the state legislation necessary to implement the directive.[76]

The European Commission begins the process through which the Council of Ministers adopts a directive.[77] When the Commission decides that a directive coordinating the laws of the member states is necessary, it appoints a group of experts which gives comments to the Commission.[78] Based on the work of the experts and the comments submitted by the professional organizations, the Commission prepares and adopts a

---

73. *See supra* notes 67-71 and accompanying text.

74. The EEC institutions responsible for effecting Community policy are the European Commission, the Council of Ministers, the European Parliament, the Economic and Social Committee, and the Court of Justice. *Common Market in Profile*, 1 Common Mkt. Rep. (CCH) ¶ 100 (Nov. 3, 1988).

75. Cruickshank, *Insider Trading in the EEC*, 10 INT'L BUS. LAW. 345, 345 (1982).

76. PRICE WATERHOUSE, *supra* note 6, at 18. The Council of Ministers is the legislative branch of the EEC and is comprised of members of each of the member state governments. In all but a few narrowly defined areas, the Council must base its decisions on the Commission proposals. *Id.* at 6-7.

77. The Commission consists of seventeen members, including two members each from France, Italy, Spain, the United Kingdom, and West Germany, and one member each from Belgium, Denmark, Greece, Ireland, Luxemburg, the Netherlands, and Portugal. Although these members are appointed by their governments, they do not represent their individual states, but rather act for the EEC as a whole. *Id.* at 8. The Commission is responsible for preparing proposed legislation. The Commission, however, cannot adopt a proposal on its own; it is required to submit all proposals to the Council of Ministers for approval. Cruickshank, *supra* note 75, at 345; *see* I. THOMSON, THE DOCUMENTATION OF THE EUROPEAN COMMUNITIES 30-31 (1989). All steps in the European Community legislative process are not readily apparent from the public documentation. *See id.* at 22.

78. Cruickshank, *supra* note 75, at 345.

proposed directive,[79] which is submitted to the Council of Ministers.[80] Both the European Parliament[81] and the Economic and Social Committee[82] consider the directive and give opinions.

The Commission considers Parliament's amendments and within one month may accept or reject them, or resubmit the proposal, including some or all of the amendments.[83] The Council adopts a common position and can accept or reject Parliament's amendments.[84] The Council's common position is referred to Parliament for a second reading.[85] Within three months of receiving the common position, Parliament must accept the common position with or without amendments, or reject it.[86] The Commission may, within one month, reexamine the position and include some or all of Parliament's amendments in its reexamined proposal.[87] The Council must adopt the reexamined proposal within three months by a qualified majority.[88] The proposal then becomes law.[89]

B. *The EEC Insider Trading Directive*

The purpose of the EEC Insider Trading Directive is to create a uniform method for preventing insider trading in the EEC.[90] The EEC is

---

79. Price Waterhouse, supra note 6 at 19.

80. *Id.*

81. Each member state elects one member to the European Parliament. Unlike the European Commission or the European Council, the people of each member state directly elect the members of the European Parliament. Thus, the European Parliament has gained much political strength vis-à-vis the European Commission and the European Council. The European Parliament, however, does not have any legislative powers; the European Parliament's main role is to give advisory opinions on the European Commission's proposed legislation. *Id.* at 9-12.

82. The Economic and Social Committee consists of 189 members appointed by the Council of Ministers. The Committee must be consulted in cases arising under the Treaty of Rome, including cases concerning the free movement of workers, freedom of establishment, freedom to supply services, and amendment of national legislation. *Id.* at 12; *see also supra* note 6 and accompanying text (discussing the Treaty of Rome). The opinions of the Committee are not binding on the Council of Ministers. The Commission, however, can amend its proposal after hearing the Committee's views. PRICE WATERHOUSE, *supra* note 6, at 12-13.

83. I. THOMSON, *supra* note 77, at 20.

84. *Id.* at 20-21.

85. *Id.* at 21.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Press Release, *supra* note 4.

attempting to establish a common capital market by 1992.[91] Creating harmony between the insider trading laws of the EEC states is a necessary step in reaching this goal.

Article 1 of the EEC Insider Trading Directive defines "inside information" as "information which has not been made public of a precise nature relating to one or several issuers of transferable securities . . . which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question."[92] Transferable securities include shares of stock and debt securities of companies as well as contracts to acquire or dispose of such securities, futures contracts, and index contracts.[93]

The Directive broadly defines insiders. Under article 2(1), an insider is a person who receives inside information because of the person's (1) membership in the administrative, management, or supervisory bodies of the issuer; (2) holding in the capital of the issuer; or (3) access to the inside information by virtue of the person's employment, profession, or duties.[94]

The Directive prohibits a person meeting the definition of insider in article 2 from using inside information to buy or sell for that person's own account or for the account of others.[95] Article 3 prohibits an insider

---

91. *See supra* note 11. The EEC has already adopted directives on the admission of securities to stock exchanges and on information that listed companies are required to publish on a regular basis. Press Release, *supra* note 4.

92. *Directive*, *supra* note 10, art. 1(1). This definition is very similar to the definition in the original proposal of the Commission. *Proposal for a Council Directive Coordinating Regulations on Insider Trading*, 30 O.J. Eur. Comm. (No. C 153), art. 6 (1987) [hereinafter *Proposal for a Council Directive*]. The European Parliament in its opinion and the Commission in its amended proposal defined inside information as that information "inaccessible or not available to the public," but the Council did not adopt this definition. *See Proposal for a Council Directive Coordinating Regulations on Insider Trading as Amended by the European Parliament*, 31 O.J. Eur. Comm. (No. C 187), art. 6 (1988) [hereinafter *Proposal as Amended by European Parliament*]; *Amendment to the Proposal for a Council Directive Coordinating Regulations on Insider Trading*, 31 O.J. Eur. Comm. (No. C 277), art. 6 (1988) [hereinafter *Amended Directive*].

93. *Directive*, *supra* note 10, art. 1(2).

94. *Id.* art. 2(1). If the person trading on inside information is a corporation or other legal entity, article 2(2) holds liable the natural persons who carry out the decisions of the entity. *Id.* art. 2(2).

95. *Id.* art. 2(1). The article 2 prohibition applies to all transactions carried out on a stock exchange as well as to all offshore transactions involving a professional intermediary. *Id.* art. 2(3). Unless a member state provides otherwise, the prohibition in article 2 also applies to any transaction undertaken outside a stock exchange that does not involve a professional intermediary. *Id.*

in possession of inside information from disclosing that information to a third party—unless that disclosure is in the normal course of the insider's employment, profession, or duties—and from recommending to a third party that the party buy or sell transferable securities admitted to trading on a stock exchange.[96] In addition to these three restrictions on insiders, article 4 extends the article 2 prohibition against using inside information to buy or sell for one's own account or for the accounts of others to any person who possesses inside information which only an insider could have provided.[97]

The territorial scope of the Directive requires that each member state apply the prohibitions "at least to actions undertaken within its territory to the extent that the transferable securities concerned are admitted to trading on a market of a Member State."[98] The Directive deems a transaction undertaken within a member state's territory if it is carried out on a market operating within that territory.[99]

Article 7 of the Directive reduces the opportunities for insider trading by placing a disclosure requirement on companies that have transferable securities traded on an exchange.[100] This article requires issuers to inform the public immediately of any information likely to influence the price of those securities unless such information is likely to harm the legitimate interests of the company.[101]

To ensure that the prohibitions against insider trading are enforced, the Directive requires member states to designate authorities responsible for ensuring that the state applies the adopted provisions of the Directive.[102] The Directive provides that these authorities shall have "all supervisory and investigatory powers that are necessary for the exercise of their functions."[103] Article 12 instructs the Contact Committee to facilitate the harmonized implementation of the Directive.[104]

---

96. *Id.* art. 3.

97. *Id.* art. 4. Article 4 applies to tippees. *Id.*

98. *Id.* art. 5.

99. *Id.*

100. *Id.* art. 7. This disclosure requirement comes from provisions of schedule C, paragraph 5(a) of the annex to *Council Directive of 5 March 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing*, 22 O.J. Eur. Comm. (No. L 66) 21, 30 (1979) [hereinafter *Council Directive*] (directive coordinating the conditions for the admission of securities to official stock exchange listings).

101. *Directive, supra* note 10, art. 7.

102. *Id.* art. 8.

103. *Proposal for a Council Directive, supra* note 92, art. 1.

104. *Directive, supra* note 10, art. 12. The Contact Committee was formed under the *Council Directive, supra* note 100, art. 20.

Article 20 provides that the function of the Contact Committee is to

The Directive also contains provisions for cooperation between member states[105] and rules governing professional secrecy.[106] The Directive instructs the regulatory authorities in member states to exchange information and cooperate whenever necessary to carry out their duties.[107] The authorities, however, may refuse to act on a request for information when communication of the information might harm the security or public policy of the member state or when judicial proceedings are already initiated, or when a final judgment has been rendered in the same action.[108] The Directive allows the EEC to enter into agreements with nonmember states on matters governed by the Directive.[109]

The Directive states that its rules are only minimum requirements; therefore, the member states may enact more stringent rules than those provided by the Directive.[110] The Directive leaves the determination of penalties to the member states.[111] These penalties, however, must be "sufficient to promote compliance with those measures."[112] The member

---

> (a) . . . facilitate the harmonized implementation of this Directive through regular consultations on any practical problems arising from its application and on which exchanges of view are deemed useful;
>
> . . . .
>
> (c) to advise the Commission . . . on any supplements or amendments to be made to this Directive . . . .

Id.

105. *Directive, supra* note 10, art. 10.

106. Article 9 provides:

> Each Member State shall provide that all persons employed or formerly employed by the competent authorities referred [*sic*] to in Article 8 shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

Id. art. 9.

107. *Id.* art. 10(1).

108. *Id.* art. 10(2). The power of the member state regulatory authorities to refuse to act in certain situations is a new provision which did not appear in any of the previous proposals. *See, e.g., Proposal for a Council Directive, supra* note 92, arts. 8-9; *Amended Directive, supra* note 92, arts. 8-9.

109. *Directive, supra* note 10, art. 11. This provision is important to the move toward internationalization of all securities markets. On the globalization of world securities markets, see Note, *Icarus and His Waxen Wings: Congress Attempts to Address the Challenges of Insider Trading in a Globalized Securities Market*, 23 VAND. J. TRANSNAT'L L. 99 (1990).

110. *Id.* art. 6. In particular, article 6 suggests that the prohibitions placed on primary insiders in article 4 should be placed on tippees as well. *Id.*

111. *Id.* art. 13.

112. *Id.* This provision is an amendment to the original proposal. *See infra* note 129 and accompanying text.

states must comply with this Directive by 1 June 1992.[113]

C. *Evolution of the EEC Directive on Insider Trading*

The drafting process on the Directive began in the early 1980s when the Commission organized a working party to address the issue of insider trading.[114] The European Commission adopted its proposal on insider trading on 20 April 1987, and submitted it to the Council on 25 May 1987.[115] On 15 June 1988, the European Parliament adopted the Council's common position subject to certain amendments.[116] The European Commission accepted certain changes proposed by the Parliament and presented its amended proposal to the Council on 4 October 1988.[117] On 13 November 1989, the Council passed the final version of the Directive.[118] The Directive is scheduled to come into force on 1 June 1992.[119]

Although the Directive is similar to the original proposal, there are some noteworthy changes, including the expansion of the definition of insider, a lessening of tippee liability, and the enhancement and clarification of the roles and powers of the regulatory agencies of the member states.[120] Most of these changes stem from British criticisms of the Directive.[121]

The Directive expands the definition of insider by adding two new categories of insiders—persons who are members of the administrative, management, or supervisory bodies of the issuer; and persons holding capital in the issuer[122]—and by including those who obtain inside information during the exercise of their "employment" in the definition.[123] The Directive also expands the term insider to include persons who take part in corporate decision-making if the corporation itself is charged with insider trading.[124] The Directive indicates that transactions under-

---

113. *Directive*, *supra* note 10, art. 14.

114. *See* Cruickshank, *supra* note 75, at 346.

115. *Proposal for a Council Directive*, *supra* note 92, at 8.

116. *Proposal as Amended by European Parliament*, *supra* note 92, at 90; *see also supra* note 86 and accompanying text.

117. *Amended Directive*, *supra* note 92, at 13.

118. *See Directive*, *supra* note 10.

119. *Council Agrees Directives on Banking and Insider Dealing*, Common Mkt. Rep. (CCH) No. 634, at 1, 2 (June 29, 1989).

120. *See infra* notes 122-34 and accompanying text.

121. *See* Appel & Wegen, *The EEC Directive on Insider Trading*, REV. SEC. & COMMODITIES REG., July 5, 1989, at 137, 139, 144.

122. *Directive*, *supra* note 10, art. 2(1).

123. *Id. See also* Appel & Wegen, *supra* note 121, at 139.

124. *Directive*, *supra* note 10, art. 2(2). This change was suggested by the Commis-

taken outside of a stock market that do not involve a professional intermediary are governed by the Directive unless the member state otherwise provides.[125] The original proposal of the Directive automatically excluded these transactions.[126]

The number of restrictions placed on tippees are fewer in the Directive than in the prior drafts. In the Directive, only the restriction found in article 2 applies to tippees.[127] The other two prohibitions found in article 3, which forbid disclosing information to a third party and using inside information to make recommendations to a third party, do not apply to tippees unless the member state extends these prohibitions under article 6.[128] In all prior proposals, all three prohibitions applied to both insiders and tippees.

The Directive gives member state regulatory authorities slightly enhanced powers. Article 8 of the Directive gives the authorities investigatory as well as supervisory powers to ensure that the provisions of the Directive are followed.[129] Article 13 requires the penalties for violations of the Directive to be "sufficient to promote compliance" with the measures of the Directive.[130] This requirement ends the complete discretion that the original proposal gave to the members to determine penalties.

Article 10 of the final Directive clarifies the powers and roles of the member state regulatory authorities. This article provides that the authorities shall cooperate whenever necessary.[131] This article, however, allows authorities to refuse to act in certain situations.[132] The Directive

---

sion in its amended proposal. *Amended Directive*, *supra* note 92, art. 1(2).

125. *Directive*, *supra* note 10, art. 2(3).

126. *See Proposal for a Council Directive*, *supra* note 92, art. 1.

127. *Directive*, *supra* note 10, arts. 4, 6.

128. *Id.* arts. 3, 6.

129. *Id.* art. 8. The original draft only referred to supervisory authority. *Proposal for a Council Directive*, *supra* note 92, art. 8.

130. *Directive*, *supra* note 10, art. 13. The European Parliament, in its opinion to the Council, suggested harmonization of the penalties on each member state. The Parliament suggested that the appropriate civil remedy for a violation of the Directive is "the payment of an indemnity by those profiting by the use of inside information to those who can show that they have thereby suffered a loss." *Proposal as Amended by the European Parliament*, *supra* note 92, art. 11. The Commission in its amended Directive did not adopt the Parliament's proposals and instead required enactment of penalties that are "sufficiently dissuasive to ensure respect for those measures." *Amended Directive*, *supra* note 92, art. 11.

131. *Directive*, *supra* note 10, art. 10(1).

132. *Id.* art. 10(2). The authorities may refuse to act when (1) communication of the information might harm the security or public policy of the member state, or (2) a judicial proceeding has been initiated or final judgment has been made. *Id.* The prior drafts did not include these exceptions. *See supra* note 108 and accompanying text.

expands the process by which the authorities may use the information they receive. The Directive allows the member state regulatory authorities to use information received from other member state authorities for purposes other than the exercise of their duties and to forward the information to other member state authorities when the member state authority which originally communicated the information consents;[133] the original proposal empowered the member state regulatory authorities to use the information received only for the exercise of their duties.[134]

The Directive specifically indicates that certain activities are not covered by the Directive.[135] The prior proposals did not specifically designate these activities. Article 11 of the Directive gives the Community the power to enter into agreements with nonmember states;[136] the prior proposals contained no similar provision.

IV. Insider Trading Laws in the EEC Member States

This part examines the current status of insider trading regulations in the EEC member states. An analysis of these regulations reveals not only the lack of uniformity suggested by other commentators,[137] but also a lack of institutional control in all of these states. The mere existence of insider trading laws is not enough to prevent insider trading if there are not sufficient enforcement mechanisms. Although all EEC states do not face the same marketplace configuration, all should establish regulations that capably handle insider trading at every possible level. The Directive responds to the weaknesses and the lack of uniformity of the insider trading laws in these states.

Insider trading regulation among the member states in the EEC varies greatly. Until recently, only the United Kingdom, France, and Denmark had enacted legislation regulating insider trading.[138] In the past two years, however, Belgium, the Netherlands, Ireland, Portugal, Spain, and

---

133. *Directive*, *supra* note 10, art. 10(3).

134. *See Proposal for a Council Directive*, *supra* note 92, art. 9(3).

135. These activities include prior decisions to buy or sell transferable securities; carrying out orders for others; estimates developed from publicly available data; communication of inside information to a regulatory authority; and transactions carried out in pursuit of monetary, exchange rate, or public debt management policies by the state. *Directive*, *supra* note 10, art. 2.

136. *Id.* art. 11; *see supra* note 109 and accompanying text.

137. *See* Note, *supra* note 11; Note, *supra* note 12.

138. *See* Appel & Wegen, *supra* note 121 (discussing the current status of the EEC insider trading laws of France, Germany, and the United Kingdom); *see also infra* part IV, sections A-B, D.

Greece enacted insider trading legislation.[139] West Germany continues to rely on a system of self-regulation.[140] The remaining states in the EEC, Luxembourg and Italy, must enact legislation on insider trading by 1992.[141]

A. *The United Kingdom*

The United Kingdom first introduced prohibitions against insider trading in the Companies Act of 1980.[142] This legislation was reenacted in 1985 in the Company Services Act.[143] In 1986, the United Kingdom amended its insider trading laws by enacting the Financial Securities Act,[144] which allows civil remedies for investors.[145] In addition to these statutory provisions, the London Stock Exchange, the Panel on Take-overs and Mergers, and the Council for Securities Industry have their own rules against insider trading.[146]

The Company Securities Act prohibits an individual who is or was at any time in the past six months knowingly connected with an issuer from trading in that company's stock if the individual has information through a connection to the company which the individual would reasonably be expected not to disclose, and which the individual knows is unpublished or price sensitive.[147] A person is knowingly connected with an issuer if the person is a director, officer, or employee of the company, or if the person is a professional advisor who has a business or professional

139. *See infra* part IV, sections E-J.

140. *West Germany Broadens Rules on Insider Trading*, Wall St. J., Apr. 8, 1988, at A28, col. 6; *see infra* part IV, section C.

141. *See supra* note 113 and accompanying text; *see infra* part IV, sections K-L.

142. The Companies Act, 1980, ch. 22. On insider trading laws in the United Kingdom, see generally J. SUTER, THE REGULATION OF INSIDER DEALING IN BRITAIN (1989).

143. Company Securities (Insider Dealing) Act, 1985, ch. 8. The 1985 Act increased criminal sanctions and included provisions relating to insider trading in the context of tender offers and takeovers. *Id.* § 8.

144. Financial Services Act, 1986, ch. 60.

145. *See* Note, *supra* note 11, at 440; *see also* Whybrow, *Civil Liability under the Financial Services Act*, INT'L FIN. L. REV., July, 1987, at 6; *infra* note 166 and accompanying text (describing possible civil remedies).

146. *See* macLachlan, *United Kingdom*, in INTERNATIONAL SECURITIES, *supra* note 17, at 245; Wallace, *Who is Subject to the Prohibition Against Insider Trading: A Comparative Study of American, British and French Law*, 15 SW. U.L. REV. 217, 235-36 (1985); Note, *Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain*, 12 B.C. INT'L L. & COMP. L. REV. 265, 268-73 (1989).

147. Company Securities (Insider Dealing) Act, 1985, ch. 8, § 1(1)-(2).

relationship with the company.[148] The Company Securities Act also prohibits such an individual from trading in the securities of any other company based on information that relates to any transaction involving both the individual's company and another company.[149] The Company Securities Act applies the prohibition against insider trading to tippees[150] and to Crown servants.[151] In addition, the Financial Services Act extends the prohibition of insider trading to public servants.[152]

The Company Securities Act defines unpublished price sensitive information as information that (1) relates to a specific concern of the company; (2) is not generally known to those who deal or are likely to deal in the securities of the company; and (3) is likely to affect materially the price.[153]

The Company Securities Act prohibits three types of activity. Insiders, tippees, and public servants with inside information are prohibited from (1) using the information to trade on a stock exchange;[154] (2) counsel or procure others to trade;[155] and (3) pass on unpublished, price-sensitive information to others likely to trade or pass the information on to others.[156] Conviction under the Act requires a showing of scienter. The alleged insider must have had a profit motive when he traded on the inside information.[157] The prosecution must also prove that the defendant possessed knowledge that the information was unpublished, price-sensitive information.[158]

A person charged with violations of insider trading in the United

148. *Id.* § 9.

149. *Id.* § 1(2).

150. *Id.* § 1(3)-(4). A tippee is anyone who receives information from a tipper if the tippee (1) knows or has reasonable cause to know that the tipper has received the information by virtue of the tipper's position, and (2) knows or has reasonable cause to know that a person in the tipper's position would be expected not to disclose such information. *Id.*

151. *Id.* § 2.

152. Financial Services Act, 1986, ch. 60, § 173. The prohibition in the Company Securities Act against insider trading applies to Crown servants in possession of unpublished price-sensitive information. The 1986 Financial Services Act extends these prohibitions to public servants generally, including employees of other public bodies, employees of agencies which are delegated powers under the 1986 Act, and employees of self-regulating institutions. Note, *supra* note 146, at 278-79.

153. Company Securities (Insider Dealing) Act, 1985, ch. 8, § 10(a)-(b).

154. *Id.* § 1(1)-(6).

155. *Id.* § 1(7).

156. *Id.* § 1(8).

157. *See* Wallace, *supra* note 146, at 236-37.

158. Company Securities Act, § 1.

Kingdom may assert several defenses. For example, insiders can argue that they were motivated "otherwise than with the view to the making of a profit or the avoidance of a loss" for themselves or another by using that information;[159] that the transaction was made in good faith in the course of the function as a liquidator, receiver, or trustee in bankruptcy;[160] or that the information was used to complete or carry out a transaction.[161]

Enforcement of the United Kingdom insider trading laws begins when an exchange or takeover panel suspects that insider trading violations have occurred.[162] The exchange or takeover panel then conducts investigations, and if the panel believes that insider trading violations have occurred, it sends the results of the investigations to the Department of Trade and Industry.[163] If the Department of Trade and Industry finds sufficient evidence to warrant public prosecution, it refers the matter to the Director of Public Prosecutions.[164]

The maximum penalties for violating the United Kingdom insider trading laws are imprisonment for seven years, a criminal fine, or both.[165] The Company Securities Act does not provide for civil fines; the Financial Services Act, however, may provide investors the opportunity to bring actions for civil damages. The Act allows an investor to sue a violator of the rules promulgated by the United Kingdom regulatory authorities if the investor suffers a loss resulting from the violation.[166] These authorities, however, have not yet adopted prohibitions regulating insider trading.

As of 1987, only ten insider trading cases were brought to trial in the United Kingdom; of these, seven resulted in convictions.[167] The most publicized case involved Geoffrey Collier, a former director of the securi-

---

159. *Id.* § 3(1)(a).

160. *Id.* § 3(1)(b).

161. *Id.* § 3(3); *see id.* § 3(1)(c) (setting forth an additional defense).

162. macLachlan, *supra* note 146, at 265.

163. *Id.*

164. *Id.* The Director has the ultimate discretion whether to prosecute. *Id.*

165. Note, *Survey of National Legislation Regulating Insider Trading*, 9 MICH. Y.B. INT'L LEGAL STUD. 209, 213-14 (1988).

166. Financial Services Act, 1986, ch. 60, § 174(3); *see also* Whybrow, *supra* note 145.

167. *Insider Trading in London: The Odds Move*, ECONOMIST, Feb. 7, 1987, at 76. The United Kingdom recently strengthened its attack on insider trading by introducing a bill that makes insider trading activities in the United Kingdom an extraditable offense. *Insider Dealing in U.K. to Become an Extraditable Offence*, 189 Doing Bus. in Europe (CCH) 5 (Mar. 8, 1988).

ties division of the Morgan Greenfell investment banking firm.[168] Collier traded stock in two companies with the nonpublic information that each of those companies was a possible target of Morgan Greenfell clients. Collier received a one year suspended sentence and a fine equivalent to $43,000.[169]

B. *France*

In 1967, the French legislature enacted *Ordonnance* 67-833 to establish the *Commission des Opérations de Bourse* (COB) to regulate the French securities markets.[170] The 1967 *Ordonnance* is similar to United States regulation of insider trading inasmuch as it requires insiders to disclose any purchase and sale of the company's shares to the COB. This disclosure provision was amended in 1970 because the COB could not keep pace with the large number of filings required of insiders.[171] The French legislature amended the French insider trading laws in 1982 and again in 1988.[172]

---

168. Forman, *Britain Moves Closer to Decision on Insider Cases*, Wall St. J., Mar. 7, 1988, at 23, col. 1; *see also* Garrett, *Mounting a Counterattack to U.K. Trading Abuses*, MERGERS & ACQUISITIONS, July-Aug., 1987, at 64.

169. Forman, *Old World Traditions Include Insider Trading*, Wall St. J., Feb. 8, 1989, at C1, col. 2; *see also* Note, *supra* note 146, at 283.

170. Ordonnance No. 67-833 du 28 septembre 1967, art. 10, J.O., Sept. 29, 1967, at 9589, 1967 D.S.L. 373. For a discussion of insider trading laws in France, see B. RIDER & R. FFRENCH, *supra* note 29, at 233-40; de Mahenge & Persiaux, *France*, in 2 INTERNATIONAL SECURITIES REGULATION, bk. 1 (R. Rosen ed. 1988).

171. Loi No. 70-1208 du 23 décembre 1970, art. 4, J.O., Dec. 24, 1970, at 11,891, 1971 D.S.L. 17, *amending* Ordonnance No. 67-833, art. 10. This reporting procedure follows section 16(a) of the 1934 Securities Exchange Act. *See supra* part II. The COB was unable to handle the more than forty thousand filings received each year. Lightburn, *Insider Trading in France*, INT'L FIN. L. REV., Jan. 1988, at 23, 23.

172. The current provision is article 10-1 of Ordonnance No. 67-833, which was amended to the Ordonnance by Loi No. 70-1208, art. 4, in 1970. Article 10-1 was subsequently amended in 1982 by Loi No. 82-1172 du 31 décembre 1982, art. 35, J.O., Jan. 1, 1983, at 15, 1983 D.S.L. 86. In 1988, the French legislature again amended article 10-1. Loi No. 88-70 du 22 janvier 1988, art. 16, J.O., Jan. 23, 1988, at 1111, 1988 D.S.L. 133.

Article 10-1, as amended, reads in pertinent part:

> Persons . . . [such as chairman of the board, president, general managers, and directors], and persons who, by reason of their professional activity dispose of privileged information on the prospects or situation of an issuer of securities or on the development prospects of a security or a futures or options contract, have carried out or knowingly allowed to be carried out, directly or through another person, one or several transactions on the market before the public is informed, will be punished as follows: by imprisonment of between two months and two years and/

Under French insider trading laws, direct and indirect insiders are prohibited from insider trading.[173] Direct insiders are the corporation's chairman or president, members of the executive committee of the board of directors, members of the board of directors and their representatives, members of the supervisory board, and the spouses of all such individuals.[174] Indirect insiders are all individuals who are not direct insiders but, as a result of their profession or duties, acquire privileged information concerning a company or its securities.[175] French case law interprets the category of indirect insiders very broadly; French courts have found guilty of insider trading such diverse persons as a financial journalist, an individual officer in another company, and an architect.[176] Pursuant to the 1970 law, only individuals can be guilty of insider trading because the French insider trading laws make no reference to corporations or legal entities; legal entities are only liable for crimes if the liability is explicit in the applicable statute.[177] The 1982 amendment, however, provides that official de facto managers of a corporation are liable when a legal entity carries out the transactions.[178] Tippees are also not prohibited from insider trading under the French laws.[179]

The 1970 law provides limited categories of information that constitute inside information. The statute defines inside information as "privileged information on the technical, commercial or financial operation of a corporation."[180] French courts have ruled that information which is "precisely specific and certain" qualifies as inside information.[181] In

---

> or a fine of between six thousand francs and five million francs, which fine may not be less than the profit made on the transaction but may be raised as high as four times such profit.
>
> In the case where transactions have been carried out by a legal entity, its official or de facto managers will be penally liable for infringements committed.

Ordonnance No. 67-833, art. 10-1 (translation).

173. Tunc, *A French Lawyer Looks at American Corporation Law and Securities Regulation*, 130 U. PA. L. REV. 757, 762 (1982).

174. 10A INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 7.16[2] (H. Bloomenthal rev. ed. 1989) [hereinafter INTERNATIONAL CAPITAL MARKETS].

175. *Id.*

176. *Id.*

177. Lightburn, *supra* note 171, at 24. Corporate directors, however, may be liable. *See infra* note 179.

178. Loi No. 82-1172, art. 35, *amending* Ordonnance No. 67-833, art. 10-1; *see supra* note 172.

179. *See infra* note 183.

180. Loi No. 70-1208, art. 4, *translated in* Tunc, *supra* note 173, at 762 n.23.

181. Compagnie Française d'Enterprise, 1978 J.C.P. II No. 18,789 (Cour d'appel, Paris, May 26, 1977), *cited in* 10A INTERNATIONAL CAPITAL MARKETS, *supra* note

1982, the French legislature modified the definition of inside information to constitute "privileged information on the prospects or situation of an issuer of securities or on the development prospects of a security or a futures or options contract."[182]

Insiders who directly or through a third party possess inside information and trade in securities on the Bourse Stock Exchange are subject to criminal sanctions.[183] On conviction of insider trading, a court may impose imprisonment from two months to two years with a fine between six thousand francs and five million francs.[184] When the insider makes a profit of more than one million francs, the statute allows fines up to four times the amount of profit.[185]

Recent insider trading scandals in France produced widespread criticisms of the COB.[186] These scandals demonstrate the COB's ineffectiveness in enforcing insider trading laws. The COB has less than one tenth the staff and budget of the United States Securities and Exchange Commission.[187] Further, the COB is not entitled to introduce proceedings or appear as a plaintiff in an insider trading action;[188] once the COB discovers an insider trading violation, it then turns the file over to the Public Prosecutor who takes the necessary steps to bring an action.[189]

The COB's powers, however, recently have been increased by the French legislature;[190] the COB may now initiate investigations.[191] Previ-

---

174, § 7.16[2].

182. Loi No. 82-1172, art. 35 (translation); *see supra* note 172.

183. Ordonnance No. 67-833, art. 10-1.

184. *Id.*; *see supra* note 172.

185. Ordonnance No. 67-833, art. 10-1; *see also* 10A INTERNATIONAL CAPITAL MARKETS, *supra* note 174, § 7.16[4].

186. Investors, including several leaders of the French Socialist Party, are alleged to have bought more than 200,000 shares of Triangle Co. shortly before the state-owned Pechiney S.A. announced a takeover of Triangle. Insider trading also is alleged to have occurred before a private group announced its takeover of France's third largest bank. *See Insider Trading Dispute Puts Spotlight on Regulator*, 2 Int'l Sec. Reg. Rep. (BNA) 4 (Jan. 18, 1989); Greenhouse, *Modest Insider-Trading Stir is a Huge Scandal in France*, N.Y. Times, Jan. 30, 1989, at D1, col. 1. The investigation into the Triangle scandal did not begin until the SEC told French authorities about an increase in trading in Triangle stock on the United States over-the-counter markets. Riemer, *Insider-Trading Shock Rocks the Elysee*, BUS. WEEK, Jan. 23, 1989, at 54.

187. Greenhouse, *supra* note 186, at D9, col. 3.

188. *See* Le Gall & Mazet, *France*, in INTERNATIONAL SECURITIES, *supra* note 17, at 121, 128. A proposal to allow the COB to file suit on its own initiative was vetoed by the French Constitutional Commission. *Council Slows COB's Progress on Path to Independence*, 2 Int'l Sec. Reg. Rep. (BNA) 3 (Aug. 2, 1989).

189. Le Gall & Mazet, *supra* note 188, at 128.

190. *Bill to Strengthen COB Approved by French Cabinet*, Int'l Sec. Reg. Rep. 4

ously the COB could only investigate insider trading violations on a company-by-company basis.[192] The COB can also impose fines up to ten million francs.[193] In addition, the COB board was increased from five members to nine members.[194] These heightened powers should increase the effectiveness of the COB in regulating insider trading.

C. *West Germany*

West Germany possesses no laws that make insider trading illegal or even subject to civil sanctions.[195] Instead, insider trading is regulated by a voluntary set of insider trading rules which were introduced in 1970 by the Commission of Stock Exchange Experts and the Minister of Economics.[196] The Committee of Stock Exchanges and the Federal Ministry of Finance recommended amendments to the voluntary rules, which resulted in the issuance in 1976 of the Insider Trading Guidelines.[197] These rules, amended again in 1988,[198] are not mandatory and apply only to corporations and banks that bind themselves contractually to the Guidelines.[199] Hence, only insiders who have voluntarily bound themselves to the Guidelines are prohibited from trading on inside information.[200]

(BNA) (Mar. 15, 1989).

191. *Id.*

192. *See* Lightburn, *supra* note 171, at 26.

193. *COB's New Governing Board in Place; Members Now at Nine*, 2 Int'l Sec. Reg. Rep. (BNA) 5 (Oct. 25, 1989).

194. *Id.*

195. *See* Wegen, *Federal Republic of Germany*, in INTERNATIONAL SECURITIES, *supra* note 17, at 85, 98.

196. Empfelungen der Börsensachverständigenkommission beim Bundeswirtschaftsministerium zur Lösung der sogenannten Insider-Probleme, *reprinted in* R. BRUNS, WERTPAPIER UND B==PORSE § 435 (1976).

197. Insiderhandels-Richtlinien [hereinafter Guidelines], *reprinted in* R. BRUNS, *supra* note 196, § 436; *and translated in* Wegen, *supra* note 195, annex 4, at 108; *see* Blum, *The Regulation of Insider Trading in Germany: Who's Afraid of Self-Restraint?*, 7 NW. J. INT'L L. & BUS. 507, 516 (1986). Insider trading is also regulated through Investment-Advisor Rules and the Rules of Procedure. Comment, *West German Bank Secrecy: A Barrier to SEC Insider-Trading Investigations*, 20 U.C. DAVIS L. REV. 609, 616 (1987). Voluntary self-regulation is based on the fact that corporations and banks have an interest in their financial reputation in the community; an insider trading violation by a broker or company could destroy the public's confidence in the company or the broker. *Id.* at 617 n.43.

198. *See West Germany Broadens Rules on Insider Trading*, Wall St. J., Apr. 8, 1988, at A28, col. 6.

199. 10A INTERNATIONAL CAPITAL MARKETS, *supra* note 174, § 8C.11.

200. *Id.*

Under the Guidelines, insiders include the corporation's board of directors, legal representatives, subsidiaries, domestic shareholders owning more than twenty-five percent of the corporation's stock, other employees who possess sufficient access to certain classes of information, and in some circumstances, third parties on equal footing.[201] The 1988 amendments expand the definition of insiders to include advisors, consultants, and credit departments.[202] Tippees, however, are not prohibited from insider trading.[203] No set criteria exist for determining which employees constitute insiders.[204] Each corporation that recognizes the Insider Trading Guidelines determines whether an employee has sufficient access to inside information to qualify as an insider.[205]

The Guidelines define inside information as knowledge not yet made known or become known which could influence the price of securities.[206] In determining what constitutes inside information, the confidential nature of the information is unimportant; the key element is whether the information was available to the public at the time the insider traded on the information.[207]

Insiders and third parties with access to inside information may not

---

201. The Guidelines define insiders as

> (a) legal representatives and members of the supervisory board of the company;
> (b) legal representatives and members of the supervisory boards of connected domestic companies, unless they do not usually obtain knowledge of inside information in this capacity;
> (c) domestic shareholders, including their legal representatives and supervisory board members, where they have more than a 25% interest in the company . . . ;
> (d) employees of the company, of the domestic companies connected with it and the domestic shareholders with more than a 25% interest in it, insofar as the employees usually obtain knowledge of inside information in this capacity.
>
> Third parties on an equal footing with insiders are: banks, their supervisory board members, managing directors and employees, who . . . are brought in and thereby obtain knowledge of inside information.

Guidelines, *supra* note 193, § 2, *translated in* Wegen, *supra* note 195, annex 4, at 108-09.

202. *See West Germany Broadens Rules on Insider Trading*, *supra* note 198.

203. Note, *supra* note 11, at 443.

204. *See* Guidelines, *supra* note 197, § 2(1)(d).

205. *Id.* § 5.

206. *Id.* § 2(3). This type of information includes knowledge about changes in dividends, solvency, or other essential circumstances which will bring about changes. Inside information also includes knowledge of (1) a reduction of capital or raising of capital, including an increase in capital from the company funds; (2) the conclusion of a direct control contract or transfer or profit contract; (3) a takeover or settlement offer; (4) an incorporation, merger, assignment of assets, or restructuring; or (5) a dissolution. *Id.*

207. Blum, *supra* note 197, at 519.

trade in securities[208] with the use of inside information for their own benefit or the benefit of a third party.[209] The Guidelines apply only to those transactions involving securities that are listed on a West German stock exchange.[210] Further, certain transactions do not violate the Guidelines, including transactions based on instructions and transactions to protect client interests.[211]

The Guidelines are monitored by investigatory committees established at each of the eight West German regional stock exchanges.[212] Each committee is comprised of five members, including a judge experienced in commercial matters.[213] If a committee strongly suspects a violation of the insider rules, it can demand information from all suspects. A complete investigatory proceeding consists of a preliminary investigation conducted by the committee and a main proceeding conducted by the company involved.[214] At the end of the main proceeding, the committee formally determines whether a breach occurred.[215]

An offending insider faces no disciplinary action because the insider trading rules are based on a voluntary agreement between the insider and the company.[216] The company who contracted with the violator can, however, bring an action for breach of contract.[217] The corporation's only remedy for breach is recovery of the profits made or losses avoided by the transaction. A violator found guilty of insider trading also pays for the costs of the proceedings.[218]

The German financial institutions long opposed statutory enforcement of insider trading.[219] The Federation of the German Stock Exchange,

---

208. The Insider Trading Guidelines define securities as shares, participation shares, stock options, and preemptive stock options that are listed for trade on a domestic stock market. Guidelines, *supra* note 197, § 2(2).

209. Blum, *supra* note 197, at 517.

210. 10A INTERNATIONAL CAPITAL MARKETS, *supra* note 170, 8C.11[2].

211. Guidelines, *supra* note 197, § 1(2).

212. Elsing & Shook-Wiercinok, *New German Insider Trading Regulations*, INT'L FIN. L. REV., Oct. 1988, at 30, 30.

213. *Id.*

214. *Id.* at 30-31.

215. *Id.* at 31.

216. *Id.*

217. *Id.*

218. Blum, *supra* note 197, at 519-20.

219. Statistics show that approximately seventy percent of all corporations quoted on listed or unlisted West German stock exchanges have adopted the Insider Rules. These transactions represent about ninety percent of all the transactions involving trades of West German securities. Elsing & Shook-Wiercinok, *supra* note 212, at 31.

however, recently has decided to comply with the EEC Directive.[220]

D. *Denmark*

Insider trading laws have existed in Denmark since June 1986.[221] The Danish legislation prohibiting insider trading does not distinguish between insiders and tippees.[222] Under the current law, anyone who trades on nonpublic information about a company or its stock is guilty of insider trading and is liable for an unlimited fine.[223]

E. *The Netherlands*

On 2 February 1989, the Netherlands introduced a criminal prohibition against insider trading.[224] This legislation prohibits anyone in possession of privileged market information from trading on an exchange.[225] Tippees are liable for trading only if they know or have reason to know that the communication of the information resulted in the violation of a fiduciary duty.[226] This law does not limit the prohibition against insider trading to transactions in which a profit is realized; the law covers any transaction in which a party intended a financial gain.[227]

The Dutch penalties for individuals are fines, with a maximum of 100,000 guilders, and two years imprisonment.[228] The maximum fine for violations by a corporation is one million guilders.[229] In addition, violators may be forced to disgorge their profits resulting from trading based on inside information.[230]

---

220. *See* Appel & Wegen, *supra* note 121, at 142.

221. Note, *supra* note 11, at 442.

222. *Id.*

223. *Id.*

224. E. Wymeersch, The Insider Trading Prohibition in the EEC Member States 3 (draft prepared for the Münich Insider Symposium, Oct. 13-14, 1989) (unpublished manuscript).

225. *New Insider Trading Law Introduces Criminal Penalties*, 2 Int'l Sec. Reg. Rep. (BNA) 6 (Mar. 15, 1989) [hereinafter *New Law*].

226. E. Wymeersch, *supra* note 224, at 29.

227. *New Law*, *supra* note 225, at 6.

228. *Id.*

229. *Id.*

230. *Id.*

F. *Belgium*

Belgium adopted its insider trading law in March 1989.[231] In this legislation, insiders are defined as persons who have access to inside information as a result of their employment or profession.[232] Inside information is undisclosed information that is sufficiently definite and precise to be likely to influence stock exchange prices if it were publicly disclosed.[233]

The Belgium law prohibits three types of inside activity: (1) using inside information to buy or sell securities to realize a profit or avoid a loss; (2) advising third parties to buy or sell securities to recognize a gain or avoid a loss; and (3) communicating information to third persons so that they can realize a gain or avoid a loss.[234]

An insider is criminally liable for trading, tipping, or making trading recommendations to anyone else on the basis of the inside information.[235] The criminal sanctions include a maximum fine of 60,000 francs and a maximum imprisonment of one year.[236] An insider is also potentially liable for the profit realized or the loss avoided if the transaction took place on an exchange.[237]

G. *Ireland*

Ireland's insider trading law was enacted on 4 October 1988.[238] This legislation defines insiders as persons connected with the company.[239] Tippees are also liable if they know that the tipper must have breached a fiduciary duty in communicating the information.[240] In Ireland, the restricted transactions include trading, tipping, or making recommendations to third parties to buy or sell securities while in the possession of inside information.[241] There are no criminal sanctions for insider trading; only civil liability exists.[242]

---

231. E. Wymeersch, *supra* note 224, at 3 & n.9.
232. *Id.* at 11.
233. *Id.* at 65.
234. *Id.* at 44; 10A INTERNATIONAL CAPITAL MARKETS, *supra* note 170, § 8A.13[2].
235. E. Wymeersch, *supra* note 224, at 44.
236. *Id.* at 70.
237. *Id.*
238. *Id.* at 3.
239. *Id.* at 6.
240. *Id.* at 28-30.
241. *Id.* at 45.
242. *Id.* at 70.

H. *Portugal*

The Portugese insider trading laws apply to insiders, particularly members of a corporation's board of directors and supervisory board.[243] The legislation also applies to civil servants and tippees who know of the confidential nature of the information.[244] The Portugese law prohibits trading or tipping with the use of inside information.[245] The sanctions for tipping include a fine; trading sanctions include disgorgement of profits and dismissal as a director.[246]

I. *Spain*

Spain enacted its insider trading law on 28 July 1988.[247] The legislation prohibits anyone in possession of inside information from trading on the stock exchange or government bond market.[248] This law also forbids anyone possessing inside information from tipping or making recommendations to others to buy or sell securities.[249] A violator is potentially liable for a maximum of five times the profit resulting from the insider trading activity.[250]

J. *Greece*

The insider trading laws in Greece make it a crime for a civil servant—a person whose salary is paid by the Greek Government—to trade on inside information.[251] An insider who is not a civil servant is prohibited from using inside information to trade in securities of the insider's company, but is not subject to criminal sanctions.[252] Tippees are not covered by the statute.[253]

---

243. *Id.* at 8.
244. *Id.* at 13.
245. *Id.* at 45.
246. *Id.* at 71.
247. *Id.* at 3.
248. *Id.* at 14, 41.
249. *Id.* at 45.
250. *Id.* at 71.
251. Telephone interview with the Greek Embassy, Washington, D.C. (Jan. 22, 1990).
252. *Id.*
253. *Id.*

K. *Luxembourg*

Luxembourg has no insider trading laws.[254] The Luxembourg Stock Exchange, however, does have regulations prohibiting insider trading, but violation of these regulations results in disciplinary sanctions only.[255]

L. *Italy*

No law currently exists to restrict insider trading in Italy.[256]

V. ANALYSIS OF THE EEC INSIDER TRADING DIRECTIVE

A. *A Response to a Variety of Needs*

The Directive responds adequately to the lack of uniformity apparent from the preceding discussion of the current insider trading laws in the EEC states.[257] The response, however, must be stronger to regulate effectively the everchanging and unpredictable securities markets. The EEC needs wide reaching legislation to keep pace with globalization of the securities markets.

As demonstrated above, the United States Congress expanded its regulation of the United States securities markets through the years to meet changes in marketplace trading.[258] Congress did not originally design section 10(b) to address the insider trading problem; section 10(b) was intended only as a general prohibition of deceitful or manipulative practices.[259] When section 10(b) was enacted in 1934, individuals dominated trading. Nonetheless, courts expanded section 10(b) and Rule 10b-5 over time to meet various situations involving the use of inside information. The language of Rule 10b-5 "prohibiting fraud or deceit in connection with the sale or purchase of securities" provides the legal basis for holding tippees as well as primary insiders guilty of insider trading.[260] Hence, the strength of Rule 10b-5 is its flexibility to reach various situa-

---

254. E. Wymeersch, *supra* note 224, at 3.

255. *Id.*

256. *Id.*; Nelson, *EEC Members Near Accord in Unity Plan*, Wall St. J., June 19, 1989, at C9, col. 6. Massive communications of inside information often occur before public offerings in Italy. Forman, *supra* note 8, at C19.

257. *See supra* part IV.

258. *See* Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (codified in scattered sections of 15 U.S.C.); Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.).

259. B. RIDER & R. FFRENCH, *supra* note 29, at 72.

260. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 910-11 (1961).

tions. As seen above, the strength of Rule 10b-5 is also its weakness.[261] The broad scope of Rule 10b-5 subjects it to judicial abuse.[262] Accordingly, liability under Rule 10b-5 has developed through the courts on an ad hoc basis.[263]

The EEC can learn two lessons from the United States securities regulation experience: first, a broad, flexible approach to the regulation of insider trading is desperately needed; and second, clear definition of terms is necessary to prevent judicial abuse. The EEC has accomplished both objectives in the Directive's definitions of insider and inside information, in its restrictions placed on trading, and in its scope.[264] But the EEC Directive falls short in its enforcement policies.

B. *Strengths of the Directive*

A major strength of the Directive is its definition of insider.[265] The Directive defines an insider as any person who receives inside information (1) by virtue of the person's membership in the administrative, management, or supervisory bodies of the issuer; (2) by virtue of the person's holding in the capital of the issuer; or (3) because the person has access to such information by virtue of the exercise of that person's employment, profession, or duties.[266] This definition provides an excellent base because it is broad and may include persons other than those directly connected with the company, such as lawyers, auditors, and financial journalists. Other Directive terms, such as employment, duties, and profession, are defined precisely and therefore should escape judicial manipulation.[267]

The definition of inside information is broad yet clearly defined. Under the Directive, inside information is nonpublic information of a precise nature that is likely to have a significant effect on the price of the transferable security.[268] Rumors fall outside the definition.

The restrictions placed on insiders and tippees nonexclusively cover three situations: (1) neither insiders nor tippees can trade on inside information;[269] (2) insiders may not disclose information to a third

---

261. *See supra* notes 31-44 and accompanying text.
262. *See supra* note 31 and accompanying text.
263. Sorin, *supra* note 1, at 95; *see also supra* note 31 and accompanying text.
264. *See supra* notes 92-99 and accompanying text.
265. *See* Note, *supra* note 11, at 448; Note, *supra* note 12, at 133-34.
266. *Directive*, *supra* note 10, art. 2(1).
267. *Id.*
268. *Id.* art. 1(1).
269. *Id.* art. 2(1).

party;[270] and (3) an insider may not disclose inside information to recommend that a third party buy or sell securities.[271] The Directive would be stronger if all three restrictions applied to tippees as well as insiders. The restrictions are already strong because they do not require a mens rea element such as the British approach requires.[272] Together these definitions provide a suitable framework for regulating insider trading.

Another strength of the Directive is its scope. The Directive applies not only to transactions undertaken on a stock exchange, but also to any transactions involving a professional intermediary. In addition, the Directive applies to any transaction undertaken outside of a stock market that does not involve a professional intermediary unless the member state provides otherwise. This Directive will therefore reach transactions involving securities registered on a stock exchange which are not traded on the exchange; it may even reach transactions that do not involve a professional intermediary.

C. *Weaknesses of the Directive*

While the language of the insider trading Directive and its definitions are adequate, the Directive is lacking in enforcement and surveillance measures. If insider trading violations are undetected or unenforced, the strong Directive terms are superfluous.

1. Surveillance

The detection of violations presents one of the largest problems facing states in the regulation of insider trading.[273] Accordingly, the United States recently passed the Insider Trading and Securities Fraud Enforcement Act (ITSFEA), which requires controlling persons to establish internal systems of control to guard against abusive use of inside information.[274] Because the United States securities markets depend on the free and honest flow of information, and because so much of that information is entrusted to brokers, dealers, and investment advisors, it is logical that

---

270. *Id.* art. 3.

271. *Id.*

272. *See supra* notes 157-58 and accompanying text.

273. There are usually only two parties that can provide direct evidence of insider trading—the trader and the source of the inside information. It is very unlikely that either of these parties will admit that they were involved in insider trading. HOUSE REPORT, *supra* note 14, at 15.

274. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.); *see supra* notes 59-66 (description of the ITSFEA).

these institutions should help protect and police the securities markets.[275] These internal systems of control also help the understaffed SEC in its investigations. Experience demonstrates that the SEC clearly cannot on its own fight the entire battle against insider trading.

Although the SEC is the world's toughest policing body of insider trading,[276] it is somewhat ineffective in curtailing insider trading abuses. This signalled to the United States Congress that it must attack insider trading at the level where the trading occurs—within the institutions. The addition of such a surveillance requirement would add greatly to the effectiveness of the EEC Directive because none of the member states have regulatory bodies similar to the SEC.

For example, an institutional level surveillance system would definitely strengthen France's attempts to regulate insider trading. Although the French legislature recently increased the powers of the COB, French insider trading laws have been ineffective in the past, particularly because of weak enforcement by regulatory authorities.[277] In the last three years, the COB has referred only eight cases to the French courts, none of which resulted in conviction.[278] No French court has ever assessed a criminal penalty for insider trading. The absence of stiff sanctions is due in part to the COB's small investigatory staff.[279] The paucity of the staff has an impact on the quality of evidence offered by the prosecutor that in turn affects the court's decision.[280] The Ethics Committee created in 1987 by the COB has already considered a statute similar to the ITSFEA provision on controlling persons.[281] The Ethics Committee proposed the drafting of model rules of conduct both at the level of individual firms and for the new Stock Exchange Authority.[282] These rules would provide the securities markets with a valuable point of reference

---

275. 134 CONG. REC. S17,219 (daily ed. Sept. 21, 1988) (statement of Sen. Heinz).

276. Tennison, *Insider Trading on World's Exchanges Gets Closer Scrutiny by Many Countries*, Wall St. J., May 17, 1982, at B30, col. 1.

277. Lightburn, *supra* note 171, at 24-25.

278. Riemer, *supra* note 186, at 54.

279. In 1986, the entire COB staff consisted of 110 individuals, including only ten investigators. Lightburn, *supra* note 171, at 28.

280. The French courts are very reluctant to act in insider trading cases. In a case involving purchases of Thomson-CSF shares by insiders just prior to the announcement of a contract with Saudi Arabia, the Paris *Cour d'appel* dismissed the case on the grounds that the prosecutor failed to prove beyond a reasonable doubt that the insiders had knowledge of the contract. *Id.* at 25. In a 1986 case, the Paris court upheld the finding of an insider trading violation, but reduced the fine by seventy-five percent so that the violation would not appear on the individual's criminal record. *Id.*

281. *Id.* at 27.

282. *Id.*

for its internal compliance efforts.

The West German securities market would also benefit from an institutional level surveillance provision, and West Germany would not have to make major changes in its securities markets to accommodate such a provision.[283] The West German securities markets are dominated by banks and institutional investors.[284] All "purchasers and sellers of securities must place their orders with a bank that is represented on a stock exchange."[285] The banks buy stocks for their customers through a registered stockbroker.[286]

There is no West German regulatory counterpart to the SEC.[287] There are several reasons for this. The volume and movement in the West German stock market is much more limited than in the United States stock markets.[288] Also, speculative types of investment are either restricted or barred from the West German securities markets.[289] As a result of these factors, West Germany relies on self-regulation to police its securities market. A surveillance system similar to that in the United States would prevent abuse of inside information in the West German banks without requiring West Germany to create a regulatory body as extensive as the SEC.

The French and German systems illustrate the need for institutional surveillance in the EEC. Although other EEC states may not have identical needs, the Directive's success depends on whether the Directive is drawn broadly enough to accommodate the needs of all its member states.

2. Penalties

The original Commission proposal left the penalties for violation of insider trading to the discretion of each member state.[290] The Directive now provides that the penalties must be "sufficient to promote compliance with those measures."[291] Although the Directive is an improvement

---

283. Germany, nonetheless, would have to make its insider trading prohibitions mandatory. *See supra* notes 198-200 and accompanying text.

284. An example of an institutional investor is a mutual fund. 10A INTERNATIONAL CAPITAL MARKETS, *supra* note 174, § 8C.02[2].

285. *Id.* § 8C.04[4].

286. *Id.*

287. Wegen, *supra* note 195, at 85.

288. Kraus, *Securities Regulation in Germany? Investors' Remedies for Misleading Statements by Issuers*, 18 INT'L LAW. 109, 124-25 (1984).

289. *Id.* at 125.

290. *Proposal for a Council Directive*, *supra* note 91, art. 11.

291. *Directive*, *supra* note 10, art. 13.

over the first proposal, harmonization of the penalties, as suggested by the European Parliament and several commentators, provides a better approach.[292] Otherwise, the primary goal of the Directive—fostering investor confidence in the EEC securities market—will not be met. A better approach is a fine of two or three times the profit gained or loss avoided rather than a penalty of a fixed amount of money. This would harmonize the force of the penalties, yet at the same time leave the penalties dependent on the amount of money involved in the particular transaction. Penalties that are not harmonized erode investor confidence, which is necessary for the successful and fair operation of markets, especially in states that make their penalties as lenient as possible. Also, the determination of what penalty is sufficient to promote compliance with the Directive in a particular case will be subject to much judicial interpretation.

In addition to harmonizing the criminal penalties, the EEC Directive should provide civil remedies. This would provide both an additional deterrent and an alternative method for penalizing violators whose actions are discovered by a harmed investor.

VI. Conclusion

The European Council has adopted the EEC Directive on Insider Trading.[293] As a result of this adoption, EEC states with existing laws on insider trading must amend their laws to meet the provisions of the Directive, while member states without insider trading laws will have to enact laws in conformance with the Directive. The strength of the Directive lies in its definition of the persons prohibited from insider trading and the types of transactions that are prohibited.[294] Its weaknesses, however, are its lack of definite penalties and its lack of institutional level surveillance systems. By adopting the present Directive, the EEC takes a strong step toward harmonizing the insider trading laws of EEC states. Still, the Directive could be an even stronger deterrent if it followed the lessons of the United States by policing against insider trading within the institutions where the trading occurs.

Amy E. Stutz

292. *See* Note, *supra* note 12, at 139-40.
293. *Directive*, *supra* note 10.
294. *See supra* part III, section B.

APPENDIX

Council directive

of 13 November 1989

coordinating regulations on insider dealing

(89/592/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission . . .,

In cooperation with the European Parliament . . .,

Having regard to the opinion of the Economic and Social Committee . . .,

Whereas Article 100a (1) of the Treaty states that the council shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market;

Whereas the secondary market in transferable securities plays an important role in the financing of economic agents;

Whereas, for that market to be able to play its role effectively, every measure should be taken to ensure that market operates smoothly;

Whereas the smooth operation of that market depends to a large extent on the confidence it inspires in investors;

Whereas the factors on which such confidence depends include the assurance afforded to investors that they are placed on an equal footing and that they will be protected against the improper use of inside information;

Whereas, by benefiting certain investors as compared with others, insider dealing is likely to undermine that confidence and may therefor prejudice the smooth operation of the market;

Whereas the necessary measures should therefore be taken to combat insider dealing;

Whereas in some Member States there are no rules or regulations prohibiting insider dealing and whereas the rules or regulations that do exist differ considerably from one Member State to another;

Whereas it is therefor advisable to adopt coordinated rules at a Community level in this field;

Whereas such coordinated rules also have the advantage of making it possible, through cooperation by the competent authorities, to combat transfrontier insider dealing more effectively;

Whereas, since the acquisition or disposal of transferable securities necessarily involves a prior decision to acquire or to dispose taken by the person who undertakes one or other of these operations, the carrying-out of this acquisition or disposal does not constitute in itself the use of inside information;

Whereas insider dealing involves taking advantage of inside information; whereas the mere fact that marketmakers, bodies

authorized to act as *contrepartie*, or stockbrokers with inside information confine themselves in the first two cases, to pursing their normal business of buying or selling securities or, in the last, to carrying out an order should not in itself be deemed to constitute use of such inside information; whereas likewise the fact of carrying out transactions with the aim of stabilizing the price of new issues or secondary offers of transferable securities should not in itself be deemed to constitute use of inside information;

Whereas estimates developed from publicly available data cannot be regarded as inside information and whereas, therefore, any transaction carried out on the basis of such estimates does not constitute insider dealing within the meaning of this Directive;

Whereas communication of inside information to an authority, in order to enable it to ensure that the provisions of this Directive or other provisions in force are respected, obviously cannot be covered by the prohibitions laid down by this Directive,

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive:

1. 'inside information' shall mean information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question;

2. 'transferable securities' shall mean:

(a) shares and debt securities, as well as securities equivalent to shares and debt securities;

(b) contracts or rights to subscribe for, acquire or dispose of securities referred to in (a);

(c) futures contracts, options and financial futures in respect of securities referred to in (a);

(d) index contracts in respect of securities referred to in (a),

when admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public.

Article 2

1. Each Member State shall prohibit any person who:

- by virtue of his membership of the administrative, management or supervisory bodies of the issuer,
- by virtue of his holding in the capital of the issuer, or
- because he has access to such information by virtue of the exercise of his employment, profession or duties,

possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.

2. Where the person referred to in paragraph 1 is a company or other type of legal person, the prohibition laid down in that paragraph shall apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

3. The prohibition laid down in paragraph 1 shall apply to any acquisition or disposal of transferable securities effected through a professional intermediary.

Each Member State may provide that this prohibition shall not apply to acquisitions or disposals of transferable securities effected without the involvement of a professional intermediary outside a market as defined in Article 1 (2) *in fine.*

4. This Directive shall not apply to transactions carried out in pursuit of monetary, exchange-rate or public debt-management policies by a sovereign State, by its central bank or any other body designated to that effect by the State, or by any person acting on their behalf. Member States may extend this exemption to their federated States or similar local authorities in respect of the management of their public debt.

Article 3

Each Member State shall prohibit any person subject to the prohibition laid down in Article 2 who possesses inside information from:

(a) disclosing that inside information to any third party unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;

(b) recommending or procuring a third party, on the basis of that inside information, to acquire or dispose of transferable securities admitted to trading on its securities markets as referred to in Article 1 (2) *in fine.*

Article 4

Each Member State shall also impose the prohibition provided for in Article 2 on any person other than those referred to in that Article who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a person referred to in Article 2.

Article 5

Each Member State shall apply the prohibitions provided for in Articles 2, 3 and 4, at least to actions undertaken within its territory to the extent that the transferable securities concerned are admitted to trading on a market of a Member State. In any event, each Member State shall regard a transaction as carried out within its territory if it is carried out on a market, as defined in Article 1 (2) *in fine*, situated or operating within that territory.

Article 6

Each Member State may adopt provisions more stringent than those laid down by this Directive or additional provisions, provided that such provisions are applied generally. In particular it may extend the scope of the prohibition laid down in Article 2 and impose on persons referred to in Article 4 the prohibitions laid down in Article 3.

Article 7

The provisions of Schedule C.5 (a) of the Annex to Directive 79/279/EEC. . . shall also apply to companies and undertakings the transferable securities of which, whatever their nature, are admitted to trading on a market as referred to in Article 1 (2) *in fine* of this Directive.

Article 8

1. Each Member State shall designate the administrative authority or authorities competent, if necessary in collaboration with other authorities to ensure that the provisions adopted pursuant to this Directive are applied. It shall so inform the Commission which shall transmit that in-

formation to all Member States.

2. The competent authorities must be given all supervisory and investigatory powers that are necessary for the exercise of their functions, where appropriate in collaboration with other authorities.

Article 9

Each Member State shall provide that all persons employed or formerly employed by the competent authorities referred *[sic]* to in Article 8 shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

Article 10

1. The competent authorities in the Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties, making use of the powers mentioned in Article 8 (2). To this end, and notwithstanding Article 9, they shall exchange any information required for that purpose, including information relating to actions prohibited, under the options given to Member States by Article 5 and by the second sentence of Article 6, only by the Member State requesting cooperation. Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the competent authorities receiving the information are subject.

2. The competent authorities may refuse to act on a request for information:

(a) where communication of the information might adversely affect the sovereignty, security or public policy of the State addressed;

(b) where judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the State addressed or where final judgment has already been passed on such persons for the same actions by the competent authorities of the State addressed.

3. Without prejudice to the obligations to which they are subject in judicial proceedings under criminal law, the authorities which receive information pursuant to paragraph 1 may use it only for the exercise of their functions within the meaning of Article 8 (1) and in the context of administrative or judicial proceedings specifically relating to the exercise of those functions. However, where the competent authority communicating information consents thereto, the authority receiving the information may use it for other purposes or forward it to other States' competent authorities.

Article 11

The Community may, in conformity with the Treaty, conclude agreements with non-member countries on the matters governed by this Directive.

Article 12

The Contact Committee set up by Article 20 of Directive 79/279/EEC shall also have as its function:

(a) to permit regular consultation on any practical problems which arise from the application of this Directive and on which exchanges of view are deemed useful;

(b) to advise the Commission, if necessary, on any additions or amendments to be made to this Directive.

Article 13

Each Member State shall determine the penalties to be applied for infringement of the measures taken pursuant to this Di-

rective. The penalties shall be sufficient to promote compliance with those measures.

Article 14

1. Member States shall take the measures necessary to comply with this Directive before 1 June 1992. They shall forthwith inform the Commission thereof.

2. Member states shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

Article 15

This Directive is addressed to the Member States

Done at Brussels, 13 November 1989.

Source: 32 O.J. Eur. Comm. (No. L. 334) 30 (1989).