Insider Trading and the EEC: Harmonization of the Insider Trading Laws of the Member States

Lisa A. Hedges

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1. Introduction

In 1973, Manuel Cohen, a former chairman of the U.S. Securities and Exchange Commission, envisioned the scenario of a U.S. investor in Kansas buying the stock of a small Swedish computer software company as easily as a U.S. citizen might invest in the stock of a U.S. company such as I.B.M. Cohen’s vision of an international securities market is becoming a reality today. Companies consider national boundaries less meaningful in the quest for and supply of capital. Investors are eager to invest in foreign securities and the demand for capital has increased around the world.

The formation of an international securities market, however, cannot occur without consistent regulation designed to ensure the continued integrity of the market system and the protection of all investors. Specifically rules dealing with the generally considered abusive practice of insider trading will have to be consistent from one nation to the next to protect all investors.

Insider trading occurs when certain individuals, after obtaining nonpublic information, trade on that information. The definition and usage of the term “insider” in the securities laws varies from one nation to the next. For the British definition see infra notes 196-208 and accompanying text, for the French definition see infra notes 209-14 and accompanying text, for the German definition, see infra notes 215-23 and accompanying text.
information that relates to the value of a corporation's publicly held securities, trade on that information to profit when the information is eventually disclosed. Insider trading threatens the proper functioning of the stock markets by undermining the equality of opportunity between investors and eroding their confidence in the market. Most commentators also consider insider trading to be unjust. Current insider trading regulations, therefore, have attempted to compensate injured parties, to punish wrongdoers, to compel disgorgement of their ill-gotten profits, and to induce rapid public disclosure of material information.

Because of the internationalization of the world's capital markets, the problems caused by insider trading have rapidly expanded to all countries which have companies listed on a national stock exchange. Insider trading legislation varies tremendously, however, from country to country. Among the European Economic Community (EEC) member states, only France and the United Kingdom have such legislation. West Germany relies upon a voluntary code. Belgium and the Netherlands are considering legislation. No specific legislation in this area currently exists in seven of the ten member states.

11. For example, according to Professor Wang's Law of Conservation of Securities, which states that securities purchased by insiders are no longer held by outsiders, insider trading is unjust because it deprives the former outside shareholder of the benefits of the subsequent price rise when the good news is announced. Wang, Trading on Material Nonpublic Information on Impersonal Markets: Who is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?, 54 S. Cal. L. Rev. 1217, 1234-35 (1982).
13. See supra notes 1-4 and accompanying text.
14. The ten current member states of the EEC are Belgium, the Netherlands, Luxembourg, France, Italy, West Germany, the United Kingdom, Ireland, Denmark, and Greece. Cruickshank, supra note 9, at 345.
17. Cruickshank, supra note 9, at 345.
18. Id. For the complete text of the insider trading guidelines see Baumbach-Duden-HoPt, Handelgesetzbuch (mit Nebengesetzen Ohne Seerecht 25th ed. 1982), Nebengesetze No. 16; E. Schwark, Borsengesetz, Annex II at 481 (1976).
19. H. Bloomenthal, International Capital Markets and Securities Regulation 1-98 (1983). The Belgian Banking Commission, which has regulatory power over the banking and securities industries in Belgium, recognizes that insider trading has been a continuing problem in Belgium. The Commission has been reluctant, however, to exercise jurisdiction in that area beyond articulating the dangers of insider trading in its publications. See B. Rider & H. French, The Regulation of Insider Trading 254 (1979). In the Netherlands, the Ministry of Justice appointed an Expert Committee in Company Law Reform to examine and make recommendations on insider trading. Id. at 247. In 1975, the Committee published a memorandum on insider trading which recommended that insider trading be made a criminal offense. Id. To date no legislative action has been taken in this area. See H. Bloomenthal, supra, at 8-28 for the text of the Committee's recommendations.
20. Most of the member states have provisions in their regulations which might be relevant to a

The EEC has the potential to play a major role in the internationalization of the securities markets. The EEC provides a vehicle by which this goal of uniform regulation may be achieved. By the use of its council directive, the EEC has made the laws of its member states consistent in many areas. The EEC has presently turned its attention to the area of insider trading and is working on a greater or lesser extent in cases of insider trading. See Rider & French, supra note 19, at 247-76. These provisions are generally inadequate, however, in regulating insider trading and must be distinguished from legislation or recommendations specifically aimed at eradicating insider trading, such as the U.S. regulations discussed infra notes 43-89 and accompanying text; the British regulations discussed infra notes 196-208, 235-36, 254-65 and accompanying text; the French regulations discussed infra notes 209-14, 238-45, 266-71 and accompanying text; and the German regulations discussed infra notes 215-23, 246-51, 272-74 and accompanying text.

21. Prior to 1967, the French did not perceive insider trading as a problem in France; it was a practice customarily enjoyed by insiders for the benefit of themselves, their relatives and their friends. Tunc, A French Lawyer Looks at American Corporations Law and Securities Regulation, 130 U. Penn. L. Rev. 759 (1982).


23. Tunc, supra note 21, at 762.


25. The Companies Act, 1980, ch. 22 §§ 68-73. There had been public demand for insider trading laws in the United Kingdom since 1973 but it took the government three different attempts to get the legislation enacted. See Hawes, supra note 22, at 337, 338.

26. Zahn, Regulation of Insider Trading in the Federal Republic of Germany, 2 Int’l Bus. Law. 92 (1974). The Federal Minister of Economic Affairs in Germany established a committee to examine the securities laws in 1968. This committee, known as the Committee of Stock Exchange Experts, decided to examine the problem of insider trading and subsequently appointed a special subcommittee chaired by Professor Wolfgang Stutzel to conduct a study. In 1970, the Committee of Stock Exchange Experts and the Federal Minister approved the report and recommendations made by the special subcommittee in a document entitled Recommendation for the Solution of the So-called Insider Problems. See Rider & French, supra note 19, at 245. For a discussion of the substance of the recommendations, see infra notes 215-23, 246-51, 272-74 and accompanying text.

27. Rider & French, supra note 19, at 245. The 1976 rules made the former guidelines more rational, practical and flexible. For example, one reform was to broaden the definition of insider. See infra notes 215-23 and accompanying text for a discussion of the German definition.

28. The Council directive is a frequently used type of EEC legislation. See infra note 139 and accompanying text.

29. See infra notes 157-77 and accompanying text for the EEC’s work in the area of company law harmonization.
directive that would harmonize the British, French, and West German approaches to insider trading.30 This Comment begins with an examination of the growing problem of insider trading throughout the world. The author then discusses the United States approach to regulating insider trading, and presents the need for an international approach to this problem. After recounting briefly the history, organization, and aims of the EEC, the author presents the EEC’s current harmonization program in the area of corporate law and shows how insider trading legislation is consistent with the EEC’s current work in the corporate area. In addition the current British, French, and German insider trading regulation will be examined paying particular attention to the three problem areas identified by the EEC: the definition of “insider,” the definition of “price-sensitive information,” and the restrictions placed on insiders. The author also discusses the EEC’s current views on each problem area. In the next section, the author analyzes each country’s method of enforcement. Finally, the author concludes that international coordination in this area is not only desirable but necessary and that the EEC presents a proper vehicle for the attainment of this objective.

II. THE GROWING NEED FOR REGULATION OF INSIDER TRADING

A. The Problem of Insider Trading

Insider trading is not a new phenomenon. Even before the advent of impersonal exchanges,31 the common law sought to prevent unfair dealing by imposing on sellers and purchasers of securities in face-to-face transactions a duty to disclose all material information of which they had personal knowledge.32 Unfortunately, with the rise of large national impersonal exchanges, insider trading has become more common.33 In fact, the persistent phenomenon, both in the United States and abroad, of significant price movement in a corporation’s stock prior to announcements of important corporate developments indicates that insider trading occurs frequently.34

Most courts, legislators, and commentators agree that insider trading is unde-

30. Cruickshank, supra note 9, at 345.
31. The term “impersonal exchanges” refers to the national stock exchanges and to the active portions of the over-the-counter market. Transactions on impersonal exchanges are different from face-to-face transactions, in which buyer and seller negotiate directly with one another. Karjala, supra note 10, at 627 n.3.
33. The problem of insider trading has recently worsened. Between 1978 and 1981 the SEC pressed charges in 39 cases involving more than 80 individuals and institutions. This was roughly the same volume of cases and defendants as in all the preceding four decades of the agency’s existence. Louis, The Unwinnable War on Insider Trading, FORTUNE July 13, 1981, at 72.
34. Hawes, supra note 22, at 336.
sirable and should be regulated because it destroys investor confidence in capital markets. Proponents of insider trading regulation argue that such regulation is justified on moral grounds and is suggested by the rules relating to the fiduciary duty of agents to employees. Whatever the justification is for the regulation, cases of insider trading are still widespread and are growing both in the United States and abroad. The problem is exacerbated by the fact that while many stock markets are becoming increasingly international, the laws of the many nations of the world remain inconsistent with regard to insider trading. Fortunately several nations recently have enacted or are considering insider trading legislation. Of the countries that regulate insider trading, the U.S. approach is the most sophisticated and effective, and other countries often model their legislation upon the U.S. legislation.

B. The U.S. Approach to the Problem of Insider Trading

The United States system of federal securities regulation is based on the principle of disclosure. U.S. companies that issue securities must provide prospective investors with a prospectus pursuant to the Securities Act of 1933. At least one commentator argues that insider trading is desirable. See H. Manne, Insider Trading and the Stock Market (1966). In essence, Manne argues that insider trading is desirable because it constantly moves the market price of a given stock towards a level that reflects its value in relation to the prices of other issues. Id. at 100-01.

35. Karjala, supra note 10, at 627. See also H. Bloomenthal, supra note 19, at 1-88, 89.
36. H. Bloomenthal, supra note 19, at 1-89. See also Hetherton, Insider Trading and the Logic of the Law, 1967 Wisc. L. Rev. 720, 733. The notion behind this argument is that investors will shy away from the stock markets if they feel that others are trading on the basis of special private information to which the "outside investor" does not have access. See Hetherton, supra, at 720. This equality of information is, of course, a legal fiction since some investors will always have more information than others. Id.


38. Hetherton, supra note 36, at 731. An agent's use of his principal's assets for his own personal gain creates unjust enrichment and constitutes a breach of fiduciary responsibility. An insider's use of corporate inside information, considered a corporate asset, for his own gain would also seem to violate his fiduciary duty to the corporation.

39. See supra notes 1-4 and accompanying text.
40. See supra notes 14-20 and accompanying text.
41. Hawes, supra note 22, at 396. See also Tunc, supra note 21, at 759.
42. Tunc, supra note 21, at 759. For example, French securities law is almost entirely inspired by U.S. law. The French Commission des Operations de la Bourse is modeled after the SEC. Id.
43. Rasmussen, An Overview of Insider Trading Laws in the United States, 9 Int'l Bus. Law. 389, 389, (1981). There are two distinctly different philosophies that may underlie a country's system of securities regulation. The first is the idea of regulation; the second is the idea of disclosure. Under a system based on regulation, the laws seek to proscribe and describe substantive conduct, to which end government officials are empowered to make substantive decisions for the benefit of investors. Id. Under a system of disclosure, the government regulates the type and timing of data that must be provided to investors but leaves the actual investment to the investors themselves. Id.
44. The term "prospectus" is defined in 15 U.S.C. § 77b(10). It denotes any specific communication.
[1933 Act]. Additionally, the Securities Exchange Act of 1934 [1934 Act] mandates that companies listed on a national securities exchange issue periodic public reports about their operations. In any required disclosure document, the basic standard for disclosure is one of materiality, i.e., all facts necessary to make an informed judgment must be disclosed. 48

The Securities and Exchange Commission (SEC) is responsible for administering and enforcing the federal securities laws. 49 Of these laws, two principal sections pertain to insider trading: section 16(b) 50 and rule 10b-5 51 of the 1934 Act. 52

1. Section 16(b)

Section 16(b) of the 1934 Act contains the only provisions in the federal securities laws that expressly prohibit insider trading. 53 Under 16(b), insiders 54 are liable for any profits obtained through short-term trading 55 in their companies' securities. 56 Any profit obtained by the insider in violation of 16(b) must be disgorged to the company. 57 This liability is absolute, and thus requires no showing of actual abuse of inside information. 58 The theory behind 16(b), and

that an issuer sends or gives to a prospective buyer that conforms to the requirements of the relevant 1933 Act section.

47. 15 U.S.C. § 78l (1982). This provision of the 1934 Act also applies to any company having at least 500 shareholders and $1 million in total assets regardless of whether the company is listed on an exchange. Id.
49. 15 U.S.C. § 78d (1982). The SEC consists of five appointed members and is an independent non-partisan regulatory agency. Id.
52. Rule 144, 17 C.F.R. § 230.144 (1982), under the Securities Act of 1933, also regulates insider trading. Adopted in 1972 by the SEC, it attempts to create some safe harbor certainties for sales of an issuer's securities by insiders and by any other security-holders who had acquired their securities directly from the issuer in a non-registered transaction. For an extended discussion of rule 144, see Rasmussen, supra note 43, at 392-93.
54. An insider, for 16(b) purposes, is an officer or director of a company with a class of equity securities registered under the 1934 Act, or the beneficial owner of 10 percent or more of such registered class of equity securities. 15 U.S.C. § 78p(a) (1982).
55. "Short-term" is defined under the 1933 Act as occurring within a period of six months. 15 U.S.C. § 78p(b) (1982).
56. Id.
57. Rasmussen, supra note 43, at 390. This profit is considered a company asset. Id. The SEC has no authority to enforce section 16(b), although it may adopt exemptions to the rule. 15 U.S.C. § 78p(b) (1982). An action under section 16(b) must be brought by the corporation or a shareholder. Id. Disclosure of all insider transactions in shares is provided through monthly SEC publications. This data, however, is obtained from reports filed by the insiders themselves. 15 U.S.C. § 78p(a) (1982).
hence the reason for the absolute liability, is that an insider’s short-term trading in the securities of his company involves a high risk that the insider might use nonpublic information.59

While section 16(b) may be effective in regulating short-term trading within the U.S., its effectiveness in protecting U.S. investors abroad is questionable. U.S. courts are able to exercise subject-matter jurisdiction to recover short-term profits from a non-U.S. insider if both the purchases and sales are transacted in the U.S. market.60 Subject-matter jurisdiction may not exist, however, if the non-U.S. insider transacted the purchases and sales exclusively on foreign exchanges even if the company is listed on a U.S. exchange.61

2. Rule 10b-5

While section 16(b) applies only to transactions made over the course of six months, rule 10b-5 is applicable to any transaction. Rule 10b-5 requires an insider to disclose all nonpublic material facts of which he has knowledge to the other party to the transaction whenever the insider buys or sells securities in his company.62 The scope of 10b-5 has developed through a voluminous body of case law.63 The application of rule 10b-5 is limited to cases in which the plaintiff either bought or sold securities.64 It is also unavailable for all allegedly fraudulent conduct of insiders, but only for such insider conduct that has a "connection with" securities transactions.65

Rule 10b-5 does not necessarily protect either U.S. or non-U.S. investors when inside information is the basis for trading in foreign markets because subject-matter jurisdiction does not exist under 10b-5 unless the defendant utilized some means of interstate commerce.66 In general, U.S. courts have applied rule 10b-5 to international securities transactions if: significant activities occurred in the United States in connection with a transaction having consequences solely outside of the United States (e.g., affecting only non-U.S. investors), or activities

60. See Roth v. Fund of Funds, Ltd., 405 F.2d 421 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969).
62. 17 C.F.R. § 240.10b-5 (1982). Rule 10b-5 was promulgated under section 10(b) of the Securities Exchange Act of 1934 which provides that it shall be unlawful for any person:

[to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

63. While an extended discussion of the case law pertaining to rule 10b-5 is beyond the scope of this Comment, the principal cases are discussed infra at notes 68-85 and accompanying text.
64. 17 C.F.R. § 240.10b-5.
65. Rasmussen, supra note 43, at 393.
took place solely outside the U.S. in connection with a transaction having substantial effect within the United States.67


Because the language of 10b-5 is quite general,68 the development of the substance of 10b-5 has been primarily through case law.69 S.E.C. v. Texas Gulf Sulphur Co. was one of the seminal cases construing rule 10b-5's application to transactions occurring on an impersonal exchange. While the Second Circuit's opinion in Texas Gulf Sulphur is notable for several reasons,70 it is particularly known for its articulation of the "disclose or abstain" rule.71 Under this rule, people privy to material nonpublic information cannot buy or sell the security until the information has been appropriately disseminated.72 The standard of materiality developed in Texas Gulf Sulphur pertained to the likely impact of the information on the market price of the security. The court considered the information material if to a reasonable investor it would affect market value.73

In Chiarella v. United States,74 the Supreme Court expanded the definition of insider to include outsiders standing in some type of fiduciary relationship to the sellers or purchasers of the company's securities.75 The Court held that a printer who traded on the basis of information obtained from decoded tender offer documents did not violate rule 10b-5 because he did not stand in a relationship with the traders that gave rise to a fiduciary duty.76 Chiarella is also significant because the dicta in the opinion indicate that tippees of insiders may be liable under rule 10b-5.77

A third notable case interpreting Rule 10b-5 is Ernst & Ernst v. Hochfelder.78 In

68. 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,
   (1) to employ any device, scheme, or artifice to defraud,
   (2) 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
   (3) 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.
70. The opinion is also notable for the Second Circuit's holding that an insider tipper was liable in an SEC action for the profits made by his tippees. Id. at 852-53.
71. Id. at 848.
72. Id. See also Hawes, supra note 21, at 365.
73. Texas Gulf Sulphur, 401 F.2d at 848. See also HANDBOOK, supra note 53, at 264.
75. Id. at 235. See also HANDBOOK, supra note 53, at 265.
77. Id. at 230 n.12 (citing Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, 495 F.2d at 237-38).
Hochfelder, the Supreme Court established that scienter is a requirement for liability under 10b-5. Although at least one commentator has indicated that this intent can probably be inferred from the conduct of the insider in most instances, it is unclear what effect the requirement of scienter will have on 10b-5 lawsuits.

The question of damages for a 10b-5 violation remains a perplexing one in the United States. Rule 10b-5, under the 1934 Act, currently provides for civil recovery, which many other nations, including the United Kingdom and France, do not allow. While it is clear that a private claim for damages can be asserted by the non-insider in a face-to-face transaction, the courts are divided on whether to allow recovery to public traders who are not in privity with insiders but who happen to be trading in impersonal markets at the same time as insiders are trading.

The United States has a fairly comprehensive system of federal securities regulation. The 1933 Act and the 1934 Act mandate that corporate insiders rapidly disclose material corporate developments. Section 16(b) prevents insiders from profiting on short-term trades, and rule 10b-5 requires disclosure of material inside information prior to any trade. When tippees receive material inside information from true insiders, case law indicates that they must either abstain from trading or disclose such information to the individuals with whom they deal.

The U.S. system, however, is not without its faults. Most significantly, because the antifraud language of section 10b-5 and rule 10b-5 does not pertain directly to insider trading, judges are frequently called upon to interpret the language. Since different judicial interpretations lead to inconsistent opinions, some commentators have suggested that Congress adopt a new section to deal specifically with insider trading. The U.S. regulations also fail to protect many U.S. investors abroad.

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79. Hochfelder, 425 U.S. at 214. Scienter may be defined as an intent to deceive, manipulate, or defraud. Id. at 193.
81. See Rasmussen, supra note 43, at 394.
83. Hawes, supra note 22, at 375.
84. Kohler v. Kohler, 519 F.2d 634 (7th Cir. 1963).
85. Hawes, supra note 22, at 374. The Second Circuit, for example, has held that plaintiffs are harmed and thus may recover when insider trading occurs. See Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, 495 F.2d 228, 229 (2d Cir. 1974). The Sixth Circuit, however, has concluded that the plaintiffs are not harmed by the insider’s trading and thus may not recover because the insiders could have refrained from trading. Fridrich v. Bradford, 542 F.2d 307 (6th Cir. 1976).
86. See supra notes 71-77 and accompanying text.
87. Fourteenth Annual Institute on Securities Regulation 322 (S. Friedman ed. 1983).
88. Id. at 319.
89. See supra notes 60-61, 66-67 and accompanying text.
C. The Need for an International Approach

The internationalization of the capital markets is already in progress.90 Although U.S. investors, U.S. issuers, and U.S. markets formerly dominated the world's capital markets,91 currently all capitalist countries in which residents have significant savings to invest have stock exchanges.92 While the New York Stock Exchange is still preeminent, the stock exchange in Tokyo occasionally trades a larger number of shares.93 In total value of shares traded, the Tokyo Exchange is second only to the New York Stock Exchange.94 In terms of market capitalization, the New York Stock Exchange ($1.2 trillion) and the Tokyo Stock Exchange ($341 billion) are followed by the stock exchanges of London ($133 billion), Montreal ($113 billion), Frankfurt ($72 billion), Toronto ($67 billion), and Paris ($45 billion).95 These stock exchanges provide not only a convenient local market for trading in securities of foreign issuers but also, in some instances, a capital market for foreign issuers as well.96

Unfortunately, the international investor is not consistently protected from insider trading throughout the world.97 The legislative approaches to insider trading range from nations with no prohibitions98 to nations with elaborate regulatory schemes.99 Approaches differ even among those nations that regulate insider trading. Because insider trading legislation is designed to bolster investor confidence in the stock markets, investors may be discouraged from trading in those markets which are unregulated or poorly regulated. Such discouragement

90. See supra notes 1-4 and accompanying text.
91. See Thomas, supra note 2, at 56.
92. H. BLOOMENTHAL, supra note 19, at 1-21. The United States today has ten stock exchanges; West Germany has eight; France has seven; Switzerland has seven; the United Kingdom, Canada, the Netherlands, Belgium, Luxembourg, Denmark, Sweden, Norway, Italy, Singapore, Hong Kong, Malaysia, Union of South Africa, Indonesia, Kuwait, Australia, Mexico, Brazil, Israel, Bahrain, and Japan all have one or more stock exchanges. Id.
93. Id. at 1-21.
94. Id. at 1-22.
95. INSTITUTIONAL INVESTOR, Nov. 1980, at 197.
96. For example, in France 163 foreign companies are listed on the French stock exchanges. Lee, Secrecy Laws and Other Obstacles to International Cooperation, 4 J. COMP. CORP. L. & SEC. REG. 63, 67 (1982).
97. The SEC had been concerned about protecting Americans who invest in companies on foreign exchanges. For example, the SEC is particularly concerned that restricting its subpoena powers to any place within the United States would prevent it from regulating transactions originating abroad, including both trading by foreign nationals and trading by U.S. residents through foreign financial intermediaries. See Hawes, supra note 22, at 391. U.S. securities laws will not protect U.S. residents outside the United States from fraud committed in other countries. U.S. courts, however, will protect U.S. plaintiffs against defendants over whom personal jurisdiction can be asserted. See supra notes 60-61, 66-67 and accompanying text. See also HANDBOOK, supra note 53, at 427.
98. See supra notes 19-20 and accompanying text. Legislators in many countries fail to proscribe insider trading because they consider it to be a legitimate business practice and perquisite. See H. BLOOMENTHAL, supra note 19, at 1-89.
99. One such nation is the United States. See infra notes 196-274 and accompanying text for a discussion regarding the British, French and West German regulatory schemes.
will in turn inhibit the growth of companies in those countries and slow down the progress towards internationalizing the markets.\textsuperscript{100}

In addition to the implication that the international investor will not be protected, the inconsistency of each country's domestic legislation hampers the enforcement efforts of nations that have insider trading legislation.\textsuperscript{101} Problems in enforcement primarily stem from the lack of cooperation between nations, particularly when bank secrecy laws are involved.\textsuperscript{102} For example, in a number of cases the French Commission des Operations de Bourse (COB)\textsuperscript{103} has had difficulties in tracing the identity of persons executing orders on the Paris Stock Exchange via the intermediary of Swiss banks.\textsuperscript{104} The London Stock Exchange has had similar difficulties.\textsuperscript{105} The use of bank secrecy laws may therefore circumvent national legislation.\textsuperscript{106}

Since 1977, European nations have increasingly cooperated in investigating cases of suspected insider trading. This cooperation is due to the recommendations embodied in the EEC's Code of Conduct.\textsuperscript{107} For example, the Takeover Panel\textsuperscript{108} in London and the Belgium Banking Commission have been cooperating with the French COB.\textsuperscript{109} Thus, the EEC has the potential to be an appropriate and viable vehicle to harmonize existing legislation and encourage cooperation among nations.\textsuperscript{110}

\textsuperscript{100} See generally Thomas, supra note 2, at 62 for an excellent discussion on the need for world competition for capital.
\textsuperscript{101} See generally Lee, supra note 96, at 87.
\textsuperscript{102} For example, Swiss bank secrecy laws prevent banks from divulging information about customer transactions unless there is evidence that Switzerland's penal code has been violated. Currently, Swiss law prohibits only the passing of inside information to third persons; it does not bar insider trading for personal gain although the Swiss government has proposed a law that would make it a criminal offense for corporate insiders to use confidential information in securities trading. Wall Street Journal, Nov. 17, 1983, at 36, col. 1.
\textsuperscript{103} The COB is the French equivalent of the U.S. Securities and Exchange Commission. See infra notes 283-85 and accompanying text.
\textsuperscript{104} Cruickshank, supra note 9, at 346. See also Hawes, supra note 22, at 380.
\textsuperscript{105} Cruickshank, supra note 9, at 346.
\textsuperscript{106} One British commentator has noted that the opportunity for clandestine dealing behind a foreign bank nominee makes insider trading legislation more symbolic than real. Lee, Insider Trading in the UK, 4 J. COMP. CORP. L. & SEC. REG. 389, 390 (1982).
\textsuperscript{107} See id. notes 181-82 and accompanying text.
\textsuperscript{108} The Takeover Panel, formally known as the City Panel on Takeovers and Mergers, is a self-regulatory body established to monitor and regulate takeover transactions. RIDER & FRENCH, supra note 19, at 160-61.
\textsuperscript{109} Hawes, supra note 22, at 380. The Belgian government's efforts to cooperate with the COB and other agencies have culminated with a provision in the Belgian draft law of 1979 that would require a Belgian intermediary acting for a person abroad to disclose the identity of the latter in cases of suspected insider trading. See Hopt, Insider Trading on the Continent, 4 J. COMP. CORP. L. & SEC. REG. 379, 383 (1982).
\textsuperscript{110} Hopt, supra note 109, at 383.
III. OVERVIEW OF THE EEC

A. Brief History

European integration has been a constant theme in Western Europe since the end of World War II. At that time, the leaders of war-torn Europe sought to create a lasting peace and to rebuild their nations' economies. Hence, the leaders of the signatory states established the European Coal and Steel Community (ECSC) in April 1951. The EEC and the European Atomic Energy Community (EAEC or Euratom) followed, set up by the two Treaties of Rome of March 25, 1957. While each community is a distinct legal entity, all three are closely allied. Of the three communities, the EEC is by far the most important because it extends into broad spheres of economic and social activity. The ECSC and the EAEC are extremely specialized. The EEC currently consists of ten member states but is facing possible expansion.

B. Structure

1. EEC Institutions

Articles 137 through 209 of the Treaty of Rome establish the four principal institutions of the EEC: the Assembly, the Council, the Commission and the Court of Justice. The Assembly, now officially the European Parliament, consists of 434 representatives. Each member state elects its representatives to

113. Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140. See also Parry & Hardy, supra note 111, at 3. The ECSC was founded on the notion that coal, iron, iron ore and steel, along with the labor and capital related to them, ought to be allowed to circulate freely within community nations and that tariffs and import quotas on these goods should be abolished among member states. The member states were France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. Kearley, supra note 112, at 56.
115. Although all three European Communities are separate legal entities, they have been governed together since April, 1965. The Convention Relating to Certain Institutions Common to the European Communities, March 25, 1957, 298 U.N.T.S. 267, provided that all three Communities would share a common Assembly and Court. The Treaty Creating a Single Council and a Single Commission, April 8, 1965, completed the unification of the governance of the three communities.
116. Parry & Hardy, supra note 111, at 9.
117. Id.
118. See supra note 14. Spain and Portugal have applied for membership into the EEC. Their entry is expected in two to four years. Kearley, supra note 112, at 58.
the Assembly directly by universal suffrage. 120 The Assembly is not a parliament in the traditional sense of the word because it does not possess direct legislative powers. 121 The other institutions must consult the Assembly on certain matters 122 and in fact do consult it in most legislation. 123 Members of the Assembly debate and report on any proposals. Since 1975, the Assembly's chief importance has been in the area of the budgetary process. 124 It currently has the power to reject or modify the Council's proposed budget, to ask the Council to propose a new budget, and to supervise the actual expenditure of approved funds. 125 Overall, the Assembly's institutional importance has greatly increased since its origin. 126

The Council consists of one representative from each member state and acts as the legislature for the European Communities. 127 The Treaty of Rome gives the Council power to ensure "that the objectives set out in the Treaty are attained" and to "ensure the coordination of the general economic policies of the member states." 128 This grant of power establishes the Council as the primary decision-making authority in the EEC. Significantly, the Council is the only institution in which the members represent the interests of their respective member states. Members of the other institutions are obliged to represent the best interests of the Community as a whole. 129 With the possible exception of action on antitrust matters, the EEC cannot make any new departures or important decisions without the agreement of the Council. 130

The Commission functions as the executive of the Community. 131 Its role is limited to the enforcement of Community laws and the initiation of proposals for the new laws. In fact, most of the Commission's activity is directed toward devising proposals for the Council. 132 The Commission consists of fourteen persons and a large staff of researchers and administrative assistants. 133 The

120. Kearley, supra note 112, at 59.
121. Parry & Hardy, supra note 111, at 22.
122. For an excellent discussion of the Assembly's consultative function see P. Kapteyn and P. Van Themat, Introduction to the Law of the European Communities 86 (1973).
123. Kearley, supra note 112, at 60.
126. Kearley, supra note 112, at 60.
128. Id. at art. 145, 298 U.N.T.S. at 69.
130. Parry & Hardy, supra note 111, at 21.
131. Id. at 22.
133. Id. at 63. Each of the smaller member states appoints one member to the Commission; each larger member state appoints two members. Id. The current arrangement for members is not required by the Treaty. Id. at 63 n.63.
Commission's importance should not be understated; the Council bases virtually all important decisions on the Commission's proposals.\footnote{134}{PARRY & HARDY, supra note 111, at 22.}

The Court of Justice consists of eleven judges who are assisted by five advocates-general.\footnote{135}{Kearley, supra note 112, at 64. The advocates-general give the justices impartial, expert solutions to cases brought before the Court. Their submissions are usually quite lengthy and contain comparative legal information. Id.} The Treaty of Rome gives the Court of Justice the authority to "ensure that in the interpretation and application of this Treaty the law is observed."\footnote{136}{Treaty of Rome, supra note 114, at art. 164, 298 U.N.T.S. at 73.} In carrying out this role, the Court has jurisdiction over controversies between member states regarding the application of Treaty provisions, actions the Commission brings against member states for alleged failure to meet Treaty obligations, disputes brought by another Community institution or a member state concerning the legality of an institution's actions, requests from member state courts for preliminary rulings on issues of Community law, and non-adversarial proceedings such as the issuance of opinions on the legality of proposed agreements with other states or international organizations.\footnote{137}{E. STEIN, P. HAY & M. WAELBROEK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 134 (1976).} Natural and legal persons can also bring actions against the EEC and its institutions under the Court's administrative jurisdiction.\footnote{138}{Kearley, supra note 112, at 65.}


The most common type of EEC legislation is the Council Directive.\footnote{139}{Cruickshank, supra note 9, at 345.} The Community has chosen this vehicle to implement most of its legislation in the area of company law harmonization.\footnote{140}{Id.} A directive is a flexible instrument: although it is binding on member states in the result to be achieved, it leaves to the individual member states the choice of how to implement the objectives of the directive.\footnote{141}{Id. In effect, the directive is an order issued by the Council requiring member states to bring their national legislation into conformity with the directive.} The Commission bears the responsibility for introducing a proposal for consideration as a directive.\footnote{142}{Schneebaum, The Company Law Harmonization Program of the European Community, 14 LAW & POL'Y INT'L BUS. 293, 296 (1982).} Once the Commission decides that it should look into a particular item, it convenes a working group of experts from the member states. At this time the working group consults with interested parties outside of

\footnote{134}{PARRY & HARDY, supra note 111, at 22.}
\footnote{135}{Kearley, supra note 112, at 64. The advocates-general give the justices impartial, expert solutions to cases brought before the Court. Their submissions are usually quite lengthy and contain comparative legal information. Id.}
\footnote{136}{Treaty of Rome, supra note 114, at art. 164, 298 U.N.T.S. at 73.}
\footnote{137}{E. STEIN, P. HAY & M. WAELBROEK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 134 (1976).}
\footnote{138}{Kearley, supra note 112, at 65.}
\footnote{139}{Cruickshank, supra note 9, at 345.}
\footnote{140}{Id.}
\footnote{141}{Id.}
\footnote{142}{Schneebaum, The Company Law Harmonization Program of the European Community, 14 LAW & POL'Y INT'L BUS. 293, 296 (1982).}
\footnote{143}{See supra notes 131-34 and accompanying text.}
the EEC. The Treaty of Rome mandates that the Council consult the Assembly and the Economic and Social Committee before starting a detailed examination of the Commission’s proposal. After these two bodies give their opinion, the Council sets up another working group with representatives from the member states. This group’s task is to obtain general agreement on the proposal from a technical point of view. If problems still exist after the working group’s study, members of ambassadorial rank from each member state convene to discuss the problems. Problems at this point are generally of a political nature. After all problems have been resolved, the Council discusses the proposal and almost always adopts it as a Council Directive. Member states then have a certain period of time, usually two years, in which to comply with a directive. If a member state fails to comply with the directive, the Commission may bring the offending state before the Court of Justice which can order compliance.

C. General Aims

Signatory states of the Treaty of Rome created the EEC to form a common economic bloc. In furtherance of this objective, the Treaty of Rome established four basic freedoms that the framers considered necessary to form this genuine economic community: the freedom of movement of goods, persons, services, and capital. An essential aspect of these freedoms is what the Treaty of Rome terms the “right of establishment.” The right of establishment provides that companies established in one member state should be able to conduct business in the other member states and enjoy the same privileges as a local company would enjoy. To enable EEC institutions to realize the right of

144. Cruickshank, supra note 9, at 345.
145. Id.
146. The Economic and Social Committee is an advisory body consisting of 156 “representatives of the various categories of economic and social activity.” Treaty of Rome, supra note 114, at art. 193, 298 U.N.T.S. at 79. In practice representatives are put in three groups: workers, employers, and a general interest group. The council, after consultation with the Commission, appoints members to four year renewable terms. Id. at art. 194, 298 U.N.T.S. at 80.
147. Cruickshank, supra note 9, at 345.
148. Id.
149. Id.
150. Id. See also Schneebaum, supra note 142, at 297-99.
152. Cruickshank, supra note 9, at 345.
154. Treaty of Rome, supra note 114, arts. 52-58, 298 U.N.T.S. at 37-40. See also Schneebaum, supra note 142, at 295.
establishment, the Treaty of Rome grants the EEC the power to coordinate certain safeguards for the protection of members and others with a view toward making safeguards uniform throughout the Community. The EEC has constructed the program of company law harmonization on this foundation.

IV. THE EEC'S CONCEPT OF HARMONIZATION

A. The Company Law Harmonization Program

The company law harmonization program is a comprehensive attempt by the EEC to protect employees, shareholders, and the public against certain kinds of corporate misconduct. The company law harmonization program is based on the right of establishment contained in the Treaty of Rome. The principal components of harmonization are coordination, safeguards, protection, and equivalence. Any legislation of a member state designed to protect shareholders, creditors, customers, potential investors or workers is a candidate for the company law harmonization program.

Since harmonization is to be attained through the issuance of directives, an examination of the directives currently in force provides a view of the direction the EEC has taken in the company law harmonization program. Currently the program is composed of ten directives; five of these directives have been issued by the Council, three have been proposed by the Commission and two have not yet been submitted by the Commission to the Council. Issued in 1968, the First Directive covers three distinct issues: public disclosure, the validity of corporate acts, and the "nullity" of companies. The Second Directive promulgated in 1976, regulates the formation, maintenance, and fluctuation of capital in the form of shares of public stock companies, the payment of dividends and

156. Schneebaum, supra note 142, at 296. The provisions of the Treaty of Rome seek to equalize conditions between member states and eliminate wide divergences in national policies. Treaty of Rome, supra note 114, at arts. 83-130, 298 U.N.T.S. at 47-66. The provisions of articles 100 through 102 specifically provide for the harmonization of differing national laws. Id. at arts. 100-02, 298 U.N.T.S. at 54-55. See also Parry & Hardy, supra note 111, at 11.
157. Schneebaum, supra note 142, at 296.
158. Id. See supra notes 154-55 and accompanying text.
159. Id.
160. Id.
161. Article 54(2) of the Treaty of Rome, supra note 114, 298 U.N.T.S. at 38, provides that, in order to implement this general program, or in the absence of such program, in order to achieve a stage in attaining freedom of establishment as regards a particular activity, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the [Parliament] issue directives, acting . . . by a qualified majority. Id.
162. Schneebaum, supra note 142, at 300.
163. 1968 (I) O.J. EUR. Comm. (No. L 65) 41 (special ed.).
164. Schneebaum, supra note 142, at 301. Each member state has implemented the First Directive.
the acquisition of assets.\textsuperscript{166} The Third Directive,\textsuperscript{167} adopted in 1978, regulates mergers.\textsuperscript{168} The Fourth Directive\textsuperscript{169} establishes the technical requirements for the publication of corporate data as mandated by the First Directive.\textsuperscript{170} The Fifth Directive has not been issued yet.\textsuperscript{171} In 1980, the Council approved the Sixth Directive\textsuperscript{172} which provides a standard format for the prospectus a company is to issue on the first public offering of shares.\textsuperscript{173}

Five directives in the company law harmonization program are yet not in force. The Fifth Directive, proposed in 1972, would apply the corporate governance system used in West Germany and the Netherlands to all EEC member states.\textsuperscript{174} The Seventh Directive was proposed in 1976 and revised in 1978. It would regulate enterprises not covered by the Fourth Directive.\textsuperscript{175} The Eighth Directive, proposed in 1978 and revised in 1979, relates to the qualifications of auditors. It would allow certain qualified auditors to practice in more than one member state.\textsuperscript{176} The Ninth and Tenth Directives, yet to be proposed, would encourage parent companies to conclude "control contracts" with their subsidiaries and would govern the dissolution of companies respectively.\textsuperscript{177}

The five directives already enacted and the five awaiting enactment are similar to the insider trading harmonization effort\textsuperscript{178} in that they are designed to ensure that people who deal with the business community in different EEC member states receive consistent treatment and enjoy essentially the same safeguards.

B. \textit{Insider Trading and the Concept of Harmonization}

The EEC is currently deciding whether it should harmonize its member states' differing approaches to insider trading regulation through a directive.\textsuperscript{179} The Commission is currently in the process of consulting each member state.\textsuperscript{180} The EEC already has taken several steps relating to insider trading. Its most sig-
nificant undertaking is the European Code of Conduct\textsuperscript{181} which the Commission recommended to the member states in 1977. Rule 9 of the Code, which relates to transactions in transferable securities, provides that a person coming into possession of price-sensitive information while carrying out the duties of his profession should refrain from trading in the security and making selective disclosure of such information.\textsuperscript{182}

Since 1970, the Council of the EEC has also had a proposed statute for European companies under consideration.\textsuperscript{183} This statute would require, among other things, that officers, directors, and shareholders owning ten percent or more of the company’s stock report their stock ownership as well as any quarterly changes to their member states’ supervisory body. The insider would also be liable to the company for any profits realized within a six month period on purchases, sales, or sales and purchases.\textsuperscript{184}

The EEC has also adopted three directives in the securities markets field, all related to disclosure.\textsuperscript{185} The EEC justifies its work in this area as necessary to ensure the movement of capital, one of the aims set out in the Treaty of Rome.\textsuperscript{186} The creation of a common capital market for the Community is considered a prerequisite to the attainment of this aim.\textsuperscript{187} The current policy of the Commission is to create this common capital market by encouraging greater investor penetration of the various national capital markets while simultaneously ensuring that member states provide satisfactory standards of investor protection throughout the Community.\textsuperscript{188} Accordingly, because insider trading legislation is a necessary component of any investor protection program,\textsuperscript{189} it is appropriate for the EEC to harmonize the insider trading laws throughout the Community so

\textsuperscript{181} O.J. EUR. COMM. (No. L. 212) 37 (1977).
\textsuperscript{182} Id. See also Rider \& French, supra note 19, at 268-71 for a complete discussion of the entire Code of Conduct.
\textsuperscript{184} Id. at art. 82. This is very similar to section 16(b) of the 1934 Act. 15 U.S.C. § 78p (1982). See supra notes 53-59 and accompanying text.
\textsuperscript{185} Cruickshank, supra note 9, at 356. Because an effective way of preventing insider trading is to shorten the period during which important information is known to only a few people, the EEC has instituted directives relating to prompt publication of price-sensitive information and to the publication of information on a regular basis. One directive provides that a listed company must “inform the public as soon as possible of any major new developments in its sphere of activity which are not public knowledge and which may, by virtue of their effect on its assets and liabilities or [financial position] or on the general course of its business, lead to substantial movements in the price of its shares.” Council Directive, March 5, 1979, O.J. EUR. COMM. (No. L 100) 1 (1979). Another directive in this area mandates that companies whose shares are admitted to official listings publish information on a regular basis. \textsuperscript{190} 1980 O.J. EUR. COMM. (No. C 335) 19. See Cruickshank, supra note 9, at 347.
\textsuperscript{186} Treaty of Rome, supra note 114, arts. 67-73, 298 U.N.T.S. at 42-44. See supra note 153 and accompanying text.
\textsuperscript{187} Cruickshank, supra note 9, at 346.
\textsuperscript{188} Id.
\textsuperscript{189} See supra notes 6-7 and accompanying text.
that investors will feel protected from the abuse of insider trading and will therefore invest in the securities offered through the securities markets of the other member states.\textsuperscript{190}

The directive on insider trading would not attempt to make the member states' laws identical. Rather, the aim of the directive would be to achieve an acceptable minimum standard of investor protection throughout the Community.\textsuperscript{191} The directive would contain general principles, but, like all directives, would leave each member state a great deal of flexibility in the implementation of the principles at the national level.\textsuperscript{192} Member states with legislation that already goes as far as or further than the directive would not have to change their existing laws.\textsuperscript{193}

V. \textbf{Current Insider Trading Legislation in the Member States}

At present, only three of the ten member states of the EEC, the United Kingdom, France, and West Germany, have specific insider trading regulations.\textsuperscript{194} The Commission has looked into these countries' regulations and identified three problem areas that would be covered in the directive: the definition of "insider," the definition of "price-sensitive information," and the restrictions to be placed on insiders.\textsuperscript{195} Since each country's legislation varies, the Commission has drawn from each in considering what the EEC directive should contain. A country-by-country analysis under each problem area follows with reference to the EEC's position in that area.

A. \textit{Definition of "Insider"}

1. The United Kingdom

The British insider trading legislation\textsuperscript{196} is by far the most lengthy and consequently the most detailed of the legislation of the member states.\textsuperscript{197} The British definition of insider is also the most inclusive. Under the Companies Act,\textsuperscript{198} an insider\textsuperscript{199} is either an individual connected with a company,\textsuperscript{200} a government

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190. See Cruickshank, \textit{supra} note 9, at 346.
191. \textit{Id.}
192. See \textit{supra} notes 139-42 and accompanying text.
193. Cruickshank, \textit{supra} note 9, at 346.
194. See \textit{supra} notes 14-20 and accompanying text.
195. Cruickshank, \textit{supra} note 9, at 346.
197. French legal scholar Andre Tunc notes that in France, the crime of insider trading was defined, and the punishment provided for, in a single sentence of twenty nine lines. The British Companies Act of 1980 devotes nine pages to the same subject. Tunc, \textit{supra} note 21, at 762.
199. The term "insider" as used in this section refers to all persons to whom the restrictions of insider trading statutes extend.
200. Companies Act, 1980, ch. 22, § 68. An individual is connected with a company if he is director of
employee who possesses unpublished price-sensitive information\textsuperscript{201} about a company whose securities he wishes to trade,\textsuperscript{202} or an individual contemplating a take-over offer for a company.\textsuperscript{203}

In addition to these provisions regarding insiders, the Companies Act specifies that individuals who knowingly obtain, directly or indirectly, information from an insider are subject to the same restrictions\textsuperscript{204} as the insiders themselves if these individuals know or have reasonable cause to believe that the information is unpublished price-sensitive information, that the insider held this information by virtue of his position, and that the insider would reasonably be expected not to disclose it.\textsuperscript{205} The people who get their information from insiders are known as "tippees."\textsuperscript{206}

The Companies Act also prohibits the insider from giving this unpublished price-sensitive information to another person if the insider knows or has reasonable cause to believe that this other person will use the information to deal, counsel, or procure another person to deal in those securities on the London Stock Exchange.\textsuperscript{207} Under the British approach, a person who knowingly receives price-sensitive information from an insider and also uses this information to trade on the Exchange is also liable.\textsuperscript{208}

The British definition of insider is more inclusive than either the French or West German definition particularly because it includes tippees in the definition of insider.

2. France

Article 10-1, which was added to the 1967 insider trading statute,\textsuperscript{209} requires directors, certain officers, their spouses, and their dependent children to register their shares with the COB and prohibits them from engaging in insider trading.\textsuperscript{210} The article also prohibits "all other persons who, incidental to the exercise of their profession or function, make use of privileged information on the technical, commercial, or financial state of the company"\textsuperscript{211} from engaging in

\begin{footnotes}
\item[201] See infra notes 235-236 and accompanying text.
\item[202] Companies Act, 1980, ch. 22, § 69. The British terminology for government employee is crown servant. \textit{Id.}
\item[203] \textit{Id.} at § 68(4).
\item[204] See infra notes 254-65 and accompanying text.
\item[205] Companies Act, 1980, ch. 22, §§ 68(3), 68(5), 69(1).
\item[206] See H. Bloomenthal, supra note 19, at 6-48.
\item[207] Companies Act, 1980, ch. 22, § 68(6), 69(7).
\item[208] See also Companies Act, 1980, ch. 22 68(3), 68(5). See also Cruickshank, supra note 9, at 346-47. See also H. Bloomenthal, supra note 19, at 6-48.
\item[209] Art. 10-1, supra note 15.
\item[210] \textit{Id.}
\item[211] \textit{Id.}
\end{footnotes}
insider trading. As the legislation indicates, the French approach is to extend the definition of insider to include persons outside the company, such as bankers, attorneys, accountants, and government personnel, who come into contact with privileged information by reason of their profession. 212 The French legislation, unlike the British legislation, does not prohibit trading by tippees outside the insider's immediate family. An amendment to Article 10-1, first introduced in 1980, 213 may alleviate that deficiency by adding a prohibition against knowingly permitting another individual to carry out a prohibited transaction. 214 This amendment still would not prohibit the tippee from trading on the inside information.

3. West Germany

The West German approach is the most inflexible of the three approaches in terms of the definition of insider. 215 Under the 1970 Recommendations, 216 certain persons closely associated with their companies are listed as insiders; only those persons are subject to the restrictions of the recommendations. 217 Insiders are members of the management and supervisory boards, and employees who have access to certain classes of specified information. 218 The company itself may decide whether an employee possesses sufficient access to sources of information to be classified as an insider. 219 Persons outside the company with inside information are not covered by these recommendations. Tippees are also not treated as insiders under these recommendations. 220

Under the modifications of 1976, the concept of insider was expanded to include shareholders holding twenty-five percent or more of the company's stock. 221 If the twenty-five percent shareholder is a company, the directors and legal representatives of the company's subsidiaries are also covered. 222 Certain outsiders may also be covered. 223

213. The National Assembly passed Bill 1080 and it is now under consideration in the Senate as Government Bill Senate 523, Bill 1080, art. 21, 1982 J.O. 5135, 5134 [hereinafter cited as Bill 1080].
214. Hawes, supra note 22, at 347.
215. Cruickshank, supra note 9, at 346.
216. See supra note 18 and accompanying text.
217. H. Bloomenthal, supra note 19, at 1-95.
218. Rider & French, supra note 19, at 245. See infra notes 246-51 and accompanying text for the classes of specialized information.
219. Id.
220. Id.
221. Id.
222. Id.
223. For example, credit institutions, their directors, managers, and employees may be subject to the recommendations' prohibitions. Id.
4. EEC Sources

Currently, the EEC's position is that a combination of the German and French legislation would be the most desirable in formulating a definition of "insider." The EEC is considering a list of principal insiders which will be supplemented by a more general clause to cover abusive traders not mentioned in the list. The majority of national experts in the Working Group considered the British approach, which includes tippees in the definition of insiders, too extensive. The British legislation would still be permissible, however, even if the EEC directive encompasses the German and French approaches because their legislation goes further in protecting investor rights.

All three member states currently include members of a company's board of directors in their definition of insider. The EEC also intends to include directors in the definition of insider. All three countries and the EEC include members of affiliated enterprises as well. The British, French, and the EEC definitions all cover individuals who come into contact with the information by reason of their profession. West Germany and the EEC specifically include controlling shareholders in their definition. The EEC directive is the most explicit in labeling financial intermediaries, auditors, public officials, journalists, spouses, and other relatives as potential insiders. The British definition covers these people, if they receive the information from "an individual connected with a company," because it covers tippees. The French definition does not cover anyone who is not directly affiliated with the company, such as the spouse of an affiliated person or one who does not get the information by way of his profession. The West German definition only covers officers, major stockholders, and employees. Because their definitions are less inclusive, the French and West German legislation will require some changes if the EEC's directive is enacted.

B. Definition of "Price-Sensitive Information"

1. United Kingdom

The language in the Companies Act defining unpublished price-sensitive information is quite general. Under section 73, unpublished price-sensitive in-
formation is specific information that relates directly or indirectly to specific matters relating or of concern to that company. In order to be classified as price-sensitive information, the information must be unknown to those persons who deal in those securities and the information must be such that it would be likely to affect the price of those securities. By saying "of concern to that company," the statute does not appear to distinguish between market information and material information acquired from a true insider.

2. France

In France, the current legislation prohibits the use of privileged information on the technical, commercial, or financial state of the company. The French definition of price-sensitive information, therefore, has two elements: the information must be privileged and it must refer to the technical, commercial, or financial state of the company. With regard to the first element, the French courts have been strict in interpreting when the information is sufficiently public so as not to be privileged within the meaning of the statute. For example, French courts have held that information is privileged even if published in a periodical which has a small circulation and the company fails to issue a press release. Even published information, therefore, may still remain privileged.

With regard to the second element, the Paris Court of Appeal stated that trading is only prohibited when the information is "precise, special and certain." Subsequent court decisions have demonstrated, however, that the standard is flexible. In one case, a person who obtained information when negotiations were incomplete was held to have traded on privileged information because he had received the information at a time when negotiations were likely to result in the contemplated transaction. In another case, however, the Paris Court of Appeal held that a bank officer did not trade on privileged information, when his knowledge consisted only of rumors. The current amendment to Article 10-1 would expand the definition of privileged information from information on the "technical, commercial, or financial state of the Company" to include any

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236. See Branson, Insider Trading-The British Regulation in the Light of the American Experience (Pt.2), 1982 J. Bus. L. 413, 414. Market information may be defined as information about the market for a company's shares rather than about the company itself, such as information received by an insider from a large brokerage firm's analyst who indicates that the firm is about to publish a favorable report on the company together with a "buy" recommendation. Federal Securities Code § 1603 comment 1(j) (1978).
237. See supra note 18.
238. Art. 10-1, supra note 15.
239. Hawes, supra note 22, at 343.
241. Id.
information on the "prospects of the evolution of a security."244 Both market information and material information245 acquired by a true insider, therefore, would be covered under French law.

3. West Germany

West Germany's definition of price-sensitive information is quite specific. According to Rule 2(3) of the 1976 recommendations, inside information is defined as knowledge pertaining to unknown or known circumstances, which can be important for the evaluation of insider documents.246 This type of information includes knowledge about changing dividends, substantial changes in earnings or liquidation, or other substantial circumstances which will bring about such changes.247 Inside information also includes knowledge of the following planned measures: capital reduction or the raiding of capital, the completion of a management or profit-sharing agreement, takeover or compensation offers, mergers, and liquidation.248 According to Note 3 of the Rule,249 it is not important whether the information is confidential per se.250 The important factor is whether it was available to the public when the insider used it.251

4. EEC Sources

The EEC has settled provisionally on the definition that "unpublished price-sensitive information means significant, confidential information relating to an undertaking which, if it were published, would be likely materially to affect the price of the securities of the undertaking concerned."252 The definition has similar elements, therefore, to both the French and British statutes in that the information must be material, it must relate specifically to the company, and it must be such that if published the price of the stock would move up or down.253

The definitions of price-sensitive information are very similar among the three member states and the EEC. All of the definitions are broad and sweeping. The information must concern the company, have the potential to affect the price of the company's stock, and be either unpublished or unknown. Thus, should the EEC enact the directive, the British, French, and West German legislation would be left intact.

244. Bill 1080, supra note 213.
245. See supra note 236.
246. RIDER & FRENCH, supra note 19, at 245.
247. Id.
248. Id. at 246.
249. See supra note 18.
250. RIDER & FRENCH, supra note 19, at 245.
251. Id.
252. Cruickshank, supra note 9, at 347.
253. Id.
C. Restrictions on Insiders

1. United Kingdom

The Companies Act prohibits insiders from dealing on the stock exchange in their company’s securities if they possess what they know is unpublished price-sensitive information. In addition, insiders are prohibited from dealing in another company’s securities if the unpublished price-sensitive information relates to any actual or contemplated transaction between their company and the other company. The Act defines “dealing on the stock exchange in securities” as buying, selling, or agreeing to buy or sell any securities. The Act prohibits an insider from acting as a tippee, dealing as an off-market dealer, and creating a market in advertised securities. The prohibitions on counseling or procuring another person to deal and on communicating information also extend to situations in which the individual knows or has reasonable cause to believe that a person will deal on a stock exchange outside of the United Kingdom. The Act does not cover either direct dealings on a foreign stock exchange by an insider or any foreign off-market deals. Some sort of international regulation, therefore, seems to be called for to cover these foreign transactions.

The United Kingdom, unlike France, or even the United States, offers a statutory defense to liability. Under the Companies Act, the insider is not liable if he undertakes the transaction for some reason other than “with a view to making a profit or avoiding a loss.” This provision is necessary to provide protection for those insiders who possess price-sensitive information but trade for innocent reasons such as wanting to liquidate their holdings because of an urgent need for money.

255. Id. § 68(2).
256. Id. § 73(3).
257. See supra notes 207-08 and accompanying text.
258. An “off-market dealer” may be any licensed or exempted dealer in securities or a member of the Stock Exchange of a recognized association of dealers in securities. Companies Act, 1980, ch. 22 § 70(3).
259. “Creating a market in securities” is defined as an off-market dealer holding himself out as willing to buy and sell the securities outside of the Stock Exchange. Id. § 73(4).
260. “Advertised securities” are securities listed on the Stock Exchange or securities for which price information has been published within the previous six months. Id. § 70(3).
261. Id. § 70(2).
263. Hawes, supra note 22, at 347.
2. France

Article 10-1 makes it a crime for those people designated as insiders\textsuperscript{266} to engage in insider trading.\textsuperscript{267} Insider trading encompasses the actual buying or selling of securities. The 1980 proposed amendment to Article 10-1\textsuperscript{268} would prohibit the insider from knowingly permitting another individual to carry out a prohibited transaction.\textsuperscript{269} This same amendment would also make it a crime for individuals to engage in insider trading for a company.\textsuperscript{270} At present, French law does not regulate trading by individuals on behalf of companies or other entities.\textsuperscript{271}

3. West Germany

According to Rule 1 of the 1976 recommendations, insiders must not engage in dealings with the help of inside information at any time, or under any circumstances, for their own benefit or for the benefit of a third party.\textsuperscript{272} Third parties include companies.\textsuperscript{273} The practice of tipping is not currently prohibited in West Germany.\textsuperscript{274}

4. EEC Sources

The EEC's directive would impose three restrictions on insiders by prohibiting the use of price-sensitive information by the insider himself, prohibiting the insiders from recommending that third parties carry out transactions on the basis of inside information, and prohibiting insiders from disclosing information to third parties.\textsuperscript{275} The EEC experts would prefer to circumvent the problem of trading by tippees by prohibiting the insiders from disclosing the information rather than by preventing the tippees from trading.\textsuperscript{276} Also, because each EEC member state would be required to comply with the EEC's rules, there is no need for any express restrictions on trading on foreign exchanges.

The British prohibitions are the most inclusive primarily because the Companies Act expressly prohibits both tipping and dealing off-market within the

\textsuperscript{266}. See \textit{supra} notes 209-14 and accompanying text.
\textsuperscript{267}. See Hawes, \textit{supra} note 22, at 347.
\textsuperscript{268}. Bill 1080, \textit{supra} note 213.
\textsuperscript{269}. See \textit{supra} note 214 and accompanying text.
\textsuperscript{270}. Hawes, \textit{supra} note 22, at 347.
\textsuperscript{271}. \textit{Id}.
\textsuperscript{272}. \textit{Rider \& French}, \textit{supra} note 19, at 245.
\textsuperscript{273}. \textit{Id}.
\textsuperscript{274}. H. Bloomenthal, \textit{supra} note 19, at 1-94.
\textsuperscript{275}. Cruickshank, \textit{supra} note 9, at 347.
\textsuperscript{276}. The EEC's approach, therefore, is distinguishable from the United Kingdom's approach in that the British regulations explicitly prevent tippees from trading. See \textit{supra} notes 204-06 and accompanying text.
United Kingdom.277 Neither West Germany nor France presently prohibits tipping, although the proposed French amendment on insider trading would prohibit tipping. The EEC’s directive would prohibit tipping. The West German, French, and EEC prohibitions are general in nature. They merely prohibit transactions in securities using inside information. Because of the generality of their language, it is possible that off-market deals are also covered.

VI. ENFORCEMENT OF INSIDER TRADING REGULATIONS

The EEC’s insider trading directive would require that each member state appoint a supervisory authority, preferably a public authority, to ensure compliance with the Community legislation on insider trading.276 Such authorities would also possess the appropriate powers of investigation in order to perform their duties.

In the United Kingdom prior to 1978, the Takeover Panel usually imposed sanctions against inside traders.279 The Companies Act abandons the enforcement approach of the 1978 Companies Bill280 which would have had the Department of Trade investigate suspected insider trading. Instead, the Companies Act gives the investigative power to the police.281 At the present time, enforcement policies are still evolving. Between 1980 and 1982 there have been only three prosecutions. In two cases the accused pleaded guilty and the third case has yet to be heard.282

In France, the COB is the agency in charge of controlling "the information of securities holders and the public on publicly held corporations and seeing to the proper functioning of the stock markets."283 In the ten years since insider trading became a criminal offense in France, the COB has conducted approximately 250 investigations of suspected insider trading in which they have identified major buyers.284 Prosecutions, however, have been relatively rare under the present law. As of October 30, 1980, only thirteen persons have been prosecuted for using privileged information.285

277. See supra notes 257-58 and accompanying text.
278. Id.
279. Hawes, supra note 22, at 377.
280. The 1978 Companies Bill was introduced by the Labor government in 1978, but failed to become law due to the change of government in May 1979. Id. at 338.
Under the West German regulation, compliance is completely voluntary. The Recommendations apply only to companies which have elected to subject themselves to the regulatory scheme. According to rule 5 of the 1976 Recommendations, these companies can merely request that their employees accept the insider trading rules. Note 1 of Rule 4 of the 1976 Recommendations states that no legal or disciplinary action can be taken against the offender, although actions for breach of contract can be brought by the company against the insider. Enforcement in West Germany has also been hampered because, ordinarily, action can only be taken in the event of a complaint; the inquiry board has no real investigatory powers and must depend on information developed by the company’s auditor. Deterrence is weak since decisions are not published, and the harshest sanction merely requires an offender to turn over his profits to the corporation and pay the cost of the proceedings.

VI. Conclusion

The EEC, by the use of the Council directive, provides an appropriate and viable vehicle to harmonize existing insider trading legislation and to encourage cooperation among nations. The insider trading directive’s basic significance is that it would be binding on all member states, thereby requiring member states to protect investors uniformly. Perhaps more importantly, the insider trading directive is desirable from two different perspectives. From the standpoint of the EEC, it will help to create the common capital market that the EEC’s founders considered so necessary to achieve continued economic growth. From an international perspective, the insider trading directive is a crucial step in the move toward an international securities market.

Members of the EEC believe that the goal of the freedom of movement of capital will only be obtained through the emergence of a common capital market. The insider trading directive will move the EEC one step closer to these twin goals by encouraging investors to trade and issuers to list their shares on foreign exchanges. This movement of capital will provide the EEC member states with a more efficient and rational flow of capital to meet their needs.

286. See, e.g., H. Bloomenthal, supra note 19, at 1-93. Professor Michael Will of the University of Munich characterizes the system as a “toothless device.” Id.
287. Id. Currently the corporations that have agreed to be bound comprise approximately 90 percent of the capital of quoted corporations. Id. at 1-94.
288. Rider & French, supra note 19, at 246.
289. Id.
290. H. Bloomenthal, supra note 19 at 1-94.
291. Id.
292. See supra notes 186-87 and accompanying text.
293. See supra notes 188-90 and accompanying text.
This in turn will help the EEC to obtain its ultimate objective as set forth in Article 2 of the Treaty of Rome: the emergence of a genuine economic community.

The EEC’s insider trading directive is also important from an international standpoint. It is a prerequisite to the formation of an international capital market. The major securities exchanges of the world are no longer solely national in scope; many companies are now able to gain access to multiple exchanges.\(^{295}\) Because companies may now be listed on exchanges in many different countries, their insiders have more opportunities to use their price-sensitive inside information in fraudulent ways. This trend toward internationalization is likely to continue far into the future.\(^{296}\) Insider trading, therefore, can no longer be dealt with on a purely national level.\(^{297}\) The EEC’s directive will transcend its member states’ borders and hopefully will encourage cooperation among non-member states.\(^{298}\)

The harmonization of securities laws alone will never bring about true integration of the securities markets. Indeed the problem of enforcement will continue to hamper this effort. Yet the EEC’s efforts to harmonize the insider trading laws throughout its member states, even if useful only for providing investors with confidence in the markets, provide the foundation for future integration and therefore should be carried forward.

Lisa A. Hedges

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\(^{295}\) In fact the EEC, by the use of a directive, has facilitated the admission of securities to multiple stock exchanges by harmonizing admission conditions throughout the Community. See Directive of March 5, 1979, coordinating the conditions for the admission of securities to official stock exchange listing, O.J. EUR. COMM., (No. L 66) 21 (1979). Access to multiple exchanges offers many advantages: the issuer is able to broaden its ownership base and create a wider market for its securities, small investors are able to purchase the foreign issue more cheaply, investment by institutions and trustees is facilitated in those countries where these investors are prohibited by local law from purchasing shares other than on a local market, the issuer obtains public relations gains, and a local listing provides the foreign issuer with the local paper it may need for further acquisitions and financings. Cohen, supra note 1, at 371.

\(^{296}\) Several factors indicate that the trend to an international market is likely to continue: the greater need for foreign capital (especially to finance the growth of multinational corporations), the continued expansion of international capital markets, and the increased interest, affluence, and mobility of individual investors. Cohen, supra note 1, at 558.

\(^{297}\) Even the United States, which has the most sophisticated and extensive network of securities regulation, is unable to police most insider trading perpetrated by non-Americans due to subject-matter jurisdiction requirements. See supra notes 60-61, 66-67 and accompanying text.