CITY RESEARCH SERIES
NUMBER EIGHT

COMPARATIVE IMPLEMENTATION OF EU DIRECTIVES (I) – INSIDER DEALING AND MARKET ABUSE

The British Institute of International and Comparative Law

DECEMBER 2005

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British Institute of International and Comparative Law

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DECEMBER 2005

Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse is published by the Corporation of London. The authors of this report are Jane Welch, Matthias Pannier, Eduardo Barrachino, Jan Bernd and Philip Ledeboer for the British Institute of International and Comparative Law.

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December 2005

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Foreword

Michael Snyder
Chairman, Policy and Resources Committee
Corporation of London

The completion of a single European market for wholesale financial services requires more than a harmonised regulatory framework of proportionate EU directives. For that regulatory framework to function effectively in an even-handed fashion, it is necessary for EU directives to be implemented in a compatible way in each Member State. If they are not, then companies will find themselves having to contend with varying requirements in different European countries – something which is not only contrary to the objectives of the single market, but is also likely to produce competitive disadvantages for firms operating across borders.

Implementation is more of a challenge than is often first thought. EU Member States have different legal systems and different legacy regulatory structures. There are also problems of language, both legal and common, which can result in critical words having very different meanings in different places. Even if the temptation to "gold-plate" is resisted, and each country starts the process of implementation by attempting the literal transposition of a directive into national law, the results can still be very different.

It is against this background that the Corporation has decided to commission a new programme of work looking at the comparative implementation of financial services directives in Member States. This first report looks at the key provisions of the Insider Dealing Directive and the equivalent sections of the Market Abuse Directive in five countries (the UK, Germany, France, Spain and the Netherlands). It has been carried out by a team of legal experts drawn from each of the countries concerned and led by the British Institute of International and Comparative Law. It provides not only detailed commentary on each exercise in implementation, but also the actual text of each resulting law with a parallel translation into English where appropriate.

The report provides a fascinating insight into the realities of transforming EU directives into national regulation. The results of the earlier implementation of the Insider Dealing Directive were very mixed, with the directive's own "minimum requirement" status interacting with varying national practices to produce a significant

range of results across the country spectrum. The results of the more recent implementation of the Market Abuse Directive have been more homogeneous, partly because of the more prescriptive nature of the directive itself and partly because countries have moved closer to straight transposition in implementation. Even in the second case, however, the report makes clear that there is still scope for variation in practice, not least because national courts are likely to interpret key concepts in different ways.

If the report proves one general point, it is simply that there are no easy victories in providing Europe with a completely level playing field in the area of financial services regulation. I believe that the report provides a fascinating case study not only into the challenges of implementation, but also into the need for care in drawing up the directives themselves. I trust that this study will serve as a model for other work of a similar nature, and that it will contribute to gathering momentum behind the campaign for better regulation – a campaign that must produce solid gains if we are to meet the demanding international competitiveness aspirations of the Lisbon Agenda.

Michael Snyder
London
December 2005

Executive Summary

This report examines in detail the implementation of Articles 1-4 of the Insider Dealing Directive (Directive 89/592/EEC)[1] (the "IDD") and Articles 1-4 of the Market Abuse Directive (Directive 2003/6/EC)[2] ("MAD") in the law of five EU Member States - the UK, Germany, France, Spain and the Netherlands.

The main points to emerge from the study are the following:

- Before the adoption of the IDD, there were wide variations in the approach taken by the relevant Member States to the prohibition of insider dealing. France first introduced legislation in 1967, whereas Germany relied on a voluntary Code of Conduct until 1994, when it brought in legislation implementing the IDD.

- The implementation of the IDD did not result in similar regulations in all the Member States considered. The IDD was a minimum harmonisation directive, was quite loosely drafted and was the first directive aimed at regulating capital markets. Market regulation was still in its infancy in many Member States. It is not surprising, therefore, that standards continued to differ widely.

- One of the main differences concerned the definition of "insider", where some Member States such as Spain and the Netherlands treated anyone in possession of inside information as an insider, while others confined the definition to those with a fiduciary or confidential relationship with the company or issuer.

- Similarly, there were variations in the way in which inside information was defined, both in the degree of publicity required before information could be said to be "public" and therefore not inside information, and in determining the price sensitive nature of inside information. The IDD did not give any guidance as to when information should be regarded as public. At one end of the spectrum, France did not regard publication to market professionals as sufficient, whereas the UK rejected the idea that information had to be made available to the man in the street to be considered public information. The IDD stipulated a "significant" effect on price, but in France and the Netherlands, for example, any effect on price was sufficient.

- As regards the prohibition on insider dealing itself, Member States differed in their application of the IDD requirements of knowledge and causation. Whereas the IDD required the insider to "take advantage of" inside information "with full knowledge of the facts" when dealing, France penalised any insider who dealt when in possession of inside information, regardless of whether the insider relied on that information. Germany on the other hand, required the insider to deal on the basis of the inside information, while the UK allowed a defence for insiders who could show that they would have dealt, even if they had not been in possession of inside information.

[1] Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ 1989 L334, p.30. The deadline for implementation was 1 June 1992.
[2] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market abuse, OJ 2003 L96, p.16. The deadline for implementation was October 12, 2004.

- Given the differences of approach to implementation of the IDD, the way in which Member States have aligned their legislation when implementing MAD is striking. By and large the MAD provisions track those in the IDD in relation to insider dealing, but the Member States examined in this report have all moved significantly towards verbatim or "copy out" implementation of MAD and the two relevant Level 2 Directives.

- Differences still remain and some Member States have not implemented every detail of MAD. Primary legislation is required to enact some provisions and this has inevitably caused a delay in meeting the timetable. Of the Member States examined, the Netherlands was the last to implement, with the legislation coming into force on October 1, 2005

- The text of the national laws implementing MAD may now be very similar, if not identical, but there is no guarantee that the provisions will be interpreted, monitored and enforced in the same way in all the Member States. This report illustrates how similar provisions can be interpreted in very different ways by Member States.

1. Introduction and Comparative Overview

This report was commissioned by the Corporation of London to examine the comparative implementation of key articles of the Insider Dealing Directive (Directive 89/592/EEC) (the "IDD") and the Market Abuse Directive (Directive 2003/6/EC) ("MAD"). Five Member States were selected for the report: France, Germany, the Netherlands, Spain and the United Kingdom.

A chapter is devoted to each of these Member States , describing the law on insider dealing (if any) before the implementation of the Insider Dealing Directive (the "IDD"), the way in which Articles 1-4 of the IDD were implemented and any problems which emerged as a result of implementation. The report then examines the implementation of Articles 1-4, MAD. One of the unique features of the report is the inclusion of the original language text of each Member State's implementing legislation, together with a translation into English, where necessary, so that readers can compare and contrast the national laws.

1.1 Comparative Overview: the Law in Member States before implementation of the Insider Dealing Directive

Of the five Member States considered in this report, France was the first to introduce a law tackling insider dealing in the Ordinance of September 28, 1967. The Ordinance was amended in 1970, making insider dealing and the disclosure of inside information to third parties a criminal offence. The 1989 Insider Dealing Directive was subsequently implemented through administrative regulations promulgated by the COB - the French Securities Regulator at the time. Regulation 90-08 on the Use of Inside Information was issued by the COB in July 1990.

The Netherlands, Spain and Germany all chose initially to tackle insider dealing through voluntary codes of conduct. Germany issued the first version of its Guidelines on Insider Dealing in 1970. These were drawn up by the German Commission of Stock Exchange Experts and board members of listed companies were expected to sign up to the Guidelines. It was not until 1994 that the voluntary guidelines were replaced by legislation implementing the Insider Dealing Directive in Germany.

Spain too opted at first for a Code of Conduct, following a report on insider dealing published in 1977. After accession to the European Community in 1986, work began in earnest on drafting a new Securities Law incorporating a ban on insider trading. The Securities Law was passed in 1988 and, to a large extent, anticipated the provisions in the Insider Dealing Directive, though some changes were needed in 1991 to ensure full compliance with the directive.

The Netherlands prohibited insider dealing through amendments to the Criminal Code introduced in February 1989. Previously, the only controls on insider dealing were to be found in the Model Code applying to companies listed on the Amsterdam Stock Exchange, which was first introduced in January 1987.

The UK finally succeeded in enacting a law banning insider dealing in 1980, after the demise of two earlier Bills. Insider dealing became a criminal offence, punishable by a fine or imprisonment. The Insider Dealing Directive was implemented by Part V of the Criminal Justice Act 1993, which remains in force today.

The EC Insider Dealing Directive was adopted on 13 November 1989 after two years' negotiation. Member States were required to implement the directive in national law at the latest by 1 June 1992. Of the Member States considered in this report, France, Spain and the Netherlands met the deadline for implementation. Although the UK already had legislation in place combating insider dealing, the amendments necessary to implement the IDD were not adopted until 1993 with the passage of the Criminal Justice Act 1993. Germany finally implemented the IDD in 1994, when the Securities Trading Act came into force.

1.2 Insiders

When defining an "insider", Member States tended to divide into two camps: those which treated anyone holding inside information as an insider and those which required some link with the company or issuer before a person in possession of inside information became subject to the prohibition on insider dealing. The IDD was a minimum harmonisation directive and required Member States to prohibit insider dealing only by insiders with a link to the company, known as "primary insiders".

Under the Dutch and Spanish legislation, anyone in possession of inside information was prohibited from dealing, regardless of how they had obtained the information. No distinction was thus drawn in Spain and the Netherlands between primary and secondary insiders, the latter being defined under the IDD as persons knowingly possessing inside information, "the direct or indirect source of which could not be other than a [primary insider]".

In Germany and France, on the other hand, a primary insider was defined by reference to his relationship with the issuer, either through board membership, employment or professional duties. Unusually, German law treated all board members in a group of companies as insiders in relation to any company within the group. France extended the ban on insider trading to the spouses and dependent children of directors and officers of French companies.

The UK steered a middle course between these two approaches. Under the Criminal Justice Act 1973, a person was treated as an insider only if he knowingly had inside information and had obtained that information either directly as a director, shareholder or employee of the company or indirectly from such an inside source. The UK was also the only Member State to include an express provision prohibiting insider dealing by crown servants or former crown servants, though public officials would almost certainly have been caught under the general provisions in force in France, Spain and the Netherlands, and possibly in Germany as secondary insiders.

Member States were required by the Insider Dealing Directive to treat shareholders who held inside information by virtue of their shareholding as primary insiders. Not all Member States included shareholders when defining insiders. There was no express mention of shareholders in French law, whereas the UK Criminal Justice Act (CJA) of 1973 did cover a person who had inside information "through being a shareholder of an issuer of securities", as did the German Securities Trading Act. Since Spain and the Netherlands treated everyone holding inside information as an insider, any shareholder who came into possession of inside information was automatically covered.

1.3 Corporate Insiders

Where the IDD was implemented through the criminal law, in general, liability attached only to the individuals involved in the insider trading and not to the company on whose behalf they are dealing. Thus under the UK CJA, only individuals can commit the offence of insider dealing. On the other hand, the law in Germany, Spain and France could apply to both companies and individuals, the COB in France having express power to impose fines on the companies themselves.

1.4 Securities covered by Insider Dealing Laws

The Insider Dealing Directive required Member State to prohibit insider dealing in relation to transferable securities (including financial futures and options in relation to transferable securities) which were admitted to trading on a regulated market in a Member State. It was open to Member States to exclude off-market deals which did not involve a professional intermediary. At the time the IDD was adopted, there was no definition of what constituted a "regulated market". Given the segmentation of the national markets at the time, little attention was paid to the territorial scope of national laws and it is not always clear whether the securities had to be admitted to trading on a regulated market in the Member State where the trading took place, for national law to bite.

The UK included securities admitted to trading on any market included in a list of regulated markets covering all the EEA Member States at that time. Off-market deals were covered, provided that a professional intermediary was involved. Germany adopted the same approach. France covered both on- and off-market trading in securities admitted to trading on an organised market. The exact scope of the Spanish legislation was not clear but is generally assumed to have extended to all securities admitted to trading on the Spanish stock exchanges, the Government bond market and any organised market to be set up in the future. The Netherlands covered all securities listed on a recognised exchange.

1.5 Definition of Inside Information

The key elements in the IDD definition are that the information:

- has not been made public
- is of a precise nature;
- must relate to one or more issuers or one or more securities; and
- would, if it were made public, be likely to have a significant effect on the price of the securities.

"Public"

There was considerable variation in the definition of "public" information. Here the member states divided into two camps; those taking the view that publication to market professionals is sufficient to make the information "public" and those requiring far wider circulation. France and the UK appear at opposite ends of the spectrum.

Early French court decisions held that publication to a restricted circle did not mean that the information could be considered "public". The UK legislation went into most detail in defining when information was "made public". It was clear that information could be treated as made public, even though it was available only to a section of the public, rather than the public at large, or even if it could be acquired only by persons "exercising diligence or expertise". Nor did the information have to be published in the UK to be considered public.

"Precise"
The UK also included information which was "specific" as opposed to "precise", while the French courts have held that inside information must be "of a precise, specific and certain nature". Member States shared the same policy objective in introducing qualifications in their national law. On the one hand they wanted to allow trading on the basis of market rumours to continue but, on the other, most did not want to limit the definition to purely "factual information". Germany, however, did use the term "fact" in its implementing legislation, though this is interpreted as including forecasts and valuations.

Effect on price
All the Member States' implementing laws contained the essential elements of the definition, though some are stricter. The French COB Regulation merely required that the information should merely "affect" the price of the securities, rather than have a "significant effect" on the price. Similarly the Dutch law required only an "effect" on the price of the securities.

1.6 Insider Dealing

There were major differences between Member States in relation to the definition of insider dealing. The IDD required Member States to prevent insiders "from taking advantage of "inside information" with full knowledge of the facts." This would require evidence that the insider knew that he was in possession of inside information.

Thus, for example, the UK CJA requires the insider to know that the information is "inside information" and that he has it from an inside source. In Spain, on the other hand, dealing by any person who happens to be in possession of inside information was caught irrespective of whether he knew that he had inside information. In France, although the COB Regulation prohibited insiders from "taking advantage of" inside information, it appears from court decisions that dealing by an insider in possession of inside information was caught, even if the decision to deal was taken before insider acquired the inside information. Germany only caught insiders who took advantage of or used the inside information to deal. In the Netherlands there was no need to show a link between the inside information and the transaction; the insider did, however, have to know that he was in possession of inside information.

1.7 Implementation of the Market Abuse Directive

What is striking about the implementation of the Market Abuse Directive (MAD), as compared with the implementation of the Insider Dealing Directive (IDD), is the way in which Member States have moved towards verbatim or "copy-out" implementation and in so doing have aligned their national laws. To some extent this was anticipated given, for example, the detail of the Level 2 Directives filling out the detail of the definition of "inside information" in Article 1(1) of MAD, which does not allow much room for national variation.

But there was also much more pressure on Member States to adopt a common approach to implementation, given that this was one of the first directives to be adopted under the Lamfalussy procedures and the involvement of the national securities regulators through CESR in advising the Commission on the content of the Level 2 measures. It remains to be seen, however, whether Member States will interpret similar provisions in similar ways or whether they will retain the approach developed in relation to the first Insider Dealing Directive.

1.8 MAD Definition of Inside Information

The definition of inside information in the UK, Germany, France, Spain and the Netherlands is virtually identical to that in Article 1(1) MAD, as implemented by Commission Directive 2003/124/EC and Commission Directive 2004/72/EC.

1.9 Inside Information in relation to Intermediaries

France, Germany and the UK have all included the additional part of the definition of inside information in relation to professional intermediaries. Spanish and Dutch law are silent on the question, which means that it is not clear whether or not front-running by an intermediary would be judged to be insider trading. It would presumably depend on whether information about client orders in relation to securities is considered to be information relating to the securities themselves under Spanish or Dutch law.

1.10 Definition of Insider

Again, there is no material difference between the laws of France, Germany and the UK implementing MAD in relation to the definition of insider. Spanish law, however, retains its very wide definition of insider as any person in possession of inside information, but introduces a new qualification that the person knows or ought to know that he was in possession of inside information. The Netherlands has abandoned its very wide definition of insider as anyone possessing inside information and adopted the MAD definition.

1.11 Definition of Insider Dealing

All the Member States examined in this report incorporate the MAD qualification that insider dealing should make use of inside information in order to be caught by the prohibition.

1.12 Financial Instruments covered

The relevant Member States now cover all the financial instruments covered by MAD, including commodity derivatives.

1.13 Disclosing, Recommending or Inducing

Article 3 MAD requires Member States to prohibit primary insiders, as defined in Article 2 MAD, from disclosing inside information to a third party and from recommending or inducing a third party to deal on the basis of that inside information. The only minor difference in national law in relation to this provision arises under UK law, where there is no express provision dealing with recommendations. Section 123(1) of the Financial Services and Markets Act 2000 (FSMA) goes somewhat further and covers the situation where an insider encourages a third party to deal, by taking or "refraining from taking any action". It would seem that a positive recommendation is not required to fall under this provision: it could cover failure to warn against a proposed deal when asked for advice. Nor does it seem necessary that the third party should be given any inside information, apart from being encouraged to buy or sell "X". The same applies to the Netherlands, where the provision in Article 3(b) MAD that the third party should be recommended or induced to acquire or dispose of the securities "on the basis of" inside information, does not seem to have been implemented.

1.14 Secondary Insiders

All the Member States examined now treat primary and secondary insiders in the same way. Since secondary insiders are now subject to the same prohibitions as primary insiders under Article 3 MAD, (unlike the IDD), there is no reason to distinguish between them under domestic law, provided that the secondary insider knows or ought to have known that the information was inside information. The sanctions which apply in the case of breach may, however, differ as between primary and secondary insiders, as is the case in Germany.

2 United Kingdom

2.1 Introduction

It was only at the third attempt in 1980 that insider dealing legislation finally reached the statute book in the UK. Two earlier Bills fell in 1977 and 1978 following the collapse of the Government of the day. But finally the Companies Act of 1980 made it an offence for certain persons to deal in securities when they had "unpublished price sensitive information". The 1980 Act applied to Great Britain but not to Northern Ireland. Those prohibited from dealing were those individuals who were "knowingly connected" with the company, tippees, Crown servants and their tippees. The Act also treated a person contemplating a takeover bid for a particular company as a primary insider in relation to the offeree company, if the fact of the offer constituted unpublished price sensitive information.

Part V of the 1980 Act was re-enacted, with minor amendments, in the 1985 Company Securities (Insider Dealing) Act 1985, which was subsequently amended by the Financial Services Act 1986. The EC Insider Dealing Directive was adopted in 1989[3] and implemented in the UK by Part V of the Criminal Justice Act 1993. The approach adopted in the Criminal Justice Act follows that in the EC Insider Dealing Directive (IDD) in that it treats insider dealing as an abuse of the market rather than as a breach of the insider's fiduciary obligations to the company. From now on, insider dealing would be regulated under securities legislation rather than company law.

The Criminal Justice Act made it an offence for an insider to:

- deal in price-affected securities on the basis of inside information
- encourage another person to deal; and
- disclose inside information to a third party.

2.2 Legislation implementing the Insider Dealing Directive

Definition of Inside Information

Article 1(1) IDD	**Section 56(1),Criminal Justice Act 1993**
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	"…Inside information" means information which - relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally; is specific or precise; has not been made public; and if it were made public would be likely to have a significant effect on the price of any securities

[3] Directive 89/592/EEC of 13 November 1989, OJ 1989 L334/32.

Section 56(2)
For the purposes of this section "price" includes value.

Section 58 (2)
Information is made public if -
it is published in accordance with the rules of a regulated market for the purpose of informing investors and their professional advisers;
it is contained in records which by virtue of any enactment are open to inspection by the public;
it can be readily acquired by those likely to deal in any securities -
i) to which the information relates, or
ii) of an issuer to which the information relates; or
it is derived from information which has been made public.

Section 58(3)
Information may be treated as made public even though -
it can be acquired only by persons exercising diligence or expertise;
it is communicated to a section of the public and not to the public at large;
it can be acquired only by observation;
it is communicated only on payment of a fee; or
it is published only outside the United Kingdom.

Comment
The definition in the CJA includes "specific or precise" information as opposed to "information of a precise nature" in the IDD. It has been argued that this formulation will catch information that a particular company's results will be much better than forecast, on the basis that this is specific rather than precise information.[4] According to this interpretation, for the information to be precise, the percentage rise would need to be known.

The definition of "information relating to an issuer" is expanded by section 60(4) of the CJA to include not only information about the company, but also information which may affect the company's business prospects. This could include information about a company's major customers, suppliers or competitors.

Section 58 of the CJA expands on the meaning of information which has been "made public". From this it is clear that information communicated to a section of the public, for example, market professionals, will be treated as having been made public, even though the private investor may be totally unaware of the information.

[4] See the statement of the Economic Secretary to the Treasury in the Report of the Standing Committee on the Criminal Justice Bill, HC Standing Committee B, p.175.

Definition of Transferable Securities

Article 1(2)IDD
"Transferable securities" shall mean:
shares and debt securities, as well as securities equivalent to shares and debt securities;
contracts or rights to subscribe for, acquire or dispose of securities referred to in (a)
futures contracts, options and financial futures in respect of securities referred to in (a)
when admitted to trading on a market which is regulated and supervised by authorities recognised by public bodies, operates regularly and is accessible directly or indirectly to the public.

Section 54 and Schedule 2, Criminal Justice Act 1993
Securities to which Part V (Insider Dealing) applies:
shares
debt securities
warrants
depositary receipts
options
futures
contracts for differences

Section 60 , Criminal Justice Act 1993
…"regulated market" means any market, however operated, which, by an order made by the Treasury, is identified (whether by name or by reference to criteria prescribed by the order) as a regulated market…

Comment
Here again the definition is broadened to include Government and local authority debt securities, and relevant futures, options and contracts for differences, in line with the IDD. It is clear from the definition of the offence of insider dealing (see below) that the legislation covers dealing on a regulated market or off-market deals involving a professional intermediary. The Insider Dealing (Securities and Regulated Markets) Order 1994[5] lists the regulated markets for the purposes of the insider dealing provisions and imposes the further condition that the securities covered by the insider dealing prohibition must be either officially listed within the EEA or admitted to trading on a regulated market within the EEA.

Definition of Insider and Insider Dealing

Article 2(1)IDD
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

Section 52 Criminal Justice Act 1993
1) An individual who has inside information as an insider is guilty of insider dealing if… he deals in securities that are price-affected securities in relation to the information

Section 57
1) A person has information as an insider if and only if -
a) it is, and he knows that it, inside information, and
b) he has it, and knows that he has it, from an inside source.
2) For the purposes of subsection 1, a person has information from an inside

[5] SI 1994/187.

or indirectly, transferable securities of the issuer or issuers to which that information relates.

source if and only if -
a) he has it though -
i) being a director, employee or shareholder of an issuer of securities; or
ii) having access to the information by virtue of his employment, office or profession; or
b) the direct or indirect source of his information is a person within a)

Comment
Under the CJA, a person can only be an insider if he knows that the information is inside information and that it has come from an inside source. UK law thus does not distinguish between primary and secondary insiders; both are subject to the ban on insider dealing, encouraging and disclosing. Shareholders are, for the first time, regarded as an "inside source" in accordance with the IDD.

The definition of "dealing" in securities extends to the acquisition and disposal of securities, whether as principal or as agent and to the procurement of an acquisition or disposal by a third party.[6]

Although section 52 does not require the prosecution to show that the insider dealing took place on the basis of the inside information, it is a defence if the insider can show that he would have dealt, even if he had not had the information.[7]

Corporate Insiders

Article 2(2) IDD
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.

Comment
The CJA applies only to individuals,[8] so the prohibition applies automatically to the insiders who are natural persons.

[6] S.55, Criminal Justice Act 1973.
[7] S.53(2)(c), Criminal Justice Act 1973.
[8] See S.52, Criminal Justice Act 1973.

Transactions Effected through Intermediaries

Article 2(3)IDD	**Section 52, Criminal Justice Act, 1993**
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.	[The offence of insider dealing occurs if] the acquisition or disposal occurs on a regulated market, or… the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

Comment
The UK chose to take advantage of the Member State option in Article 2(3) of the IDD. The prohibition on insider dealing only applies where the person dealing relies on a professional intermediary[9] or where the deal is executed on a regulated market. Off-market deals between non-professionals are not caught.

Exemption for Public Debt Management

Article 2(4)IDD	**Section 63, Criminal Justice Act, 1993**
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.	Section 52 [the offence of insider dealing] does not apply to anything done by an individual acting on behalf of a public sector body in pursuit of monetary policies or policies with respect to exchange rates or the management of public debt or foreign exchange reserves.

Comment
The UK has taken full advantage of the IDD exemption for public debt management.

Disclosing or Procuring

Article 3 IDD	**Section 52(2), Criminal Justice Act 1993**
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	An individual who has information as an insider is also guilty of insider dealing if - a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that

[9] See s59(4) Criminal Justice Act, which sets out the circumstances under which a person dealing in securities "relies on a professional intermediary".

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 in Article 1(2) in fine.

the dealing would take place in the circumstances mentioned in subsection (3); or
b) he discloses the information otherwise than in the proper performance of the functions of his employment, office or profession to another person

Comment
The CJA provisions in relation to encouraging or disclosing go beyond those of the IDD. Whereas Article 3 of the IDD prohibits recommending or procuring a third party to deal "on the basis of that inside information", the CJA prohibits mere encouragement of a third party to buy "X" where the third party is unaware that these are price-affected securities.

Secondary Insiders

Article 4 IDD
Each Member State shall also impose the prohibition in Article 2 [on insider dealing] 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.

Section 57, Criminal Justice Act, 1993
A person has information as an insider if and only if -
a) it is, and he knows that it is, inside information, and
b) he has it, and knows that he has it, from an inside source.
A person has information from an inside source if and only if -
a) he has it through -
i) being a director, employee or shareholder of an issuer of securities; or
ii) having access to the information by virtue of his employment, office or profession; or
b) the direct or indirect source of his information is a person within paragraph a.

Comment
Although the IDD divides insiders into primary insiders and secondary insiders, the UK implementing legislation treats any person who knowingly has inside information which he knows has come from an inside source, albeit indirectly, as an insider. To that extent UK law goes further than the IDD, since secondary insiders are only required to be subject to the ban on dealing. Under UK law, they are also subject to the prohibition on encouraging or disclosing.

2.3 From the Criminal Justice Act 1993 to the Financial Services and Markets Act 2000

It proved extremely difficult to prosecute cases of insider dealing successfully under the criminal law. In addition, the powers of the regulatory bodies under the Financial Services Act 1986 in relation to activities which fell short of criminal behaviour extended only to authorised persons and, in some cases, key employees. The Financial Services and Markets Act 2000 (FSMA) provided the opportunity, both to reform the regulatory structure with the transfer of enhanced regulatory powers to the Financial Services Authority (FSA) and also to overhaul the substantive law. FSMA included provisions giving the FSA the power to impose civil sanctions, including fines, on persons engaging in market abuse. The concept of market abuse included insider dealing, though the type of behaviour targeted differed somewhat from that caught by the criminal law, which continued in force. FSMA required the FSA to draw up a Code of Market Conduct, indicating which types of conduct would amount to market abuse and the defences or "safe harbours" available.

2.4 Implementation of the Market Abuse Directive

The adoption of the Market Abuse Directive in January 2003 inevitably entailed some changes in the FSMA regime. The MAD provisions in relation to insider dealing were similar to but not identical to those in the market abuse regime and the Government chose to adapt the UK regime to comply with the directive, but to maintain any UK requirements which went beyond those in the directive. The Treasury included, for example, an additional super-equivalent offence in the implementing legislation, of misuse of relevant information not generally available, in order to avoid any narrowing of the previous market abuse regime.[10] MAD was finally implemented in the UK through the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005[11] and through changes to FSA rules. All the necessary amendments came into force on July 1, 2005, (apart from some provisions which came into force on 17 March 2005) some nine months after the deadline set in MAD for implementation.

2.5 Legislation implementing the Market Abuse Directive

Definition of Inside Information, as implemented by Commission Directive 2003/124/EC[12]

Article 1(1) Market Abuse Directive

"Inside information" shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Section 118C, Financial Services and Markets Act 2000 ("FSMA")

(2) In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which -
is not generally available
relates directly or indirectly,
to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and would, if generally available, be likely to have a

[10] S.118(4) FSMA.
[11] Financial Services and Markets Act 2000(Market Abuse) Regulations 2005, SI 2005/381.
[12] OJ 2003 L339/70.

Commission Directive 2003/124

Article 1

1.For the purpose of applying point 1 of Article 1 of Directive 2003/6/EC, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.

2. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, "information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments" shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions.

significant effect on the price of the qualifying investments or on the price of related investments.

5) Information is precise if it -

a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and

b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.

6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.

Comment

Section 118 C defines inside information as information which “is not generally available” as opposed to the MAD definition of information “which has not been made public”.[13] The FSA in its Code of Market Conduct[14] lists several factors which are to be taken into account in determining whether or not information is generally available (and therefore not inside information). It endorses the interpretation in Recital 31 of MAD that research and estimates developed from publicly available data should not be regarded as inside information and makes it clear that it is not relevant when considering whether information is generally available, that it is only generally available outside the UK.

Section 118C fully implements Article 1(1) MAD and Commission Directive 2003/124/EC,[15] which defines what is meant by "precise" and "likely to have a significant effect on the prices of financial instruments" in Article 1(1) MAD.

[13] The previous text of s118 FSMA referred to "information which is not generally available to those using the market."

[14] MAR 1.2.12E.

[15] Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC as regards the definition and public disclosure of inside information and the definition of market manipulation.

Financial instruments covered

Article 1(3) , Market Abuse Directive
"Financial instrument" shall mean:
- transferable securities as defined in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field,
- units in collective investment undertakings
- money market instruments,
- financial-futures contracts, including equivalent cash-settled instruments,
- forward interest-rate agreements,
- interest-rate, currency and equity swaps,
- options to acquire or dispose of any instrument falling into these categories, including equivalent cash-settled instruments. This category includes in particular options on currency and n interest rates,
- derivatives on commodities,
- any other instrument admitted to trading on a regulated market in a Member State or for which a request for admission to trading has been made.

Article 4, Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, as amended by Regulation 10 of the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005

There are prescribed, as qualifying investments in relation to the markets prescribed by article 4, all financial instruments within the meaning given in Article 1(3) of Directive 2003/6/EC [on Market Abuse].

Comment
Regulation 10 amends the Prescribed Markets and Qualifying Investments Order[16] to include all regulated markets within the meaning of Article 1(13) of the Investment Services Directive[17] and amends Part 8 FSMA to include all financial instruments within the meaning of Article 1(3) MAD. The UK will however, continue to apply its market abuse provisions to AIM and OFEX which are not ISD regulated markets.

Inside Information in relation to Commodity Derivatives, as applied by Commission Directive 2004/72/EC[18]

Article 1(1) , Market Abuse Directive
In relation to derivatives on commodities, "inside information" shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets.

Article 118C (3), FSMA
In relation to qualifying investments or related investments which are commodity derivatives, inside information is information of a precise nature which is not generally available relates, directly or indirectly, to one or more such derivatives, and users of markets on which such derivatives are traded would expect to receive in accordance with any accepted market practices on those markets.

[16] SI 2001/1996.
[17] Directive 93/22/EEC, OJ 1993 L141/27.
[18] OJ 2004 L 162/70

Article 4, Commission Directive 2004/72/EC implementing the Market Abuse Directive

Users of markets on which derivatives on commodities are traded, are deemed to expect to receive information relating, directly or indirectly, to one or more such derivatives which is:

routinely made available to the users of those markets

required to be disclosed in accordance with legal or regulatory provisions, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market.

Article 118C (7)

For the purposes of subsection 3(c), users of markets on which investments in commodity derivatives are traded are to be treated as expecting to receive information relating directly or indirectly to one or more derivatives in accordance with any accepted markets practices, which is:

routinely made available to the users of those markets

required to be disclosed in accordance with any statutory provision, market rules, or contracts or customs on the relevant underlying commodity market or commodity derivatives market.

Comment

The UK has copied out the MAD definition of "inside information in relation to commodity derivatives", as implemented by Commission Directive 2004/72/EC.[19] What is important in relation to commodity derivatives is what market participants expect to receive in the way of information.

Inside Information in Relation to Intermediaries

Article 1(1) Market Abuse Directive

For persons charged with the execution of orders concerning financial instruments, "inside information" shall also mean information conveyed by a client and related to the client's pending orders, which is of a precise nature, which relates directly or indirectly to one or more issuers of financial instruments or one or more financial instruments and which if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Section 118C (4)

In relation to a person charged with the execution of orders concerning any qualifying investments or related investments, inside information includes information conveyed by a client and related to the client's pending orders which -

is of a precise nature

is not generally available

relates, directly or indirectly, to one or more issuers of qualifying investments or to one or more qualifying investments, and

would, if generally available, be likely to have a significant effect on the price of those qualifying investments or related investments.

Comment

This provision in MAD which is designed to provide the basis for outlawing front – running (dealing ahead of client orders)[20] has been implemented verbatim by the UK.

[19] See n. 16 above.

[20] See MAR 1.3.2.

Definition of Insider Dealing

Article 2(1) Market Abuse Directive

Member States shall prohibit any person referred to in the second subparagraph who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.

Section 118, FSMA

(1) …market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) which -

a) occurs in relation to -

i) qualifying investments admitted to trading on a prescribed market,

ii) qualifying investments in respect of which a request for admission to trading on such a market has been made, or

iii) in the case of subsection (2) or (3) behaviour, investments which are related investments in relation to such qualifying investments, and

b) falls within any one of the types of behaviour set out in subsections (2) to(8)

(2) The first type of behaviour is where an insider deals, or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.

Comment

Under the IDD provisions, an insider was prohibited from "taking advantage of that information with full knowledge of the facts." MAD requires only that the insider uses the information to deal. The qualification that he do so "in full knowledge of the facts" has disappeared.

The UK maintains the requirement that the dealing must be carried out "on the basis of" inside information in line with the MAD requirement that the insider dealer must "use" the information when dealing. Dealing when in possession of inside information is not sufficient to constitute the offence. Thus dealing will not be on the basis of inside information if the decision to deal was made before the person was in possession of the relevant information, or if the person is dealing to satisfy a legal or regulatory obligation which came into being before he possessed the relevant inside information. Whether the latter factor would serve to excuse an insider who sells relevant securities to pay a tax demand is not clear.

Both on- and off-market transactions in traded instruments must be covered; the IDD option to exclude off-market deals which did not involve an intermediary was not retained in MAD.

Definition of Insider

Article 1(1) Market Abuse Directive
The first subparagraph shall apply to any person who possesses that information:
by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or
by virtue of his holding in the capital of the issuer;
by virtue of his having access to the information through the exercise of his employment , profession or duties; or
by virtue of his criminal activities.

Section 118B
…An insider is any person who has inside information -
as a result of his membership of an administrative, management or supervisory body of an issuer of qualifying investments,
as a result of his holding in the capital of an issuer of qualifying investments,
as a result of having access to the information through the exercise of his employment , profession or duties,
as a result of his criminal activities, or
which he has obtained by other means and which knows or could reasonably be expected to know, is inside information

Comment
It is not necessary for an insider, as defined in section 118B (a) - (d) to know that the information in his possession is inside information, but a person who obtains inside information by other means[21] (section 118B (e)) will only be considered to be an insider if he knows or ought to have known that he obtained the information from an insider and if he knows or ought to have known that it is inside information. This is consistent with MAD which makes the same distinction between primary and secondary insiders. No other distinction is made between secondary insiders, as defined in Article 4 MAD, and primary insiders under UK law.

Corporate Insiders

Article 2(2) Market Abuse Directive
Where the [insider] is a legal person, the prohibition laid down… shall also apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

Comment
Whereas the CJA 1993 applies only to individuals, the FSMA provisions on insider dealing apply to "any person", i.e. both individuals and bodies corporate (companies). The FSA Code of Market Conduct likewise applies to both natural and legal persons. “Person” is defined in the FSA glossary as including natural[22] and legal[23] persons.

[21] S.118(e) FSMA.
[22] i.e. individuals, English and Welsh and Northern Irish partnerships.
[23] i.e. companies and Scottish partnerships.

Completion of Transactions

Article 2 (3), Market Abuse Directive

This Article shall not apply to transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information.

Comment
The UK has not implemented this exception expressly, taking the view that it is unnecessary to do so since the deal would not be "on the basis of" the inside information and it would not therefore be caught under section 118(2) FSMA.[24]

Disclosing or Recommending

Article 3, Market Abuse Directive
Member States shall prohibit any person subject to [the insider dealing prohibition] from:
disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;
recommending or inducing another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

Section 118, FSMA
The second [type of behaviour constituting market abuse] is where an insider discloses inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duties.

Section 123(1) FSMA
If the [FSA] is satisfied that a person ("A")
(b) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse,
it may impose on him a penalty of such amount as it considers appropriate.

Comment
Arguably, "encouraging" another person to deal requires less than an outright recommendation. It is unclear whether failure to oppose a proposed transaction when asked for advice would be sufficient to constitute "encouragement". Section 123 (1) also appears to catch recommendations or inducements which do not involve the disclosure of inside information, such as a recommendation to buy or sell "X".

[24] See MAR 1.3.3.

Secondary Insiders

Article 4, Market Abuse Directive
Member States shall ensure that Articles 2 and 3 [the insider dealing prohibition] also apply to any person, other than the persons referred to in those Articles, who possesses inside information while that person knows, or ought to have known, that it is inside information.

Section 118B, FSMA
An insider is a person who has inside information -
e) which he has obtained by other means and which he knows, or could reasonably be expected to know, is inside information.

Comment
As discussed above, the UK includes secondary insiders in the definition of insider in section 118B, but subject to the qualification that he knows or ought to have known that the information is inside information. This achieves exactly the same result as the MAD provisions, since both primary and secondary insiders are subject to the same prohibitions on dealing and disclosing and recommending in Articles 2 and 3 MAD.

3 Germany

3.1 Introduction

The law before the introduction of legislation implementing the Insider Dealing Directive[25]

The German Commission of Stock Exchange Experts (Börsensachverständigenkommission) enacted the Insider Dealing Guidelines (Insiderhandelsrichtlinien) on 13 November 1970.[26] They were amended in 1976 and 1988. The Guidelines were a voluntary code of conduct which was enforceable only as a matter of contract.[27] In listed companies members of the management or supervisory board were often required to sign such an undertaking.

The German Insider Dealing Guidelines, however, did not play an important role and were not rigorously enforced. Until 1983 only 18 investigation procedures were reported.[28] One of the most well-known cases is the Steinkühler case.[29] Steinkühler was president of the trade union 'IG Metall' and, at the same time, a member of the supervisory board of Daimler-Benz AG. He was suspected to have used non-public information about a share transfer in his favour and in favour of third parties. As a result Steinkühler had to resign from his posts but was not held responsible under the Insider Dealing Guidelines as he had not signed an undertaking.

Main changes required to implement IDD

The Insider Dealing Directive (IDD) was implemented in Sections 12-20 and 38-40 of the German Securities Trading Act (Wertpapierhandelsgesetz, WpHG) of 26 July 1994. The WpHG was part of the Second Act on the Promotion of the Capital Market (Zweites Finanzmarktförderungsgesetz).[30] The WpHG came into force on 1 January 1995 and introduced a new regime which is very similar to the system of the IDD. It completely replaced the old voluntary Insider Dealing Guidelines.[31] Germany failed to meet the deadline for implementation of the Directive because of disputes between the Federal Government and the states (Länder) about their respective legislative and executive competences. The Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin)[32] in Frankfurt am Main was formed on 1 January 1995 and is responsible for the supervision of insider dealing. The BaFin is a separate federal authority reporting to the Federal Ministry of Finance

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[25] Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, Official Journal L 334/30.

[26] M Peltzer, *Die neue Insiderregelung im Entwurf des Zweiten Finanzmarktförderungsgesetzes* [1994] ZIP 746; KB Caspari, *Anlegerschutz in Deutschland im Lichte der Brüsseler Richtlinie* [2005] NZG 98, 101. The Insider Trading Guidelines are reprinted in KJ Hopt and MR Will *Europäisches Insiderrecht* (1973)

[27] M Peltzer (n 2) 746; KB Caspari (n 2) Fn 46.

[28] M Peltzer (n 2) 746; C Ott and HB Schaefer, *Ökonomische Auswirkungen der EG-Insider-Regulierung in Deutschland,* in: *Zeitschrift für Bankrecht und Bankwirtschaft* (1991) ZBB 226, 227 (19 cases).

[29] KJ Hopt Labor *Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe* 14 (1994) Int Rev L & Econ 203, 206.

[30] Gesetz über den Wertpapierhandel und zur Änderung börsenrechtlicher und wertpapierrechtlicher Vorschriften - Zweites Finanzmarktförderungsgesetz, [1994] BGBl I 1749.

[31] S Grundmann *Europäisches Schuldvertragsrecht* (Walter de Gruyter Berlin New York 1999) 768.

[32] Initially the task was fulfilled by the Bundesaufsichtsamt für den Wertpapierhandel – BAWe. From 1 May 2002, the BAWe was merged with the Federal Banking Supervisory Office (Bundesaufsichtsamt für das Kreditwesen - BAKred) and the Federal Insurance Supervisory Office (Bundesaufsichtsamt für das Versicherungswesen - BAV) to become the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin).

(Bundesfinanzministerium).[33] The dispute about the competences of the BaFin arose from the provisions of the German constitution (Grundgesetz) that give the Länder the competence to supervise stock exchanges. Under the WpHG the local authorities (Börsenaufsichtsbehörden) of the Länder have to work closely together with the BaFin.[34]

3.2 Legislation implementing the Insider Dealing Directive

Definition of Inside Information

WpHG 1994 German text	WpHG 1994 English Translation
§ 13 Insider (1)...Kenntnis von einer nicht öffentlich bekannten Tatsache hat, die sich auf einen oder mehrere Emittenten von Insiderpapieren oder auf Insiderpapiere bezieht und die geeignet ist, im Falle ihres öffentlichen Bekanntwerdens den Kurs der Insiderpapiere erheblich zu beeinflussen (Insidertatsache).	Section 13 Inside Information (1) …a fact which has not been made public relating to one or more issuers of insider securities, or to insider securities, which, if it were made public, would be likely to have a significant effect on the price of the insider security (inside information).
(2) Eine Bewertung, die ausschließlich aufgrund öffentlich bekannter Tatsachen erstellt wird, ist keine Insider- tatsache, selbst wenn sie den Kurs von Insiderpapieren erheblich beeinflussen kann.	(2) An analysis based entirely on publicly-known information shall not be regarded as inside information, even if it may have a significant effect on the price of insider securities.

Comment
The definition in Section 13(1) WpHG is different to the definition in Art 1(1) of the IDD. It refers to the term 'fact' (Tatsache) instead of inside 'information'. The word 'information' has specific connotations in the German language. To enable a distinction to be drawn between information and pure rumours and opinions, the German legislator used a different term. The word 'fact' (Tatsache) can however be interpreted in the light of the Directive. Such an interpretation would include forecasts and evaluations which would be covered by the Directive. An example would be the forecast of a board member that the share price will increase in the future.

The term 'precise' is not used in Section 13(1) but the term "fact" includes only precise information. Section 13(2) excludes an analysis based entirely on publicly-known information. An evaluation based on insider facts will therefore be covered.

Another difference is not reflected in the wording of Section 13(1) but in the explanatory memorandum accompanying the draft law. According to this, the term "public" (öffentlich) should be interpreted as including a section of the public (Bereichsöffentlichkeit). In contrast to one interpretation of the IDD, under German law "public" would include an information system which is used only by direct market participants or an electronic press information system such as Reuters or Deutsche

[33] Sec 3-11 WpHG.
[34] Sec 6 WpHG and Sec 1 Börsengesetz.

Presse Agentur (dpa) provided that an unlimited number of persons have the possibility of access.

As for the significant effect on the price of the insider security, under the WpHG 1994 it was generally accepted that certain thresholds such as 5% for shares of DAX companies could be used as a measure of "significant effect".[35]

Definition of Transferable Securities

WpHG 1994 German text	WpHG 1994 English Translation
§ 2 Begriffsbestimmungen (1) Wertpapiere im Sinne dieses Gesetzes sind, auch wenn für sie keine Urkunden ausgestellt sind, 1. Aktien, Zertifikate, die Aktien vertreten, Schuldver- schreibungen, Genußscheine, Optionsscheine, 2. andere Wertpapiere, die mit Aktien oder Schuldver- schreibungen vergleichbar sind, wenn sie auf einem Markt gehandelt werden können, der von staatlich anerkannten Stellen geregelt und überwacht wird, regelmäßig stattfindet und für das Publikum un- mittelbar oder mittelbar zugänglich ist.	Section 2 Definitions (1) Securities within the meaning of this Act, whether or not represented by an instrument, are 1. shares, certificates representing shares, bonds, participation certificates, warrants 2. other securities which are comparable to shares or bonds, if they can be traded 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.
§ 12 Insiderpapiere (1) Insiderpapiere sind Wertpapiere, die 1. an einer inländischen Börse zum Handel zugelassen oder in den Freiverkehr einbezogen sind, oder 2. in einem anderen Mitgliedstaat der Europäischen Gemeinschaften oder einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschafts- raum zum Handel an einem Markt im Sinne des § 2 Abs. 1 zugelassen sind. Der Zulassung zum Handel an einem Markt im Sinne von § 2 Abs. 1 oder der Einbeziehung in den Freiverkehr steht gleich, wenn der Antrag auf Zulassung oder Einbeziehung gestellt oder öffentlich angekündigt ist. (2) Als Insiderpapiere gelten auch 1. Rechte auf Zeichnung, Erwerb oder Veräußerung von Wertpapieren, 2. Rechte auf Zahlung eines Differenzbetrages, der sich an der	Section 12 Insider securities (1) Insider securities are securities which are 1. admitted to official trading on a German stock exchange or traded on the free market (Freiverkehr), or 2. admitted to trading on an organised market under Section 2(1) in another Member State of the European Communities or in another of the Contracting States to the Agreement on the European Economic Area. Securities shall be deemed to be admitted to trading on a market under Section 2(1) or to be traded on the free market (Freiverkehr) if the application for such admission or such trading has been made or publicly announced. (2) The following shall also be regarded as insider securities: 1. rights to subscribe for, acquire or dispose of securities; 2. rights to the payment of a differential

[35] HD AssmannWertpapierhandelsgesetz (3rd ed Köln Schmidt) Section 13 para 69; BT-Drucks 12/6679 p 47.

Wertentwicklung von Wertpapieren bemißt,

3. Terminkontrakte auf einen Aktien- oder Rentenindex oder Zinsterminkontrakte (Finanzterminkontrakte) so- wie Rechte auf Zeichnung, Erwerb oder Veräußerung von Finanzterminkontrakten, sofern die Finanztermin-kontrakte Wertpapiere zum Gegenstand haben oder sich auf einen Index beziehen, in den Wertpapiere einbezogen sind,

4. sonstige Terminkontrakte, die zum Erwerb oder zur Veräußerung von Wertpapieren verpflichten,

wenn die Rechte oder Terminkontrakte in einem Mitglied- staat der Europäischen Gemeinschaften oder einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum zum Handel an einem Markt im Sinne des § 2 Abs. 1 zugelassen oder in den Freiverkehr einbezogen sind und die in den Nummern 1 bis 4 genannten Wertpapiere in einem Mitgliedstaat des Abkommens über den Europäischen Wirtschaftsraum zum Handel an einem Markt im Sinne des § 2 Abs. 1 zu- gelassen oder in den Freiverkehr einbezogen sind. Der Zulassung der Rechte oder Terminkontrakte zum Handel an einem Markt im Sinne des § 2 Abs. 1 oder ihrer Einbe- ziehung in den Freiverkehr steht gleich, wenn der Antrag auf Zulassung oder Einbeziehung gestellt oder öffentlich angekündigt ist.

amount calculated on changes in the value of securities;

3. forward contracts on a share or fixed-interest security index or forward interest-rate contracts (financial futures) and rights to subscribe for, acquire or dispose of financial futures in so far as such financial futures are concerned with securities or relate to an index which includes securities;

4. other forward contracts entailing a commitment to acquire or dispose of securities;

if the rights or forward contracts are admitted to trading on a market under Section 2 in a Member State of the European Union or in another of the Contracting States to the Agreement on the European Economic Area and the securities referred to in numbers 1. to 4. above are admitted to trading on market under Section 2 or are traded on the unofficial market in a Contracting State to the Agreement on the European Economic Area. The rights or forward contracts shall be deemed to be admitted to trading on an organised market or to be traded on the free market (Freiverkehr) if the application for such admission or such trading has been made or publicly announced.

Comment

The definition of the relevant market in Section 12 WpHG is broader than the scope of Art 1(2) IDD.[36] Section 12 WpHG also includes securities that are traded on the free market (Freiverkehr), a market which is only privately regulated.[37] Furthermore, the definition catches securities which are not already admitted to trading but where an application for admission has been made or publicly announced.

[36] S Grundmann (n 8) 770.

[37] BT-Drs 12/6679 p 45.

Definitions of Insider and Insider Dealing

WpHG 1994 German text	WpHG 1994 English Translation
§ 13 Insider (1) Insider ist, wer 1. als Mitglied des Geschäftsführungs- oder Aufsichtsorgans oder als persönlich haftender Gesellschafter des Emittenten oder eines mit dem Emittenten verbundenen Unternehmens, 2. aufgrund seiner Beteiligung am Kapital des Emittenten oder eines mit dem Emittenten verbundenen Unternehmens oder 3. aufgrund seines Berufs oder seiner Tätigkeit oder seiner Aufgabe bestimmungsgemäß Kenntnis von einer (Insidertatsache [siehe Defintion oben) hat...	Section 13 Insiders (1) An insider is any person who 1. by virtue of his membership of the management or supervisory body of the issuer, or as a personally liable partner in the issuer or in an undertaking associated with the issuer, 2. by virtue of his holding in the capital of the issuer or of an undertaking associated with the issuer, or 3. by virtue of his profession, employment or duties directly in his professional capacity possesses … (inside information). [see definition above]
§ 14 Verbot von Insidergeschäften (1) Einem Insider ist es verboten, 1. unter Ausnutzung seiner Kenntnis von einer Insidertatsache Insiderpapiere für eigene oder fremde Rechnung oder für einen anderen zu erwerben oder zu veräußern	Section 14 Prohibition on Insider Dealing Insiders shall be prohibited from 1. taking advantage of their knowledge of inside information to acquire or dispose of insider securities for their own account or for the account of or on behalf of a third party

Comment
Like the IDD, the WpHG distinguishes between primary and secondary insiders. The primary insider is called 'Insider'. For primary insiders the definition is broader than Art 2(1) IDD. It also includes members of a company board in any company in a group of companies (Section 15 Aktiengesetz). Section 13(1) is also narrower than Art 2(1) IDD in that Section 13(1) requires not only that a primary insider receives the fact by virtue of his board membership, shareholding or employment but also that the information has been intended to reach him. Persons that receive the information only accidentally in the course of their work would be excluded (e.g. failure of Chinese walls). These persons would be covered by the Directive but not by the WpHG as primary insiders. The WpHG would treat them as secondary insiders.

Corporate insiders

Comment
Section 13(1) also covers companies. There is no separate provision.

Transactions effected through intermediaries

Comment
The prohibition applies also to professional intermediaries. The German legislator did not use the option under Art 2(3) S2 IDD.

Exemption for public debt management etc

WpHG 1994 German text	WpHG 1994 English Translation
§ 20 Ausnahmen Die Vorschriften dieses Abschnitts sind nicht auf Geschäfte anzuwenden, die aus geld- oder währungs- politischen Gründen oder im Rahmen der öffentlichen Schuldenverwaltung vom Bund, einem seiner Sonderver- mögen, einem Land, der Deutschen Bundesbank, einem ausländischen Staat oder dessen Zentralbank oder einer anderen mit diesen Geschäften beauftragten Organisation oder mit für deren Rechnung handelnden Personen getätigt werden.	Section 20 Exceptions The provisions of this Part (Sections 12-20) shall not apply to transactions carried out in pursuit of monetary, exchange rate or public debt management policies by the Federation, one of its special funds, a Land, the Deutsche Bundesbank, a foreign State or its central bank or other body commissioned to conduct such transactions or with any person acting for their account.

Disclosing or procuring

WpHG 1994 German text	WpHG 1994 English Translation
§ 14 Verbot von Insidergeschäften (1) Einem Insider ist es verboten, ... 2. einem anderen eine Insidertatsache unbefugt mitzuteilen oder zugänglich zu machen, 3. einem anderen auf der Grundlage seiner Kenntnis von einer Insidertatsache den Erwerb oder die Veräußerung von Insiderpapieren zu empfehlen.	Section 14 Prohibition of insider dealing (1) Insiders shall be prohibited from … 2. disclosing or making available inside information to a third party without authority to do so; 3. recommending a third party, on the basis of their knowledge of inside information, to acquire or dispose of insider securities.

Comment
As indicated above, Section 14(1) WpHG applies only to primary insiders as does the IDD). But German law catches fewer primary insiders because of the definition in Section 13(1). Other insiders are treated as secondary insiders (third parties). Section 14(1) Nr. 1 WpHG includes the prohibition to acquire or dispose of insider securities ("1. taking advantage of their knowledge of inside information to acquire or dispose of insider securities for their own account or for the account or on behalf of a third party;"). Under Section 14(2) WpHG this prohibition also applies to secondary insiders (see below).

Secondary Insiders

WpHG 1994 German text	WpHG 1994 English Translation
§ 14 Verbot von Insidergeschäften (2) Einem Dritten, der Kenntnis von einer Insidertatsache hat, ist es verboten, unter Ausnutzung dieser Kenntnis Insiderpapiere für eigene oder fremde	Section 14 Prohibition of insider dealing (2) A third party who has knowledge of inside information shall be prohibited from taking advantage of that knowledge to acquire or dispose of insider securities

Rechnung oder für einen anderen zu erwerben oder zu veräußern.	for his own account or for the account or on behalf of others.

Comment
The definition of secondary insiders in the WpHG is wider than the IDD. The information does not have to be received even indirectly from a primary insider.[38] Therefore, every person holding inside information is treated as a secondary insider. Following the IDD the German legislator did not extend the prohibition of Art 3 IDD to secondary insiders.

3.3 Interpretation and enforcement of the Insider Dealing Directive

The Third Financial Market Promotion Act, which came into force in 1998, granted the authorities more far-reaching powers to obtain information in connection with investigations into insider trading and extended the notification requirements of parties holding voting rights in exchange-listed enterprises.

In a decision of 6 November 2003 the Federal Supreme Court (Bundesgerichtshof, BGH)[39] had to deal with the question of whether 'scalping' is a form of insider dealing under Section 14 WpHG. The defendants purchased financial instruments for their own account before recommending them to others and then selling at a profit on the rise in the price following the recommendation. The Regional Court held the defendants to be guilty of insider dealing under Section 13(1) No 3 and 14(1) No 1 and 38(1) WpHG. Before the decision of the Supreme Court the treatment of scalping was not clear. According to the prevailing opinion, scalping was a form of insider dealing. Others regarded scalping as a form of market manipulation. According to the Supreme Court scalping does not fall under Section 14 WpHG. The Court referred to the IDD and stated that Section 14 WpHG has to be interpreted in the light of this Directive. The Court stated that it was not the intention of the IDD also to cover facts, which the person in question produced itself. The IDD defines the term inside information as precise information. According to the Court the term information regularly includes a reference to third parties. It does however not include the intentions of the person concerned. This is different to 'front running' where the contravener receives precise information, i.e. information about an order before this order is performed, and takes advantage of this information to buy or sell the financial instrument before that. The Supreme Court further referred to the Commission proposal for the MAD and states that scalping is specifically treated by the proposal as a form of market manipulation. The German legislator had already in 2002 introduced Section 20a WpHG in advance of the MAD. Section 20a WpHG came into force on 1 July 2002. Also Section 88 BörsG covered scalping.

3.4 Main changes required to implement the Market Abuse Directive[40]

The Act to Improve Investor Protection (Anlegerschutzverbesserungsgesetz, AnSVG) of 29 October 2004 implemented the Market Abuse Directive (MAD). The provisions changing the WpHG came into force on 30 October 2004. The AnSVG also changed the composition of the Securities Council (Börsenrat). The Securities Council is an organ within the Supervisory Authority participating in the supervision of stock exchanges and other financial markets. It comprises representatives of the Federal States (Section 5 WpHG 2004).

[38] Grundmann (n 8) 771.
[39] BGH (6.11.2003) 1 StR 24/03 [2004] NJW 302.
[40] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), Official Journal L 09616.

In accordance with the terminology of the MAD the AnSVG introduces the term ‘financial instruments’ instead of ‘securities’ which was used before the AnSVG. The term financial instruments now also includes securities subscription rights as well as other instruments admitted to trading on an organised market in Germany or another member state of the European Union, or where application for admission has been made (Section 2(2b) WpHG 2004).

The term ‘insider fact’ as used in Section 13(1) WpHG 1994 is changed to the term ‘inside information’ in Section 13(1) WpHG 2004. As for the prohibition of insider dealing, the insider no longer has to ‘take advantage’ of the inside information. Now it is sufficient if the insider ‘makes use of’ the information.

Primary and secondary insiders are treated by the WpHG 2003 in the same way. Only the legal consequences of a breach of the insider prohibition are different. The disclosure of inside information by a secondary insider is now also covered by the prohibition.

3.5 Legislation implementing the Market Abuse Directive

Definition of Inside Information Art. 1(1) MAD (as applied by Article 1, Commission Directive 2003/124/EC)

WpHG 2004 German text	WpHG 2004 English Translation
§ 13 Insiderinformation (1) Eine Insiderinformation ist eine konkrete Information über nicht öffentlich bekannte Umstände, die sich auf einen oder mehrere Emittenten von Insiderpapieren oder auf die Insiderpapiere selbst beziehen und die geeignet sind, im Falle ihres öffentlichen Bekanntwerdens den Börsen- oder Marktpreis der Insiderpapiere erheblich zu beeinflussen. Eine solche Eignung ist gegeben, wenn ein verständiger Anleger die Information bei seiner Anlageentscheidung berücksichtigen würde. Als Umstände im Sinne des Satzes 1 gelten auch solche, bei denen mit hinreichender Wahrscheinlichkeit davon ausgegangen werden kann, dass sie in Zukunft eintreten werden. Eine Insiderinformation ist insbesondere auch eine Information über nicht öffentlich bekannte Umstände im Sinne des Satzes 1, die sich	Section 13 Inside information (1) Inside information is any specific information about circumstances which are not public knowledge relating to one or more issuers of insider securities, or to the insider securities themselves, which, if it became publicly known, would likely have a significant effect on the stock exchange or market price of the insider security. Such a likelihood is deemed to exist if a knowledgeable investor would take the information into account for investment decisions. The term circumstances within the meaning of sentence 1 also applies to cases which may reasonably be expected to come into existence in the future. Specifically, inside information refers to information about circumstances which are not public knowledge within the meaning of sentence 1, which
1. auf Aufträge von anderen Personen über den Kauf oder Verkauf von Finanzinstrumenten bezieht oder	1. is related to orders by third parties for the purchase or sale of financial instruments or
2. auf Derivate nach Abs. 2 Nr. 4 bezieht und bei der Marktteilnehmer erwarten würden, dass sie diese Information in Übereinstimmung mit der zulässigen Praxis an den betreffenden Märkten	2. is related to derivatives within the meaning of section 2 (2) no. 4 and which market participants would expect to receive in accordance with the accepted practice of the markets in question.

erhalten würden.

(2) Eine Bewertung, die ausschließlich auf Grund öffentlich bekannter Umstände erstellt wird, ist keine Insiderinformation, selbst wenn sie den Kurs von Insiderpapieren erheblich beeinflussen kann.

(2) A valuation based solely on information about publicly known circumstances is not inside information, even if it could have a significant effect on the price of insider securities.

Financial Instruments Covered

§ 12 Insiderpapiere

Insiderpapiere sind Finanzinstrumente,

1. die an einer inländischen Börse zum Handel zugelassen oder in den geregelten Markt oder in den Freiverkehr einbezogen sind,
2. die in einem anderen Mitgliedstaat der Europäischen Union oder einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum zum Handel an einem organisierten Markt zugelassen sind oder
3. deren Preis unmittelbar oder mittelbar von Finanzinstrumenten nach Nummer 1 oder Nummer 2 abhängt.

Der Zulassung zum Handel an einem organisierten Markt oder der Einbeziehung in den geregelten Markt oder in den Freiverkehr steht gleich, wenn der Antrag auf Zulassung oder Einbeziehung gestellt oder öffentlich angekündigt ist.

Section 12 Insider securities

Insider securities are financial instruments

1. admitted to trading on a German stock exchange or included on the regulated market (Geregelter Markt) or the regulated unofficial market (Freiverkehr);
2. admitted to trading on an organised market in another member state of the European Union or signatory to the Agreement on the European Economic Area and
3. the prices of which depend directly or indirectly on financial instruments within the meaning of nos.1 or 2.

Securities shall be deemed admitted to trading on an organised market or included on the regulated market (Geregelter Markt) or the regulated unofficial market (Freiverkehr) if the application for such admission or inclusion has been made or publicly announced.

§ 2 Begriffsbestimmungen

(1) Wertpapiere im Sinne dieses Gesetzes sind, auch wenn für sie keine Urkunden ausgestellt sind,

1. Aktien, Zertifikate, die Aktien vertreten, Schuldverschreibungen, Genussscheine, Optionsscheine und
2. andere Wertpapiere, die mit Aktien oder Schuldverschreibungen vergleichbar sind,

wenn sie an einem Markt gehandelt werden können. Wertpapiere sind auch Anteile an Investmentvermögen, die von einer Kapitalanlagegesellschaft oder einer ausländischen Investmentgesellschaft ausgegeben werden.

Section 2 Definitions

(1) Securities within the meaning of this Act, whether or not represented by a certificate, are

1. shares, certificates representing shares, bonds, profit-participation certificates, warrants and
2. other securities which are comparable to shares or bonds,

if they can be traded on a market. Investment fund units issued by a German investment company or a foreign investment company are also deemed to be securities.

(1a) Geldmarktinstrumente im Sinne dieses Gesetzes sind Forderungen, die

(1a) Money market instruments within the meaning of this Act are receivables

nicht unter Absatz 1 fallen und üblicherweise auf dem Geldmarkt gehandelt werden.

which do not come under the provisions of subsection (1) and are usually traded on the money market.

(2) Derivate im Sinne dieses Gesetzes sind als Festgeschäfte oder Optionsgeschäfte ausgestaltete Termingeschäfte, deren Preis unmittelbar oder mittelbar abhängt von

(2) Derivatives within the meaning of this Act are forward transactions in the form of futures or option contracts whose price depends directly or indirectly on

1. dem Börsen- oder Marktpreis von Wertpapieren,
2. dem Börsen- oder Marktpreis von Geldmarktinstrumenten,
3. Zinssätzen oder anderen Erträgen,
4. dem Börsen- oder Marktpreis von Waren oder Edelmetallen oder
5. dem Preis von Devisen.

1. the stock exchange or market price of securities;
2. the stock exchange or market price of money market instruments;
3. interest rates or other returns;
4. the stock exchange or market price of commodities or precious metals or
5. currency prices.

(2a) Finanztermingeschäfte im Sinne dieses Gesetzes sind Derivate im Sinne des Absatzes 2 und Optionsscheine.

(2a) Financial futures transactions within the meaning of this Act are derivatives within the meaning of subsection (2) and warrants.

(2b) Finanzinstrumente im Sinne dieses Gesetzes sind Wertpapiere im Sinne des Absatzes 1, Geldmarktinstrumente im Sinne des Absatzes 1a, Derivate im Sinne des Absatzes 2 und Rechte auf Zeichnung von Wertpapieren. Als Finanzinstrumente gelten auch sonstige Instrumente, die zum Handel an einem organisierten Markt im Sinne des Absatzes 5 im Inland oder in einem anderen Mitgliedstaat der Europäischen Union zugelassen sind oder für die eine solche Zulassung beantragt worden ist.

(2b) Financial instruments within the meaning of this Act are securities within the meaning of subsection (1), money market instruments within the meaning of subsection (1a), derivatives within the meaning of subsection (2) and securities subscription rights. Additionally, other instruments admitted to trading on an organised market within the meaning of subsection (5) in Germany or another member state of the European Union, or for which such admission has been requested, are also deemed financial instruments.

(5) Organisierter Markt im Sinne dieses Gesetzes ist ein Markt, der von staatlich anerkannten Stellen geregelt und überwacht wird, regelmäßig stattfindet und für das Publikum unmittelbar oder mittelbar zugänglich ist.

(5) An organised market within the meaning of this Act is a market which is regulated and supervised by state-approved bodies, is held on a regular basis and is directly or indirectly accessible to the public.

Comments

The AnSVG introduced a broader definition of the term inside information in Sec 13(1) WpHG 2004. The term inside fact in Sec 13(1) WpHG 2004 is now changed to the term inside information. The definition refers to information about circumstances. Under Sec 13(1) S3 the term circumstances now also applies to cases which may reasonably be expected to come into existence in the future in line with Commission Directive 2003/124/EC.

According to the Explanatory Memorandum on the government's proposal, the term information covers more than the term fact. In particular it covers also verifiable value judgments and prognoses.[41] The definition of information is however not as precise as Art 1(1) Dir 2003/124/EC. It has also been criticized that the definition in Section 14 WpHG 2004 does not make clear that information indirectly referring to the issuer or the relevant financial instruments is also covered by the WpHG 2004.[42] This can only be implied from the Explanatory Memorandum on the government proposal. The new definition will not mean major change in practice since it simply reflects the previous interpretation of the law.[43] In general, prognoses and valuations were already covered by the old definition even if it was not possible to prove them.[44] The profit forecast of a board member is one of the most cited examples.[45]

The definition of inside information also introduces a new definition of the "significant effect on the stock exchange or market price" (Kursbeeinflussungspotential). The WpHG 2004 does not refer to specific thresholds that were used in practice. According to Sec 13(1) S2 WpHG 2004 it is sufficient if a knowledgeable investor would take the information into account for investment decisions, which is in line with the Level 2 Commission Directive.[46]

Sec 13(1) WpHG 2004 also refers to the broader definition of insider securities in Sec 12(1) WpHG 2004. Insider securities are now defined as financial instruments which are further defined in Sec 2(2b) WpHG 2004. In contrast to the WpHG 1994, insider securities now also include securities subscription rights and all other instruments admitted to trading on an organised market in Germany or another member state of the European Union, or, according to Sec 12 Sentence 2 WpHG 2004, for which an application for admission to trading has been made.

Sentence 1 no 3 broadens the scope further by including financial instruments the prices of which depend directly or indirectly on financial instruments admitted to a regulated market in a EU or EEA member state, for instance securities option programmes.[47] So if the underlying security is itself admitted to trading on a regulated market, the insider dealing prohibition will apply regardless of whether the instrument itself is admitted to trading.

The exclusion in Sec 13(2) WpHG 2004 remains.[48] A valuation based solely on information about publicly known circumstances is not inside information, even if it could have a significant effect on the price of insider securities. Sec 13(1) Sentence 4 no 1 WpHG 2004 clarifies that front running can constitute insider dealing.[49]

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[41] BT-Drucks 15/3174 p 33.
[42] H Ziemons *Neuerungen im Insiderrecht und bei der Ad-hoc-Publizität durch die Marktmissbrauchsrichtlinie und das Gesetz zur Verbesserung des Anlegerschutzes* [2004] NZG 537, 538.
[43] S Koch *Neuerungen im Insiderrecht und der Ad-hoc-Publizität* [2005] Der Betrieb 267.
[44] S Koch (n 27) 268; HD Assmann (n 14) Section 13 para 33a.
[45] S Koch (n 27) 268; HD Assmann (n 14) Section 13 para 33b, 33.
[46] See also Art 1(2) Directive 2003/124/EC.
[47] Bafin *Entwurf eines Emittentenleitfadens der Bundesanstalt für Finanzdienstleistungen (BaFin)* (2004) 12, S Koch (n 27) 267.
[48] See also MAD recital 31.
[49] S Koch (n 27) 268; H Diekmann and M Sustmann *Gesetz zur Verbesserung des Anlegerschutzes* (Anlegerschutzverbesserungsgesetz – AnSVG) [2004] NZG 929, 932. See also the discussion above.

Inside Information in relation to Commodity Derivatives

WpHG 2004 German text	WpHG 2004 English Translation
§ 13 Insiderinformation Eine Insiderinformation ist insbesondere auch eine Information über nicht öffentlich bekannte Umstände im Sinne des Satzes 1, die sich 1. .... 2. auf Derivate nach Abs. 2 Nr. 4 bezieht und bei der Marktteilnehmer erwarten würden, dass sie diese Information in Übereinstimmung mit der zulässigen Praxis an den betreffenden Märkten erhalten würden.	Section 13 Inside information Specifically, inside information refers to information about circumstances which are not public knowledge within the meaning of sentence 1, which 1. …. 2. is related to derivatives within the meaning of section 2 (2) no. 4 and which market participants would expect to receive in accordance with the accepted practice of the markets in question.

Comment
Derivatives on commodities and metals are now covered by Sec 2(2) no 4. Sec 12.

Inside Information in Relation to Intermediaries Art 1(1) MAD

WpHG 2004 German text	WpHG 2004 English Translation
§ 13 Insiderinformation Eine Insiderinformation ist insbesondere auch eine Information über nicht öffentlich bekannte Umstände im Sinne des Satzes 1, die sich 1. auf Aufträge von anderen Personen über den Kauf oder Verkauf von Finanzinstrumenten bezieht	Section 13 Inside information Specifically, inside information refers to information about circumstances which are not public knowledge within the meaning of sentence 1, which 1. is related to orders by third parties for the purchase or sale of financial instruments

Comment
Germany has fully implemented Article 1(1) MAD in relation to intermediaries.

Definition of insider dealing Art 2(1) MAD

WpHG 2004 German text	WpHG 2004 English Translation
§ 14 Verbot von Insidergeschäften (1) Es ist verboten, 1. unter Verwendung einer Insiderinformation Insiderpapiere für eigene oder fremde Rechnung oder für einen anderen zu erwerben oder zu veräußern.	Section 14 Prohibition of insider dealing (1) It is prohibited, 1. to make use of inside information to acquire or dispose of insider securities for own account or for the account or on behalf of a third party.

Comment
The WpHG 2004 introduces a stricter prohibition of insider dealing. In the future the insider does not have to 'take advantage' of the inside information to acquire or dispose of insider securities.[50] It is now sufficient to "make use of inside information". The government's new terminology, which is identical to Art 2(1) MAD, should make it clear that it is not necessary to prove intent. Under German law there is a difference between intent and knowledge of a fact. The old wording of Section 14(1) WpHG 1994 made it difficult to prove that the insider took advantage of the inside fact because that would have required intent. The intention of the insider is however now reflected in the penal provisions of the WpHG 2004. Intent is therefore not relevant for the prohibition but for the legal consequences of the infringement.

The wording to "make use of inside information" is also intended to limit the scope of the prohibition where the information did not influence the behaviour of the person concerned.[51] He must have decided to deal on the basis of the inside information. German law covers attempts to deal as required by Article 2(1) MAD. Section 38(3) WpHG 2004 expressly states that the attempt to acquire or dispose of an insider security in contravention of a prohibition pursuant to Section 14(1) no 1 is punishable.

Definition of insider Art 2(1) MAD

WpHG 2004 German text	WpHG 2004 English Translation
§ 38 Strafvorschriften	Section 38 Criminal Offences
(1) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer	(1) Any person who
1. entgegen § 14 Abs. 1 Nr. 1 ein Insiderpapier erwirbt oder veräußert oder	1. acquires or disposes of an insider security in contravention of a prohibition pursuant to section 14 (1) no. 1;
2.	2.
a. als Mitglied des Geschäftsführungs- oder Aufsichtsorgans oder als persönlich haftender Gesellschafter des Emittenten oder eines mit dem Emittenten verbundenen Unternehmens,	a. by virtue of his membership of the management or supervisory body of the issuer, or as a personally liable partner of the issuer or of an undertaking associated with the issuer,
b. auf Grund seiner Beteiligung am Kapital des Emittenten oder eines mit dem Emittenten verbundenen Unternehmens,	b. on the basis of a participating interest in the capital of the issuer or a company associated with the issuer,
c. auf Grund seines Berufs oder seiner Tätigkeit oder seiner Aufgabe bestimmungsgemäß oder	c. on the basis of profession, activities or tasks performed as part of their function or
d. auf Grund der Vorbereitung oder Begehung einer Straftat	d. on the basis of conspiracy to perpetrate or perpetration of a crime
über eine Insiderinformation verfügt und unter Verwendung dieser Insiderinformation eine in § 39 Abs. 2 Nr. 3 oder 4 bezeichnete vorsätzliche Handlung begeht.	is privy to inside information and commits any intentional tort named in section 39 (2) no.3 or 4 shall be liable to imprisonment for a term not exceeding five years or to a criminal fine.

[50] See also G Spindler *Kapitalmarktreform in Permanenz – Das Anlegerschutzverbesserungsgesetz* [2004] NJW 3449, 3450.
[51] BT-Drucks 15/3174 p 34.

Comment
As for the prohibition of insider dealing, Section 14 WpHG 2004 does not distinguish between primary and secondary insiders. The distinction between primary and secondary insiders is just important in respect of the legal consequences of a breach of the prohibition. Therefore, the definition has been moved from Section 13 WpHG 1994 to Section 38(1) no 2 WpHG 2004. The infringement of Sec 14 WpHG 2004 by a primary insider is a criminal offence punishable by five years imprisonment, Sec 38(1) no 2 WpHG 2004. A secondary insider can only be fined up to €200.000, Sec 39(3) and (4) WpHG.

The prohibition in Section 14 WpHG just refers to the possession of inside information. Consequently, all three prohibitions apply to primary and secondary insiders. The disclosure or making available of inside information as well as a recommendation on the basis of inside information by a secondary insider are now covered by the prohibition. The old Sec 14(2) WpHG 1994 only prohibited a third party (secondary insider) from taking advantage of inside facts to acquire or dispose of insider securities for his own account or for the account or on behalf of others.

The prohibition in Section 14(1) no 3 WpHG 2004 on recommending a third party to deal on the basis of inside information has been supplemented by a general prohibition "otherwise inducing a third party". To induce is defined by the government as to "persuade" by any means.[52]

Corporate insiders Art 2(2) MAD

Comment
The prohibition in Section 14(1) also covers companies. There is no separate provision.

Completion of transactions Art 2(3) MAD

Comment
Art 2(3) MAD was not expressly implemented by the WpHG. According to the government's Explanatory Memorandum the wording of the prohibition in Section 14(1) makes clear that completion of transactions is not covered by the prohibition.[53] The government refers to the term "make use of inside information" which shall also filter out all inside information which does not affect the action of the person concerned at all. As mentioned above, intent is not necessary. However, the information must have influenced the decision making.

Disclosing or recommending (Art 3) MAD

WpHG 2004 German text	WpHG 2004 English Translation
§ 14 Verbot von Insidergeschäften (1) Es ist verboten,	Section 14 Prohibition of insider dealing
2. einem anderen eine Insiderinformation unbefugt mitzuteilen oder zugänglich zu machen,	2. to disclose or make available inside information to a third party without the authority to do so or
3. einem anderen auf der Grundlage einer Insiderinformation den Erwerb oder die Veräußerung von Insiderpapieren zu	3. to recommend, on the basis of inside information, that a third party acquire or

[52] BT-Drucks 15/3174 p 34.
[53] BT-Drucks 15/3174 p 34; H Ziemons (n 26) 537, 539.

empfehlen oder einen anderen auf sonstige Weise dazu zu verleiten.	dispose of insider securities, or to otherwise seduce a third party to do so.

Comment
As mentioned above, Section 14(1) WpHG 2004 applies to primary and secondary insiders and covers the three elements including the prohibition to disclose or make available inside information or to recommend, on the basis of inside information, that a third party acquire or dispose of insider securities, or to otherwise induce a third party to do so. It has been argued that this would lead to rules which are unnecessarily stricter than the MAD.[54] However, on the secondary level, the legal consequences of an infringement are different for primary and secondary insiders.

Secondary insiders (Art 4) MAD

Comment
As mentioned above, for the prohibition of insider dealing the WpHG 2004 does not distinguish between primary and secondary insiders but the sanctions which apply in the case of breach are different.

3.6 Problems of interpretation and enforcement in relation to the Market Abuse Directive

The implementation of the MAD has been criticized because the drafting of Section 14 WpHG 2004 implementing the prohibition on insider dealing is stricter than the old provision of the WpHG 1994 and stricter than the MAD. In particular, professional insiders, such as board members and other executives, who have access to inside information on a regular basis have to be more careful to act in compliance with the new insider dealing prohibition.[55] This development could lead to more compliance measures in Germany like black-out periods and window trading.

It has also been questioned whether a due diligence audit before an acquisition is still possible.[56] Before the WpHG 2004 it was accepted that such an acquisition cannot be regarded as taking advantage of inside information. The acquisition was not motivated by the inside information but by the decision to acquire the company which was already taken before. It is still unclear if this is in compliance with Section 14 WpHG 2004.[57] Others argue that this provision must be interpreted in the light of the purpose of the implementing legislation in order to limit its scope.[58] This approach is supported by the wording of the MAD in Recital 29 which states that the access to and use of inside information in a context of a public take-over bid for the purpose of gaining control of that company does not itself constitute insider dealing.

There has also been criticism that the exception in Art 2(3) MAD has not been expressly implemented but can only be implied from the Explanatory Memorandum on the Government proposal.

[54] H Ziemons (n 26) 537, 539; H Diekmann and M Sustmann (n 34) 931; see for this discussion also S Koch (n 26) 268.
[55] S Koch (n 26) 269.
[56] S Koch (n 26) 269.
[57] Negative: H Ziemons (n 26) 537, 539; H Diekmann and M Sustmann (n 34) 931.
[58] S Koch (n 26) 269.

4 France

4.1 Introduction

Regulation of Insider Dealing before Implementation of Insider Dealing Directive (IDD)
France was among the first Member States to introduce legislation controlling the use of inside information. The Ordinance of September 28, 1967[59] added a new provision to the 1966 Companies Act, instituting a requirement for all directors and company officers to report their securities dealings to the Commission des Operations de Bourse (COB). The COB had been set up under the same Ordinance.

Unfortunately the disclosure regime simply resulted in the COB being submerged in a large volume of reports, which proved impossible to monitor. The COB therefore recommended the replacement of the disclosure requirements by a complete ban on insider trading. In December 1970 Law No 70-1208[60] was passed, amending the Ordinance of 28 September, 1967 and prohibiting insider trading and the disclosure of inside information to third parties.

The significant features of the 1970 Law were the following:

1) directors and certain officers of French companies, their spouses and dependent children were required to hold their shares in those companies in registered rather than bearer form. It became a crime for them to engage in insider dealing under the new Article 10-1 of the Ordinance.
2) All other persons with access to inside information by virtue of their employment were prohibited from trading in the relevant shares on the basis of that information. So external advisers such as accountants, legal advisers and bankers could be caught.
3) The 1970 Law did not, however, cover those tippees who did not receive the inside information by virtue of their profession or employment: they remained free to take advantage of the information.
4) Inside information or "privileged information" as it was termed in Article 10-1 of the Law, was defined as information which had not been made public. The French courts were to adopt a strict interpretation of what could be regarded as "public". In 1977, the Paris Court of Appeal held that an officer of a company who had sold shares in the company, having read in a periodical of losses suffered by the company, was guilty of insider trading, since the circulation of the periodical was too limited for the information to be considered "public".[61] The information remained confidential until it had been confirmed by an official communication from the company or was more widely reported in the financial press. Similarly, the Paris Court of First Instance held in 1979 that information remained privileged, even if it had spread to third parties, provided that they represented only a very small part of the total number of stock exchange dealers.[62]

Further amendments to the 1967 Ordinance were made in 1983 and 1988 widening the scope of the offence. In 1989, Law No 89-531 was passed giving the COB the power to impose administrative sanctions for breaches of its own regulations. A year later, on July 17, 1990, the COB promulgated Regulation 90-08 on the Use of Inside Information. There were thus two sets of regulations applying to insider dealing -

[59] Ordinance No.67-833 of September 28, 1967, Journal Officiel ("JO"), September 29, 1967 at 9589.
[60] JO, December 24,1970 at 11891.
[61] Cour d'Appel, Paris, Ministere Public c. D JCP 1978.II.18789.
[62] Tribunal de Grande Instance, Paris, Ministere Public c. Gustave P, JCP 1980 II 19306.

criminal law in the shape of the 1967 Ordinance and administrative regulations in the shape of the COB Regulation. The COB regulation implements the EC Insider Dealing Directive, Directive 89/592. In the table of implementing provisions which follows, reference will be made to articles of the COB Regulation; any major differences between the Regulation and the 1967 Ordinance, as amended, will be picked up in the commentary.

4.2 Legislation implementing the Insider Dealing Directive

Definition of Inside Information (Article 1(1) IDD)

RÈGLEMENT COB N° 90-08 RELATIF À L'UTILISATION D'UNE INFORMATION PRIVILEGIÉE	COB Regulation No. 90-08 on the Use of Inside Information
Article 1er	**Article 1**
- le terme "information privilégiée" signifie une information non publique, précise, concernant un ou plusieurs émetteurs, une ou plusieurs valeurs mobilières, un ou plusieurs contrats à terme négociables, un ou plusieurs produits financiers cotés qui, si elle était rendue publique, pourrait avoir une incidence sur le cours de la valeur, du contrat ou du produit financier concerné.	The term "inside information" shall mean non-public precise information concerning one or more issuers, one or more transferable securities, one or more negotiable futures contracts, or one or more financial products which, if made public, might affect the price of the security, of the contract or of the financial product concerned.

Comment
Inside Information is defined as information which has not been made public.[63] The COB Regulation, unlike the Ordinance, also requires that the information be precise, in line with Article 1(1) of the IDD. In any event, the French Court of Appeal had held earlier in 1977, when applying the Ordinance that information must be of a "precise, specific and certain nature" to be regarded as inside information and accordingly concluded that certain alarming rumours could not be regarded as inside information.[64] Whether the information was sufficiently "certain" to constitute inside information was rather more difficult to determine. The predictions of journalists that the price of a security was going to rise was held by a Paris court[65] to be "uncertain and hypothetical information" and not sufficiently precise to constitute inside information. On the other hand, information about an intended takeover bid was sufficiently certain to constitute inside information.

In addition, as required by the IDD, the information must be likely to have an effect on the price of the securities. The COB regulation widened the earlier wording of the 1967 Ordinance that the inside information should concern the "technical, commercial and financial operations of a company" to include all information concerning an issuer or concerning relevant financial products, thereby bringing French law into line with the wording of the IDD. An earlier court decision in 1975[66] which held that knowledge of a proposed takeover bid clearly concerned the financial operations of the company was criticised at the time by some French lawyers, though it appears uncontroversial today.

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[63] It is clear from the case law that wide circulation is required before information can be said to be "public". Communication only to professionals does not suffice, Schneider case, COB decision of 24 June 1993, COB Bulletin, No. 271, 1993.
[64] Cour d'Appel, Paris, *Ministere Public* c. *C…B…* JCP 1978 II 18789.
[65] Tribunal de Grande Instance, Paris, *Ministere Public* c. *Poron*, Gaz. Pal. 1985 .1.287.
[66] Tribunal de Grande Instance, Paris, JCP 1976 II 18329.

Definition of Transferable Securities (Article 1(2) IDD)

The COB is responsible under Article 1 of the 1967 Ordinance for the proper functioning of markets for securities, quoted financial products and negotiable futures contracts. French law covers all financial instruments that are admitted to trading on a regulated market. "Financial instruments" were defined in Law No.96-597 of 2 July 1996 as including shares, debt securities, shares in collective investment undertakings and financial futures.

Definition of Insider and Insider Dealing (Article 2(1) IDD)

Article 2 COB Regulation No.90-08	**Article 2 , COB Regulation No90-08**
Les personnes disposant d'une information privilégiée à raison de leur qualité de membres des organes d'administration, de direction, de surveillance d'un émetteur, ou à raison des fonctions qu'elles exercent au sein d'un tel émetteur doivent s'abstenir d'exploiter, pour compte propre ou pour compte d'autrui, une telle information sur le marché, soit directement, soit par personne interposée, en achetant ou en vendant des titres de cet émetteur, ou des produits financiers liés à ce titre.	Those persons possessing inside information by virtue of their membership of the administrative, management or supervisory boards of an issuer, or by virtue of their employment or functions in relation to the issuer, shall refrain from taking advantage of that information, for their own account or for the account of a third party, either directly or indirectly, by acquiring or disposing of the issuer's securities, or financial products related to those securities.
Article 3, COB Regulation No 90-08 Les personnes disposant d'une information privilégiée à raison de la préparation et de l'exécution d'une opération financière ne doivent pas exploiter, pour compte propre ou pour compte d'autrui, une telle information sur le marché ….	Article 3, COB Regulation No. 90-08 Persons holding inside information by virtue of their involvement in the preparation and execution of a financial transaction shall not take advantage of that information on the market, for their own account or for the account of a third party….

Comment
The definition of insider in the COB Regulation differs from that in the IDD in one respect. Shareholders are not included in the list of insiders, although Article 2(1) of the IDD includes "any person who…by virtue of his holding in the capital of the issuer".

However, it has been argued that Article 3 of the COB Regulation could apply in the case of some shareholders who might conceivably hold inside information by virtue of their involvement in the preparation and execution of a financial transaction.

Both the COB Regulation and the Ordinance prohibit dealing by an insider in possession of inside information. No proof of knowledge or causation seems to be required. In the COB's view at the time, the inclusion of the word "knowingly" was unnecessary and while some element of causation was required, it could be implied from the insider's actions. Thus in 1994 in the *Yves San Laurent* case, the COB fined a director for dealing while in the possession of inside information, even though he had taken the decision to deal before he acquired the inside information. The

decision was upheld by the Paris Court of Appeal,[67] which again held a year later in the *Lyonnaise des Eaux-Dumez* case[68] that the duty to refrain from dealing when in possession of inside information was of an "absolute nature". French law thus appears to go well beyond the requirements of the directive which seeks to prohibit insiders from "taking advantage of that information with full knowledge of the facts". Under French case law, an insider who comes into possession of inside information after transmitting an order, but before execution of the order, is required to revoke the order, even though he does not "take advantage" of the information. Although the COB Regulation does retain the provision that insiders should not "take advantage of" inside information to deal, it appears to have been interpreted by the COB in the same way as the 1967 Ordinance, where the requirement that the insider deal "on the basis of" the inside information was removed by the 1988 amendments because it was proving too difficult to secure convictions.

Corporate Insiders (Article 2(2) IDD)

Article 1 COB Regulation No.90-08	**Article 1 COB Regulation No.90-08**
Au regard du présent règlement: le terme "personne" désigne une personne physique ou une personne morale	The term "person" [in the present regulation] means a natural or a legal person

Comment
The provisions of the COB Regulation applied to both legal and natural persons. Article 10(1) of the 1967 Ordinance provided that, as a matter of criminal law, where the relevant transactions were carried out by a company, its directors (whether de facto or de jure) would be responsible. It was apparently open to a director to prove that he had no inside knowledge or that he was not involved in the transaction, though the burden of proof lay on the director and in the *Paribas-Societe Generale de Fonderie* case in 1993, the Orleans Court of Appeal held that mere lack of knowledge was not sufficient to exonerate the director, suggesting that no reporting lines should lead to the director in question.

Transactions effected through Intermediaries (Article 2(3) IDD)

Comment
The IDD required the prohibition on insider dealing to be applied to any transactions effected through a professional intermediary but allowed Member States to exclude off-market transactions, which did not involve a professional intermediary. Off-market transactions are covered automatically under French law, which applies to all insider transactions, whether effected through an intermediary or not.

[67] Cour d'Appel, Paris, 16 March 1994.
[68] Cour d'Appel, Paris, 15 March 1995.

Exemption for Public Debt Management (Article 2(4) IDD)

Comment
France has not implemented this exemption, either in the 1967 Ordinance or in the COB Regulation.

Disclosing or Procuring (Article 3 IDD)

Article 2, COB Regulation No.90-08 Les personnes mentionnées à l'alinéa précédent doivent s'abstenir de communiquer l'information privilégiée à des fins autres ou pour une activité autre que celles à raison desquelles elle est détenue.	Article 2, COB Regulation No.90-08 [Insiders including intermediaries, as defined in Article 2 & 3 above] shall refrain from disclosing inside information otherwise than in the normal course of their duties or employment.

Comment
It was a criminal offence under Article 10-1 of the Ordinance for an insider to disclose inside information to a third party otherwise than in the normal course of their duties or employment and to knowingly enable a third party to trade on the basis of inside information. The COB regulation was more restrictive in that it only covered disclosure of information by insiders. It is not clear that the COB Regulation covered recommendations to a third party to buy "X", if the recommendation did not involve disclosure of inside information, though such recommendations are covered by Article 3(b)) IDD.

Secondary Insiders (Article 4 IDD)

Article 5 COB Regulation No 90-08 Toute personne qui, en connaissance de cause, possède une information privilégiée provenant directement ou indirectement d'une personne mentionnée aux articles 2, et 4 du présent règlement, ne doit pas exploiter, pour compte propre ou pour compte d'autrui, une telle information sur le marché.	Article 5, COB Regulation No.90-08 Any person who, with full knowledge of the facts, possesses inside information originating directly or indirectly from a person [an insider, as defined in Article 2&3 above] shall not take advantage of the information on the market, for his own account or for the account of a third party.

Comment
Although tippees or secondary insiders are not covered under the criminal law (the Ordinance), Article 5 of the COB Regulation fully implements Article 4 of the IDD.

4.3 Changes to the Regulatory System in France

The French regulatory system for banks, financial institutions and capital markets was reformed in 2003, six months after the adoption of the Market Abuse Directive. Under the Loi de Securite Financiere of August 1, 2003,[69] the Commission des Operations de Bourse (COB) and the Conseil des Marches Financiers (CMF) were merged to form the Autorite des Marches Financiers (AMF), which now exercises all the regulatory powers exercised by the former regulators, together with those of the Conseil de Discipline de la Gestion Financiere.

A year later in November 2004, the AMF issued its General Regulation[70] after a wide ranging consultation process. The General Regulation codified and reorganized all the previous regulations issued by its predecessor bodies and also implemented several EU Directives, including the major part of the Market Abuse Directive in Book VI: Insider Trading and Market Abuse.

Once the general decisions of the CMF and instructions issued by the COB and the CMF are updated and incorporated in the AMF General Regulation, the result will be that the main securities laws and regulations will be found in one place, though reference will still have to be made to the Monetary and Financial Code. In the meantime, the AMF has indicated that current instructions and recommendations that are consistent with the AMF General Regulation will continue to be applied until repealed.

4.4 Implementation of the Market Abuse Directive

France has implemented the Market Abuse Directive through the AMF General Regulation. Among the main changes from the previous law are the inclusion of commodity derivatives in the list of financial instruments susceptible to insider trading, the inclusion of financial instruments admitted to trading on Alternext, which is not a regulated market covered by MAD, the inclusion of shareholders as potential insiders and the new definition of secondary insiders, which now covers any person other than a primary insider who possesses inside information if he knew or ought to have known that it was inside information. Generally the AMF has adopted a "copy-out" approach to implementation of MAD and very little comment is required.

So far France has not implemented the prohibition included in MAD on attempts by insiders to deal, because the necessary primary legislation has not yet been passed.

[69] Law No 2003-706.
[70] Journal Officiel, November 24, 2004.

4.5 Legislation implementing the Market Abuse Directive

Definition of Inside Information: Article 1(1) MAD, as implemented by Commission Directive 2003/124/EC[71]

Article 621-1 Reglement general de l'Autorite des Marches Financiers (AMF)	**Article 621-1 General Regulation of the Autorite des Marches Financiers**
Une information privilégiée est une information précise qui n'a pas été rendue publique, qui concerne, directement ou indirectement, un ou plusieurs émetteurs d'instruments financiers, ou un ou plusieurs instruments financiers, et qui si elle était rendue publique, serait susceptible d'avoir une influence sensible sur le cours des instruments financiers concernés ou le cours d'instruments financiers qui leur sont liés.	Inside information is any information of a precise nature which has not been made public, relating directly or indirectly to one or more issuers of financial instruments, or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of the relevant financial instruments or on the prices of related financial instruments.
Une information est réputée précise si elle fait mention d'un ensemble de circonstances ou d'un événement qui s'est produit ou qui est susceptible de se produire et s'il est possible d'en tirer une conclusion quant à l'effet possible de ces circonstances ou de cet événement sur le cours des instruments financiers concernés ou des instruments financiers qui leur sont liés.	Information is deemed to be precise if it indicates a set of circumstances or event that has occurred or is likely to occur and a conclusion may be drawn as to the possible effect of such set of circumstances or event on the prices of financial instruments or related financial instruments.
Une information, qui si elle était rendue publique, serait susceptible d'avoir une influence sensible sur le cours des instruments financiers concernés ou le cours d'instruments financiers dérivés qui leur sont liés est une information qu'un investisseur raisonnable serait susceptible d'utiliser comme l'un des fondements de ses decisions d'investissement.	Information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments, is information that a reasonable investor would be likely to use as part of the basis of his investment decisions.

[71] OJ 2003 L339/70.

Financial Instruments covered (Article 1(3) MAD)

Article 611-1 AMF General Regulation

[Sauf dispositions particulières, le présent livre s'applique à] :
2° (Arrêté du 15 avril 2005) "Aux instruments financiers mentionnés à l'article L. 211-1 du code monétaire et financier :
a) Admis aux négociations sur un marché réglementé au sens de l'article L. 421-1 dudit code ou pour lesquels
une demande d'admission sur un tel marché a été présentée ; ou
b) Admis aux négociations sur un système multilatéral de négociation organisé prévu par l'article 525-1;

3° (Arrêté du 15 avril 2005) "Aux opérations portant sur ces instruments, que celles-ci aient été effectivement exécutées ou non sur un marché réglementé ou lorsqu'elles ont lieu sur un système multilatéral de négociation organisé."
Les articles 622-1 et 622-2 s'appliquent également aux instruments financiers non admis à la négociation sur un marché réglementé (Arrêté du 15 avril 2005) "ou sur un système multilatéral de négociation organisé," mais dont la valeur dépend d'un instrument financier admis aux négociations sur (Arrêté du 15 avril 2005) "un tel marché ou système".

Article 611-1

[The insider dealing provisions apply to]
2 The financial instruments referred to in Article L 211-1 of the Financial and Monetary Code:

a) which have been admitted to trading on a regulated market within the meaning of Article L421-1 of the same Code or for which a request for admission to trading on such a market has been made; or
b) which have been admitted to trading on an organised multilateral trading facility referred to in Article 525-1.

3 Transactions in instruments referred to in 2 a) above, regardless of whether they have been executed on a regulated market or an organised multilateral trading facility.

[The definition of inside information also applies] to financial instruments not admitted to trading on a regulated market or an organised multilateral trading facility, but whose value depends on a financial instrument that has been admitted to trading on such a market or multilateral trading facility.

Inside information in relation to Commodity Derivatives, (Article 1(1) MAD) as applied by Directive 2004/72/EC, Art 4[72]

Article 621-2 AMF General Regulation

Pour les instruments dérivés sur produits de base, constitue une information privilégiée une information précise qui n'a pas été rendue publique, qui concerne, directement ou indirectement, un ou plusieurs de ces instrumentsdérivés et que les utilisateurs des marchés sur lesquels ces instruments dérivés sont négociés s'attendraient à recevoir conformément aux pratiques de marché admises sur ces marchés, lorsque cette information:
1° Est périodiquement mise à la disposition de leurs utilisateurs ou;
2° Est rendue publique en application de la loi, des règlements ou des règles de marché, de contrats ou d'usages propres au marché du produit de base sous-jacent ou au marché d'instruments dérivés sur produits de base concernés.

Article 621-2

For commodity derivatives, inside information shall mean precise information that has not been made public, that concerns, directly or directly, one or more such derivatives, and that users of markets on which the derivatives are traded would expect to receive, in accordance with accepted practices in such markets, where such information is:

1) routinely made available to their users; or
2) made public, pursuant to law, market rules or regulations, contracts or customary practice on the market in the underlying commodity or on the market in the relevant commodity derivative .

Inside Information in relation to Intermediaries (Article 1(1) MAD)

Article 621-3 AMF General Regulation

Pour les personnes chargées de l'exécution d'ordres concernant des instruments financiers, constitue également une information privilégiée toute information transmise par un client qui a trait aux ordres en attente de ce client, est d'une nature précise, se rapporte directement ou indirectement, à un ou plusieurs émetteurs d'instruments financiers ou à un ou plusieurs instruments financiers et serait susceptible, si elle était rendue publique, d'avoir une

Article 621-3

For persons charged with the execution of orders concerning financial instruments, inside information shall also mean information conveyed by a client and related to the client's pending orders, which is of a precise nature, which relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, and which if it were made public, would be likely to have a significant effect on the prices of those

[72] OJ 2004 L162/70.

influence sensible sur le cours des instruments financiers concernés ou le cours d'instruments financiers qui leur sont liés.

financial instruments or on the price of related derivative financial instruments.

Definition of Insider Dealing (Article 2(1) MAD)

Article 622-1 AMF General Regulation
Toute personne mentionnée à l'article 622-2 doit s'abstenir d'utiliser l'information privilégiée qu'elle détient en acquérant ou en cédant, pour son propre compte ou pour le compte d'autrui, soit directement soit indirectement, les instruments financiers auxquels se rapporte cette information ou les instruments financiers auxquels ces instruments sont liés.

Article 622-1
[Insiders] shall refrain from using inside information when acquiring or selling, for their own account or on behalf of others, either directly or indirectly, the financial instruments to which that information relates.

Comment
It will be interesting to see how the AMF interprets "using" inside information. The previous law also included the provision that insiders should "take advantage" of inside information to be caught by the ban but this seemed to be largely ignored by the French courts in favour of an absolute ban on insider dealing by insiders. Attempting to deal is not yet covered by French law. The necessary primary legislation has not yet been passed.

Definition of Insider (Article 2(1) MAD)

Article 622-2 AMF General Regulation

Les obligations d'abstention prévues à l'article 622-1 s'appliquent à toute personne qui détient une information privilégiée en raison de:

1° Sa qualité de membre des organes d'administration, de direction, de gestion ou de surveillance de l'émetteur;

2° Sa participation dans le capital de l'émetteur;

3° Son accès à l'information du fait de son travail, de sa profession ou de ses fonctions, ainsi que de sa participation à la préparation et à l'exécution d'une opération financière;

4° Ses activités susceptibles d'être qualifiées de crimes ou de délits.

Article 622-2

[The prohibition referred to above] applies to any person holding inside information by virtue of:

1) his membership of the administrative, management or supervisory bodies of the issuer;
2) his holding in the issuer's capital or
3) his access to such information through the exercise of his employment, profession or duties, as well as his participation in the preparation or execution of a corporate finance transaction;
4) any activities which may be characterised as crimes or offences.

Comment

Two points of difference may be noted in the French implementation of Article 2(1) MAD: first the AMF Regulation expressly extends to persons holding inside information as a result of their participation in the preparation or execution of a corporate finance transaction, though they could be regarded as already covered under one of the other headings in Article 622-2. Secondly, whereas MAD covers persons holding inside information by virtue of their criminal activities, the AMF Regulation restricts the prohibition to those holding inside information by virtue of any activities which may be described as "crimes" or "delits" under French law, which is a narrower concept.

Corporate Insiders (Article 2(2) MAD)

Article 622-2 AMF General Regulation

Lorsque la personne mentionnée au présent article est une personne morale, ces obligations d'abstention s'appliquent également aux personnes physiques qui participent à la décision de procéder à l'opération pour le compte de la personne morale en question.

Article 622-2

Where the person referred to in this article is a legal person, the prohibitions shall also apply to the natural persons taking part in the decision to effect the transaction on behalf of the legal person.

Completion of Transactions (Article 2(3) MAD)

Article 622-1 General Regulation
Les obligations d'abstention posées au présent article ne s'appliquent pas aux opérations effectuées pour assurer l'exécution d'une obligation d'acquisition ou de cession d'instruments financiers devenue exigible, lorsque cette obligation résulte d'une convention conclue avant que la personne concernée détienne une information privilégiée.

Article 622-1
The prohibitions set out in this Article do not apply to transactions effected in discharge of an obligation that has become due to acquire or dispose of financial instruments, where that obligation results from an agreement entered into before the person concerned held inside information.

Disclosing or Recommending (Article 3 MAD)

Article 622-1 AMF General Regulation
Toute personne mentionnée à l'article 622-2 doit s'abstenir de
1° Communiquer cette information à une autre personne en dehors du cadre normal de son travail, de sa profession ou de ses fonctions ou à des fins autres que celles à raison desquelles elle lui a été communiquée;
2° Recommander à une autre personne d'acquérir ou de céder, ou de faire acquérir ou céder par une autre personne, sur la base d'une information privilégiée, les instruments financiers auxquels se rapportent cette information ou les instruments financiers auxquels ces instruments sont liés.

Article 622-1

[Insiders] shall also refrain from:
1) Disclosing such information to another person otherwise than in the normal course of his employment, profession or duties, or for a purpose other than that for which the information was disclosed to them;
2) Recommending another person to buy or sell, or to have bought or sold by another person, on the basis of inside information, the financial instruments to which the information pertains, or related financial instruments.

Secondary Insiders (Article 4 MAD)

Article 622-2
Ces obligations d'abstention s'appliquent également à toute autre personne détenant une information privilégiée et
qui sait ou qui aurait dû savoir qu'il s'agit d'une information privilégiée.

Article 622-2
[The prohibitions above] also apply to any other person who possesses inside information and who knows or ought to have known, that it is inside information.

5 Spain

5.1 Introduction

At the outset, there was nothing. There is hardly a better way to describe the Spanish insider dealing regime before Spain implemented the Insider Dealing Directive 89/592 (the "IDD").[73] Spanish financial services regulation experienced a complete shake-up with the enactment of the Spanish Securities Market Act 1988 or *Ley del Mercado de Valores*[74] (hereinafter SMA) which carried out a major reform of the Spanish regulation of the primary and secondary markets. Before then, Spanish securities regulation and in particular, the regulation of insider dealing was largely non-existent. For the first time the Spanish securities market was provided with a sound set of rules aimed at ensuring the smooth functioning of the securities market. The SMA is hence the key piece of legislation which contains not only the principles by which the Spanish securities market operates, but also detailed rules on other aspects. It could be said to be the constitution for Spanish financial services.

One of the key novelties of the SMA was the creation of the *Comisión Nacional del Mercado de Valores* (the "CNMV") whose functions, duties and powers are similar to those of the UK Financial Services Authority. The SMA also introduced in Spain the regulation of insider dealing. The insider dealing regime before its coming into force was almost entirely based on civil law principles which proved to be inefficient and extremely onerous when it came to prove damage. Essentially, the coming into force of the SMA in 1988 meant the end of a Roman law approach and the beginning of a new regime inspired by Anglo-American thinking.

It was not until the late 1970s that Spain began to develop a more modern and complex securities market. In those days, the market had to operate on the basis of the torts system set forth in the Spanish Civil Code for both contractual[75] and non contractual[76] liability[77]. These two Articles enshrine the right of individuals to claim compensation for damages but they only become operative once the event has occurred. As a consequence, they had little deterrent effect on dealers, since damage needed to be committed and proved.

The delay in Spain enacting appropriate legislation to fight insider dealing can easily be explained by the fact that it was never perceived as a serious problem. However, in the late 1970s the perception changed and it was felt that Spain needed to articulate a modern capital markets regime which would cover insider dealing. This change of approach was the logical result of the growth of the Spanish economy. In 1977 a Commission was set up to draft a report on the necessary reforms for the Spanish capital markets.[78] A special commission chaired by Prof Sánchez Calero was commissioned to study insider dealing which came up with two alternatives: the American system providing fines and sanctions; or the continental system, based on

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* Thanks are due to Ignacio Benejam, admitted in Barcelona (Gay & Vendrell), who kindly provided relevant materials.

[73] Council Directive 89/592 EEC of 13 November 1989 coordinating regulations on insider dealing OJ L 334.

[74] Ley 24/1988, 28 July 1988, published in BOE (Spanish Official Gazette) on 29 July 1988.

[75] Article 1101 of the Civil Code reads as follows: "A party shall be liable for damages whenever he has acted negligently performing his contractual obligations".

[76] Article 1902 of the Civil Code reads as follows: "Whomsoever causes damage to another person by an act or omission and with negligence or fault is liable for the damage caused".

[77] Liability covers two scenarios: negligence (lack of care) and *dolus* (the actual intention to do something).

[78] Zurita J in *Estudios en Homenaje al Profesor Girón Tena* (1991) 1252, 1254.

a code of conduct.[79] Disappointingly, the Commission favoured a reform based on a code of conduct.[80] The reason behind this decision is the fact that the Commission was very influenced by the *European code of conduct*[81] relating to transactions in transferable securities which adopted a principles-based approach.

In retrospect, that decision can be criticized as naïve and ineffective. It reflects the Continental-Latin legal thinking and its resistance to legislation combating fraud.[82] In 1980 a Royal Decree[83] on regulation of IPOs imposed a duty of confidentiality on those knowing the IPOs plans was enacted. However, it proved to be ineffective since no civil or criminal sanctions were imposed.[84]

Spain was slow to develop any consumer protection laws. This changed completely with the enactment of the Spanish Constitution[85] and its express protection of consumer rights[86] which led in turn to concern about the protection of investors and fair and transparent markets. This constitutional protection of consumer rights has provided the impetus for developing legislation to protect investors in the capital markets.

In 1985 a draft for a securities market act was published but soon shelved. On 1 January 1986 Spain became a full member of the European Community which would have a momentous impact on the works to adopt a proper insider dealing regime. A new project was launched in 1987 which greatly differed from the previous project of 1985 as it anticipated the provisions of the draft of the future EC Directive 85/592. On 12 February 1988 the Government approved the draft of the SMA so it could be approved after discussion in the Spanish Parliament or *Cortes.*

Insider trading is regulated in Spain in three different and equally important ways. Damages and liability issues are regulated by the civil law.[87] Secondly, the Criminal Code[88] covers insider dealing and although the definition used is the same as in the SMA, its implications, rules of evidence and principles may differ.[89] Thirdly, administrative law regulates conduct in the securities markets, most notably, insider dealing. As it was intimated earlier, the CNMV is an administrative body and has the power to fine.

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[79] *ibid.,*
[80] *ibid.,* 1255.
[81] Commission Recommendation of 25 July 1977, O.J. 1977, L 212/37, Annex: European Code of Conduct Relating to Transactions in Transferable Securities.
[82] Another classic example which illustrates this opposition of mind is the strict regulation of competition (anti-trust legislation) in the USA (even with the help of criminal law) whereas the European Union has been softer on this although lately has adopter a tougher approach.
[83] Article 12 Royal Decree No 1848, 5 September 1980.
[84] Zurita J in *Estudios en Homenaje al Profesor Girón Tena* (1991) 1252, 1255.
[85] It came into force on 27 December 1978.
[86] Article 51 in full reads as follows: 1. The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests. 2. The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law. 3. Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic trade and the system of licensing commercial products.
[87] Articles 1101 and 1902 of the Civil Code.
[88] L.O. 10/1995 de 23 de noviembre de 1995 del Código Penal.
[89] Although criminal law goes beyond the scope of this work, it is worth mentioning, in passing, the main features of the Spanish criminal regime for insider trading. Article 285 of the Spanish Criminal Code punishes insider dealing whenever there is a benefit above 600,000 euros or loss for the same amount. The concept of inside trading comes directly from Article 81 (3) therefore there are not changes on the nature of this activity.

Title VII of the SMA 1988 is entitled Rules of Conduct and governs inside information, *inter alia*. The heading reveals the new approach taken by legislators, controlling and punishing insider trading. Furthermore Title VII leaves no doubt about the strictness of the new rules. Indeed, Chapter 2 of Title VII lists a plethora of prohibited activities, along with the corresponding fines.[90] It contrasts greatly with the code of conduct so much in vogue 10 years earlier.

Article 81 of the SMA is the Article upon which the entire edifice of the regulation of Spanish insider trading is sustained. It has undergone changes, some of them very radical.[91] As we will see below, in 1991 it had added a third section. In 1998, a minor reform[92] resulted in a change of its structure along with the introduction of financial instruments in the SMA.[93] In addition, while nothing substantial changed, after the reforms of 1998, section 3 of Article 81 was removed and merged with section 2.

It should be noted that when it came to establishing an insider dealing regime, Spain adopted a securities markets approach as opposed to the earlier company law approach taken by other European jurisdictions. Indeed, apart from a minor and indirect mention of insider dealing in the Spanish Public Companies Act[94] the entire inside information regime is enshrined within the capital markets legislation.

5.2 Legislation implementing the Insider Dealing Directive

Article 1 (1) of IDD: Definition of Inside Information

Spanish text:	**English translation:**
A los efectos de la presente ley se entiende por información privilegiada toda información de carácter concreto, que se refiera a uno o varios emisores de valores o a uno o varios valores, que no se haya hecho pública y que, de hacerse o haberse hecho pública, podría o habría podido influir de manera apreciable sobre la cotización de ese o de esos valores.	For the purposes of this Act inside information shall mean information of a precise nature, relating to one or more issuers of securities or to one or more securities, which has not been public and if it had made public could or would have had a significant effect on the price of the security or securities in question.

Comment

This Article was the result of the enactment of *Ley 9/1991*[95] which amended the original Article 81 of the SMA by providing a new structure and adding more elements. The original wording of Article 81 was approved before IDD came into force so the main purpose of these amendments was to ensure full implementation of

[90] Articles 95-107 SMA.

[91] Article 81 has been reformed by Ley 9/1991, Ley 37/1998 de reforma de la Ley 24/1998 del Mercado de Valores and Ley 44/2002 de medidas de reforma del sistema financiero.

[92] Ley 24/1998, de reforma de la Ley 24/1988 de 28 de julio del Mercado de Valores.

[93] Article 2.

[94] Real Decreto Legislativo 1564/1989 por el que se aprueba el Texto Refundido de la Ley de Sociedades Anónimas, 22 December 1989. Article 127 thereof establishes the duty of care of administrators of companies to its shareholders.

[95] Ley 9/1991, por la que se modifican determinados artículos de la Ley 24/1988 del mercado de valores, 22 March 1991 (BOE 27 March 1997).

IDD once it was approved. Article 6 of the *Ley 9/1991* provided a new Article 81 which was divided in 3 paragraphs. The main difference from the previous wording is the addition of the word “issuers” so that the definition of inside information could catch more than the original wording which was limited to information relating to securities. The amendment of Article 81 did not add the word transferable to securities so the scope of securities caught remained very broad, as opposed to IDD which expressly focused on transferable securities.

The definition contained the key elements of Article1 (1) IDD that is, information of a precise nature, which has not been made public, which relates to securities (IDD said transferable) and is likely to have a significant effect on prices. The Spanish wording contained those elements although it is worthwhile to comment on minor differences. Whereas IDD said “would be likely to have a significant effect on the prices”, the new Article 81 read “it would or it could have had a significant effect”. It did not include the word “likely”. This seems to have the effect of including information which might possibly have had a significant effect on price as well as information which was likely to have a significant effect on price.

Furthermore, the requirement that the information should be of “a precise nature” was implemented in Spanish through the word “concrete” which conveys the same message of that of IDD, that is, information relating to particular facts and not just rumours. Likewise, Spanish law fully adopted without any qualification the requirement that the information has not been made public.

An interesting case arose in 1998 when a member of the Bank of Spain Executive Board sold off all his shares in a Spanish bank after attending the meeting where the Bank of Spain agreed to intervene in that bank.[96] The director appealed against his conviction for insider dealing before the Spanish *Tribunal Supremo.*[97] The appellant claimed that, since over one million shares were sold at the same day as he sold 2,399 shares, his trade did not have any significant effect on the price of securities.

The *Tribunal* was quick to dismiss his argument on the ground that Article 81 (2) provided that “everyone possessing inside information shall abstain from acquiring or disposing”. According to the *Tribunal*, the offence is committed when the prescribed conduct (to acquire or dispose) takes place, irrespective of the impact on the prices. For an individual or corporation to be fined under Article 99 (o) of the SMA, what matters is that the insider acquires or disposes of securities regardless of the effect on the market. This was the approach taken by the *Tribunal* when commenting on the duty to abstain from dealing. However, the *Tribunal* held that when it comes to ascertaining when information becomes privileged it is critical that it might affect prices. It is crucial to determine the effect on the market in order to regard some information as inside information. This is in line with the definition of inside information by both European law and Spanish law.

According to the *Tribunal Supremo*, the potential effect on price is relevant only to the determination of whether the information meets the definition of "inside Information". Once an offence has been committed, the fact that the transaction did not have any significant effect on the price of the securities is not relevant to the decision on the size of the fine to be imposed. According to the *Tribunal* whether it is inside information or not will be assessed on a case by case basis.

[96] STS 11 April 2004 (rec 1861/1998).
[97] The highest judicial instance in Spain.

Article 1(2) of IDD: definition of transferable securities

Article 81 (3) SMA, as amended by *Ley 9/1991*

Spanish text:	English translation:
(…) que se refiera a uno o varios emisores de valores o a uno o varios valores….	(…) relating to one or more issuers of securities or to one or more securities…

Comment
As we noted above, neither the original wording of the SMA nor the 1991 amendments defined "securities". It appears that the Spanish legislator was determined to leave the concept of securities very broad. Whereas Article 2 (1) IDD set forth a list of different securities and included a further requirement, that is, the need for the securities to be admitted to trading in a regulated market supervised by authorities, Article 81 (3) was silent, suggesting that securities which were not admitted to regulated markets would fall within the definition.

The matter was not without controversy. To what extent did the SMA want to catch every single security? Whereas is its true that neither Article 81 itself or the SMA in general provided any definition of securities, in principle, there was a limit, a natural one since the SMA aimed to govern regulated securities markets,[98] suggesting that inside information would relate only to those securities (transferable or not) traded in a regulated market in Spain. Article 5 of the SMA sets two classes: registered and bearer securities. In addition, the SMA used the expression "admitted to trading" in different articles[99] so it was odd that the definition of inside information did not use this expression. This might be attributable to the zeal of Spanish law to cover as much as possible. It seems sensible to conclude that since the purpose of SMA was (and still is) the regulation of primary and secondary markets, only those securities traded on those markets would be caught by the SMA.

Article 2(1) of IDD: Definition of Insider and Insider Dealing

Article 81 (2), as amended by *Ley 9/1991*

Spanish text:	English translation:
Todo el que disponga de alguna información privilegiada deberá abstenerse de ejecutar, por cuenta propia o ajena, directa o indirectamente, las conductas siguientes (…)	Every person who possesses inside information will refrain from carrying out for his own account or for the account of a third party, directly or indirectly, the following actions: (…)
a) preparar o realizar cualquier tipo de operación en el mercado sobre los valores a que la información se refiera.	a) Preparing or carrying out on the capital markets any sort of operation relating to the information possessed.

[98] Article 1 of SMA read: "The purpose of this Act is to regulate primary and secondary securities markets, establishing for this purpose principles for their organization and operation, rules governing the activities of individuals and institutions operating on these markets and a system for their surveillance".
[99] For instance, Article 32.

Comment
The approach taken by Spanish law when it comes to defining who is an insider has traditionally differed from the approach adopted in the EC directives. In effect, the scope of Article 81 (2) is enormous and thus, Spanish law went beyond the wording of IDD. Anyone who possessed inside information would fall within the definition of "insider" without any further qualification and therefore must abstain from doing certain activities. Spain was allowed to go beyond the wording of IDD since IDD was a minimum harmonisation directive.[100] But the matter has not been without controversy. There has been much discussion by Spanish lawyers as to whether "every person" was as wide as it seemed, some lawyers arguing that since Article 81 was included in a section of the SMA which aims to regulate companies and securities firms, only those can actually fall within the prohibition.[101] However, the majority of lawyers accepted that the wording was clear and therefore it included everyone. The natural consequence of this wider and general definition of insider was that the IDD division of insiders into primary and secondary insiders had no relevance under Spanish law.

Anyone who possesses inside information is considered to be an insider for the purposes of Spanish law. There is no requirement that he should have acquired the information by virtue of his board membership or shareholding in the issuer as in IDD. There are other differences: Article 2 (1) IDD prohibited an insider from taking advantage of that information with full knowledge of the facts by acquiring or disposing transferable securities, either for his own account or the account of a third party. Spanish law did not require "full knowledge of the facts" which again broadened the scope of the conduct caught under the law. In addition, while Article 81 (2) prohibited "preparing or carrying out any sort of operation", IDD defined the prohibited conduct more narrowly, that is, "acquiring or disposing".

"Any sort of operation" is a far-reaching formulae, much broader than that of IDD. In addition, Article 81 (2) included "preparing or carrying out" so the mere preparation falls within the prohibition. This contrasts with the more limited formulation in Article 2 (1) IDD to "acquire or dispose" implying the exclusion of preparatory acts. Spanish law was therefore concerned not only about the result "to carry out" but also with the intention "to prepare". It remained unclear what amounted to preparation.

To conclude, it is obvious that Spanish law went far beyond the provisions of IDD by adopting a very wide definition of insider, of insider dealing and of securities covered by the prohibition.

Article 2(2) IDD: Corporate insiders

Spanish law did not establish any classification of insiders. Indeed, as we saw earlier, Article 81 (2) listed the three prohibitions which applied to "everyone who possesses inside information".

[100] Article 6 of IDD read: "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."
[101] Marínez Florez A *Sobre los Destinatarios de la Prohibición de Usar Información Privilegiada,* Revista de Derecho Mercantil (1995) 495, 503.

Article 2(3) IDD: Transactions effected through intermediaries

As stated above, Spanish law did not classify different insiders and did not take advantage of the exemption allowed for in Article 2(3). Intermediaries holding inside information are covered automatically and all transactions, whether on- or off-market appear to be included.

Article 2 (4) IDD: Exemption for Public Debt Management

Spanish law did not expressly implement this Article as Article 81 belongs to a particular section of the SMA which was addressed only to securities firms and other persons. Although this would change later, at that time it was felt unnecessary.

Article 3 IDD: Disclosing or procuring

Article 81 (2), paragraphs b) and c), as amended by *Ley 9/1991*:

Spanish text:	**English translation:**
Todo el que disponga de alguna información privilegiada deberá abstenerse de ejecutar, por cuenta propia o ajena, directa o indirectamente, las conductas siguientes: (...)	Every person who possesses inside information will refrain from carrying out the following actions for his own account or for the account of a third party, directly or indirectly (…)
b) Comunicar dicha información a terceros, salvo en ejercicio normal de su trabajo, profesión, cargo o funciones.	b) Disclosing that inside information to third parties unless such disclosure is made in the normal course of the exercise of his employment, profession, role or duties.
c) Recomendar a un tercero que adquiera o ceda valores o que haga que otro los adquiera o ceda, basándose en dicha información.	c) Recommending a third party, on the basis of that inside information, to acquire or dispose securities or make someone else to do so.

Comment
Article 3 of IDD required Member States to prohibit insiders from disclosing or recommending inside information to third persons. In complying with Article 3 IDD, Article 81 (2) (b) addressed disclosure to third parties and contained the three defences of Article 3 IDD: in the normal course of employment, profession or duties. In addition, it provided for another exception: "in the exercise of his role". It is unclear why role was included since it did not seem to add much to the other exceptions, that is, duties, employment or profession.

As Article 3 (b) IDD did, Spanish law broadened the scope of Article 81 since it actually covered not only recommending a third party but also recommending a third party to recommend another person based on inside information (procuring).

Article 4IDD: secondary insiders

Article 81 (2) as amended by *Ley 9/1991*

Comments
As stated earlier, Spanish law did not distinguish between primary and secondary insiders, only those described in Article 1 (1). Indeed, as we saw earlier, Article 81 (2) listed the three prohibitions which applied to "everyone who possesses inside information". In addition, while Article 4 IDD required "full knowledge of the facts", Article 81 (2) was silent on this question.

5.3 Interpretation and enforcement of implementing legislation

At the time the first wording of Article 81 of the SMA was drafted, IDD was still being discussed. Once the Directive came into force it was discussed whether it was necessary to make any changes to Spanish law in order to implement it. The definition of inside information contained in the original Article 81 roughly corresponded to Article 1 of IDD, that is, "information which has not been public", of "a precise nature" and "relating to one or several issuers". It is interesting to note that whereas the Spanish text of IDD used "*precise*"[102] Article 81 put *"concreto"*, that is, concrete. In addition some differences are worth mentioning briefly.

Whereas Article 1 IDD stated "several issuers of transferable securities", Article 81 said "one or more issuers of securities" without any restriction. Spanish law went thus beyond the strict wording of IDD.

In addition, while Article 1 IDD required that "if it were made public, would be likely to have a significant effect…" Article 81 said "had it been public, could have had a significant effect on the prices of those securities".

Under Article 1 IDD the information had to be related to one or several issuers of transferable securities or to one or several transferable securities". Article 81, however only mentioned "relating to one or more securities". There was no mention of issuers. Most Spanish scholars saw no problem on this, for a security is always related to an issuer. This ignored inside information that related to issuer rather than to securities which could have significant impact on securities.

In addition, in 1998 there was the last amendment on the Spanish definition of inside information before the need for a new directive on insider dealing and market abuse was proposed in the Commission's Financial Services Action Plan in 1999 and endorsed by the Lamfalussy Report on the Regulation of European Securities Markets in 2001. The reform was minor and it was focused only on the verb tenses which have changed every time the Article was modified.

[102] It says "de carácter preciso".

5.4 Main changes required to implement the Market Abuse Directive

Before MAD was approved Spain already had a fairly advanced insider dealing regime. This was the result of the approval of the Act 44/2002[103] which substantially amended Article 81 and the entire insider dealing and market abuse regulation. The Act aims to improve investor confidence by enhancing market integrity and by extending the definition of inside information.[104] Proof of the new commitment to market confidence is the fact that the CNMV´s powers were strengthened. Again the new Act anticipated some of the provisions of the MAD. Article 38 of Act 44/2002 resulted in a major reform of Article 81 and essentially updated the entire Spanish insider dealing regime.

It is also worth mentioning the Act 37/1998[105] which essentially implemented the Investment Services Directive and thus included the concept of financial instrument in the SMA. Indeed, this Act incorporated swaps, options, futures, forwards, and so forth into Spanish law. These amendments would later facilitate the implementation of MAD in Spain.

At the time of writing, Spain had not yet implemented the Level 2 Directives, Directive 2003/124/EC and Directive 2004/72/EC, on the definition of inside information, but the Spanish Finance Ministry had approved the draft of a Royal Decree designed to implement the Commission directives.[106]

5.5 Legislation implementing the Market Abuse Directive

Definition of inside information (Art 1(1) MAD), as implemented by Commission Directive 2003/124/EEC

Article 81 (1) as amended by *Ley 44/2002*

Spanish text:	**English translation:**
Se considerará información privilegiada toda información de carácter concreto que se refiera directa o indirectamente a uno o varios valores negociables o instrumentos financieros de los comprendidos dentro del ámbito de aplicación de esta Ley, o a uno o varios emisores de los citados valores negociables o instrumentos financieros, que no se haya hecho pública y que, de hacerse o haberse hecho pública, podría influir o hubiera influido de manera apreciable sobre su cotización en un mercado o sistema organizado de contratación.	Inside information shall mean information of a precise nature which has not been made public, relating directly or indirectly to one or more transferable securities or financial instruments within the meaning of this Act, or to one or more issuers of transferable securities or financial instruments, which if it were or had been made public, would or could have had a significant effect on the prices of those financial instruments traded on a regulated market.

[103] Ley 44/2002, de medidas de reforma del Sistema Financiero, 22 November 2002.
[104] Recital IV.
[105] Ley 37/1998 de 16 de noviembre de Reforma de la Ley 24/1988 de 28 de Julio del Mercado de Valores.
[106] Royal Decree 1333/2005 came into force on 24 November, 2005

Lo dispuesto en el párrafo anterior será de aplicación también a los valores negociables o instrumentos financieros respecto de los cuales se haya cursado una solicitud de admisión a negociación en un mercado o sistema organizado de contratación.

The above paragraph, shall also apply to transferable securities or financial instruments for which an application to a regulated market or an organised trading system has been filed.

Comment

As a result of Ley 44/2002, the definition of inside information is now contained in Article 81 (1). The wording of the new Article is all-embracing which has been the traditional approach since Spain started to regulate insider dealing. Basically the definition of inside information remains unchanged. Essentially, the definition of inside information copies Article 1 (1) MAD and thus it contains the defining elements:

- a precise nature;
- relating directly or indirectly to transferable securities, financial instruments or issuers;
- has not been made public; and
- had it been disclosed, it would have had a significant effect on the price.

The Spanish text retains the term *concreto* (concrete) as opposed to precise, used by MAD. In Spanish, *concreto* serves MAD's purposes better, that is, it refers to something which is determined or defined, without vague terms. On the other hand, *preciso* (precise) in Spanish conveys the idea of something fixed, on time, certain. Precise has therefore a distinct meaning, hence the use of concrete which has become traditional in Spanish inside dealing regulation. In any case, what is relevant is that the information must exist it must be ascertained easily as opposed to rumours or abstract information. Essentially it must be straightforward to identify inside information, to distinguish it from public information. It is worth noting that the Article now includes the words "relating directly or indirectly to" in line with MAD in contrast to the previous wording of Article 81.

Financial Instruments Covered (Article 1(3) MAD)

The most significant change is the express introduction of "financial instrument" in line with Article 1 (1) MAD which covers a wider spectrum of instruments than the traditional expression transferable securities.[107] Options, futures and the like fell outside the scope of the previous wording of Article 81 since their contractual nature would not qualify them as securities. Under Spanish law, the concept of securities covered only registered and bearer securities, thus leaving derivatives, forwards, and so forth outside the scope of SMA.

The situation changed when the Act 37/1998 came into force and implemented the Directive 93/22 on Investment Services. Indeed, Article 2 of the Act 37/1998 added the concept of financial instrument to the list of transferable securities covered by Article 2 of SMA.[108] Whereas financial instruments were already covered by the SMA they were not expressly mentioned in Article 81 although the wording refers to transferable securities which after all ink to the list of Article 2 of the SMA. In any case, it was sensible to include the mention to financial instruments in Article 81.

As such, Article 2 of the SMA now includes, *inter alia*: contracts subject to negotiation in a regulated secondary market; swaps, options and forwards as long as the underlying property takes the form of financial assets, indices, currencies, interest rates or any other underlying property of a financial nature, regardless of the form in which they are settled and irrespective of whether they are traded or not in an organised market; and contracts or transactions over instruments not mentioned in the previous paragraphs provided they are eligible to be traded in a secondary market, whether is official or not, irrespective of whether the underlying property is financial or not thus therefore including commodities, raw goods and any other tangible asset.

In line with Article 1(1) MAD, inside information under Article 81(1) also covers information relating to transferable securities and financial instruments for which an application to a regulated market or other trading systems has been filed. In addition, it applies not only to regulated markets recognised under the Investment Services Directive but also to other trading systems. It is for the government to create a financial market in Spain[109]. In Spain, the following are regulated secondary markets according to the SMA,[110] the Act 37/1998[111] and other legal instruments:

- The Stock Exchange (Madrid, Barcelona, Valencia y Bilbao);
- Options and Futures Markets;
- "FC&M" the futures and options market for citrus fruits;
- "MFAO", the commodities market for olive oil;
- Fixed Interest Market of the Financial Asset Intermediaries Association;
- Public Debt Market issued by the Bank of Spain and other regional / local bodies;
- Other nationwide securities markets relating to securities.

[107] Article 5 SMA (as amended).
[108] Article 2 establishes the securities that fall within the scope of SMA although it does not define them.
[109] Article 59 SMA.
[110] Article 31 SMA.
[111] Transitory Proviso No 6.

Inside information in relation to commodity derivatives (Article 1(1) MAD) as applied by Directive 2004/72/ EC, Article 4

Article 81 (1) as amended by *Ley 44/2002*

Spanish text:

En relación con los instrumentos financieros derivados sobre materias primas se considerará información privilegiada toda información de carácter concreto, que no se haya hecho publica, y que se refiera directa o indirectamente a uno o varios de esos instrumentos financieros derivados, que los usuarios de los mercados en que se negocien esos productos esperarían recibir con arreglo a las prácticas de mercado aceptadas en dichos mercados

English translation:

In relation to financial derivative instruments on raw commodities, inside information shall mean information of a precise nature which has not been public, relating directly or indirectly, to one or more such financial derivative instruments and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets.

Comment
The third paragraph of Article 81 (1) adopts virtually the same wording than that of Article 1 (1) MAD. In Spain, commodity derivatives markets refer to the futures markets for citrus fruits and olive oil.

Spain has not so far implemented Commission Directive 2004/72/EC implementing Article 1(1) MAD, on the definition of inside information in relation to derivatives on commodities.

Inside Information in relation intermediaries (Article 1(1) MAD)

Hitherto, no express provisions on intermediaries have been included in Spanish law, because Spain defines an insider as any person who possesses inside information, which would include relevant intermediaries.

Definition of insider dealing (Article 2 (1) MAD)

Article 81 (2) SMA, as amended by *Ley 44/2002*

Spanish text:

Todo el que disponga de información privilegiada deberá abstenerse de ejecutar por cuenta propia o ajena, directa o indirectamente, alguna de las conductas siguientes:
a) Preparar o realizar cualquier tipo de operación sobre los valores negociables o instrumentos financieros de los mencionados en el apartado anterior a los que la información se refiera, o sobre

English translation:

Any person who possesses inside information shall refrain from using that information to do any of the following, directly or indirectly, for his own account or for the account of a third party:
a) Preparing or carrying out any sort of operation in relation to transferable securities or financial instruments to which the inside information relates or any other securities, financial

los cualquier otro valor, instrumento financiero o contrato de cualquier tipo, negociado o no en un mercado secundario, que tenga como subyacente a los valores negociables o instrumentos financieros a los que la información se refiera.	instruments or contract of any sort, regardless of whether it is admitted to trading on a secondary market or not, if the inside information relates to the underlying transferable securities or financial instruments.

Comment
Article 2 (1) MAD defines insider dealing as "using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates".

There are a number of differences with Article 2 (1): Article 81 (2) prohibits "preparing or carrying out" as opposed to "trying to acquire or disclose", thus arguably catching plans which have not yet reached the stage of a formal attempt. What is prohibited under Spanish law is "any sort of operation" in relation to negotiable securities and financial instruments. It is not limited to "acquiring or disposing".

Definition of insider (Article 2 (1) MAD)

Article 81 (2), as amended by *Ley 44/2002*

Spanish text:	**English translation:**
Las prohibiciones establecidas en este apartado se aplican a cualquier persona que posea información privilegiada cuando dicha persona sepa, o hubiera debido saber, que se trata de esta clase de información.	These prohibitions shall apply to any person who possesses inside information provided that person knows or ought to have known that it was inside information.

Comment
Spanish Law has retained its wide definition of "insider" as including anyone who possesses inside information but a new paragraph has been added to Article 81(2) requiring that the person knows or ought to have known that the information was privileged. The definition of "primary insiders" in Article 2(1) MAD does not require knowledge. On the other hand, it is reasonable to assume that any of the primary insiders listed in Article 2 (1) who possess inside information ought to know that it is inside information. It remains to be seen how the Spanish courts will decide whether an individual knew or ought to have known that the information he held was actually inside information.

Whereas MAD describes the means by which the information has been obtained, for example board membership, Spanish law remains indifferent and covers every person who holds inside information provided he ought to have known that it was inside information.

Corporate insiders (Article 2 (2) MAD)

As stated earlier, Spanish law has no special provisions for insiders who are legal persons, as opposed to natural persons.

Completion of transactions (Article 2 (3) MAD)

Article 81 (2) (a), as amended by *Ley 44/2002*

Spanish text:	English translation:
Se exceptúa la preparación y realización de las operaciones cuya existencia constituye, en sí misma, la información privilegiada, así como las operaciones que se realicen en cumplimiento de una obligación, ya vencida, de adquirir o ceder valores negociables o instrumentos financieros, cuando esta obligación esté contemplada en un acuerdo celebrado antes de que la persona de que se trate esté en posesión de la información privilegiada, u otras operaciones efectuadas de conformidad con la normativa aplicable.	The following conduct will fall outside the above prohibition: the preparation or completion of transactions information about which is inside information in itself; transactions conducted in the discharge of an obligation that has become due to acquire or dispose of transferable securities or financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information, and any other operation required by law.

Comment
Article 2 (3) MAD provides for one exception to the prohibition on insider dealing which is implemented by Article 81 (2) (a). Spanish law provides for two additional exclusions where trading by an insider will not be subject to the prohibition on insider dealing:

- Carrying out a transaction, knowledge of which constitutes inside information in itself.
- Any other operation required by law.

Disclosing or recommending (Article 3 MAD)

Article 81 (2), b) and c)

Spanish text:	English translation:
Todo el que disponga de información privilegiada deberá abstenerse de ejecutar por cuenta propia o ajena, directa o indirectamente, alguna de las conductas siguientes: (..) b) Comunicar dicha información a terceros, salvo en el ejercicio normal de su trabajo, profesión o cargo.	Any person who possesses inside information shall refrain from using that information, directly or indirectly, for his own account or for the account of a third party to do any of the following: (..) b) Disclose such information to a third party.

c) Recomendar a un tercero que adquiera o ceda valores negociables o instrumentos financieros o que haga que otro los adquiera o ceda basándose en dicha información.	c) Recommend a third party to acquire or dispose of transferable securities or financial instruments on the basis of that information.

Comment
The two last paragraphs of Article 81 (2) fully implement the prohibitions on disclosure and recommendation. In effect, paragraph b) implements the prohibition on disclosure of information to a third party, unless such disclosure is made in the normal course of employment, profession or duties.

The prohibition on recommending third parties to deal on the basis of inside information is set in paragraph c) of the above Article.

Secondary insiders (Article 4 MAD)

Since the prohibition applies to everyone possessing inside information who knew or ought to have known that the information was inside information, the provisions of Article 4 MAD are already covered in the definition of insider.

6 The Netherlands

6.1 Introduction

The law before the introduction of legislation implementing the Insider Dealing Directive[112]

In 1986 the *Vereniging voor de Effectenhandel* enacted a code of conduct on insider trading (Modelcode Voorkoming Misbruik van voorwetenschap). The code of conduct came into force on 1 January 1987 and was directed at companies listed on the Amsterdam Stock Exchange, as it then was. The code of conduct covers various issues such as dealing in securities by directors, supervisory directors and other relevant persons.

The first legislation in the Netherlands on insider dealing was the Act of 2 February 1989 (Stb. 1989, 16) prohibiting insider dealing in section 336a of the Penal Code. The provisions on insider dealing, together with minor amendments to implement the Insider Dealing Directive,[113] were transferred from the Penal Code to section 31a of the Act on the Supervision on the Securities Trade (Wet toezicht effectenverkeer) in 1992.[114] The provisions on insider dealing have been completely revised in sections 46-46d of the revised Act on the Supervision of Securities Trading 1995 (Wet toezicht effectenverkeer 1995).

Main changes required to implement the Insider Dealing Directive

Council Directive 89/592/EEC of 13 November 1989 on insider dealing required only minor amendments to section 336a of the Penal Code. The main reason was the fact that section 336a of the Penal Code, unlike the Council Directive, applied to any person in possession of inside information there was no requirement that the person should have obtained the inside information by virtue of a professional or employment relationship with the relevant company.

Directive 89/592/EEC of 13 November 1989 has been implemented in Dutch Law in the Wet toezicht effectenverkeer (ASST) or Act on the Supervision of Securities Trading, which law has been replaced by the Wet toezicht effectenverkeer 1995 (ASST 1995). The latter was amended in 1999 to take account of practical experience.

[112] Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, Official Journal L 334, 18/11/1989 P. 0030–0032.
[113] *ibid.,*
[114] Act of 1 July 1992, Stb. 1992, 378.

6.2 Legislation implementing the Insider Dealing Directive

Art 1(1) IDD Definition of Inside Information

Dutch text Art. 46(2) Act on the Supervision on the Securities Trade 1995 (ASST 1995).	English Translation:
Voorwetenschap is bekendheid met een bijzonderheid omtrent de rechtspersoon, vennootschap of instelling, waarop de effecten betrekking hebben of omtrent de handel in de effecten: a) die niet openbaar is gemaakt; en b) waarvan openbaarmaking, naar redelijkerwijs is te verwachten, invloed zou kunnen hebben op de koers van de effecten, ongeacht de richting van die koers	Inside information shall mean the knowledge of specific information concerning a legal person, company or institution to which the securities relate or concerning the trade in the said securities: a) that has not been made public; and b) where disclosure can reasonably be expected to have an effect on the price of the securities concerned, irrespective of the direction of the share price.

Comment
The two important differences between the 1989 Directive and art. 46(2) ASST 1995 are:
- the directive speaks of "information (..) of a precise nature" while art. 46(2) ASST 1995 deals with "specific" information; and
- the directive requires "a significant effect on the price" while according to art. 46(2) "an effect on the price" will suffice.
Both differences have the effect of widening the scope of insider trading under the ASST 1995 compared with the 1989 Directive.

Article 1(2) of IDD: definition of transferable securities

Dutch text	English translation
Art. 46(2) ASST 1995 Het is een ieder verboden om, beschikkende over voorwetenschap, in of vanuit Nederland een transactie te verrichten of te bewerkstelligen in: a. effecten die zijn genoteerd aan een op grond van artikel 22 erkende effectenbeurs dan wel aan een buiten Nederland gevestigde en van overheidswege toegelaten effectenbeurs of effecten waarvan aannemelijk is dat deze spoedig aan een zodanige beurs zullen worden genoteerd; of b. effecten waarvan de waarde mede wordt bepaald door de waarde van onder a bedoelde effecten.	It shall be prohibited for any person who is in possession of inside information to carry out or cause to be carried out in or from the Netherlands a transaction in: (a) securities that are listed on a securities exchange recognised pursuant to section 22 or on a securities exchange that is established outside the Netherlands and is recognised by its government, or securities that are likely to be listed on such an exchange in the near future; or (b) securities whose value is determined in part by the value of the securities referred to in (a).

Comment
Art. 46(2) refers to securities that are listed on a securities exchange with recognized status such as the AEX or securities exchanges recognized by foreign governments. Art. 46(2) gives no further definition of "securities". Therefore we must look at art. 1 ASST 1995:
For the purpose of this Act (..)
(a) "securities" shall mean:
1. share certificates, debt certificates, profit-sharing or founders' certificates, option certificates, warrants and similar documents of value.
2. rights of joint ownership, options, futures, entries in share and debt registers, and similar rights, conditional or otherwise;
3. certificates representing securities as referred to above;
4. scripts representing securities as referred to above;

Article 2(1) of IDD: Definition of Insider and Insider Dealing

Art 46(2) ASST 1995

Dutch text Art 46(2) ASST 1995	English Translation:
Het is een ieder verboden om, beschikkende over voorwetenschap, in of vanuit Nederland een transactie te verrichten of te bewerkstelligen in:	It shall be prohibited for any person who is in possession of inside information to carry out or cause to be carried out in or from the Netherlands a transaction in:
a. effecten die zijn genoteerd aan een op grond van artikel 22 erkende effectenbeurs dan wel aan een buiten Nederland gevestigde en van overheidswege toegelaten effectenbeurs of effecten waarvan aannemelijk is dat deze spoedig aan een zodanige beurs zullen worden genoteerd; of	a) securities that are listed on a securities exchange recognised pursuant to section 22 or on a securities exchange that is established outside the Netherlands and is recognised by its government, or securities that are likely to be listed on such an exchange in the near future; or
b. effecten waarvan de waarde mede wordt bepaald door de waarde van onder a bedoelde effecten.	b) securities whose value is determined in part by the value of the securities referred to in (a).

Comment
As mentioned in the introduction, art. 46 ASST 1995 is, like its predecessor section 336a of the Penal Code, not restricted to insider trading by "insiders" as defined in art. 2(1) of the 1989 Directive. Art. 46 ASST 1995 covers "any person" who is in possession of inside information *tout court*.

Corporate insider

Art 2(2) IDD
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.

Comment
Dutch law does not distinguish between insiders who are legal persons and those who are natural persons.

Transactions effected through intermediaries (Article 2(3) IDD)

Dutch text	English Translation:
Art. 46(3) ASST 1995	
Het verbod van het eerste lid is niet van toepassing:	The prohibition in subsection (1) shall not apply to:
a) op de tussenpersoon die, slechts beschikkend over voorwetenschap met betrekking tot de handel, volgens de regels van de goede trouw handelt ter bediening van opdrachtgevers;	a) an intermediary who, being merely in possession of inside information concerning the trade insecurities, trades in accordance with the principles of good faith in order to execute client orders.
b) op de rechtspersoon, vennootschap of instelling waarvan de werknemers die zijn betrokken bij het verrichten of bewerkstelligen van de transactie slechts beschikken over voorwetenschap met betrekking tot de handel; (..)	b) a legal person, company or institution of which the employees who are involved in the carrying out of transactions or in causing transactions to be carried out are only in possession of inside information concerning the trade in securities; (..)

Comment
The 1989 directive applies also to professional intermediaries. According to art.46(3) ASST 1995 the prohibition on insider dealing does not apply to intermediaries acting in accordance with the principles of good faith.

Exemption for public debt management etc: Article 2 (4) IDD

Comments
The Dutch legislator did not use the option under art. 2(4) IDD.

Article 3 IDD: disclosing or procuring

Dutch text	English Translation:
Art. 46a(1) ASST 1995	
Het is een ieder die beschikt over voorwetenschap omtrent een rechtspersoon, vennootschap of instelling als bedoeld in artikel 46, tweede lid, of omtrent de handel in effecten als bedoeld in artikel 46, eerste lid, die op die rechtspersoon, vennootschap of instelling betrekking hebben, verboden om, anders dan in de normale uitoefening van zijn werk, beroep of functie: a) deze voorwetenschap aan een derde mee te delen, of b) een derde aan te bevelen transacties te verrichten of te bewerkstelligen in die effecten	It shall be prohibited for any person who is in possession of inside information concerning a legal person, company or institution as referred to in section 46(2) or concerning the trade in securities as referred to in section 46(1) in respect of that legal person, company or institution, other than as part of his normal duties, profession or position: a) to communicate this inside knowledge to a third party, or b) to recommend a third party to carry out or to cause to be carried out transactions in such securities.

Comment
Apart from differences between art. 2 IDD and art. 46 ASST 1995 as mentioned above, art. 46a(1) ASST fully implements art. 3 of the 1989 Directive. The Dutch law goes further than the Directive in that it prohibits recommending a third party to buy relevant securities, but this is not subject to the Directive qualification that this should involve the disclosure of inside information "on the basis of that inside information".

Article 4 IDD: Secondary insiders

Comment
This article has not been implemented in Dutch law, since no distinction is made between primary and secondary insiders. The prohibition in section 46 applies to anyone who is in possession of inside information.

6.3 Problems of interpretation or enforcement of implementing legislation

In the HCS verdict of 26 June 1995 (NJ 1995, 662) the Hoge Raad (Supreme Court) decided that using inside information is only punishable if at the time of executing or bringing about the transaction, it could reasonably have been expected that publication of the information would result in a change of the price of the securities.

The Amsterdam Gerechtshof (High Court) ruled on 30 June 2000, JOR 2000, 154 that specific information is price-sensitive if its disclosure can reasonably be expected to influence the price of the securities concerned. Such influence must be identifiable.

The Hoge Raad ruled on 31 May 2005, LJN: AR8021, and JOR 2005, 185 that two unconnected pieces of specific information when taken together may jointly constitute a fact that may influence the price of securities.

As to 'significant' the Hoge Raad looked at the MAD definition as implemented in Commission Directive 2003/124/EC and ruled that this means information which a reasonable investor would be likely to use as part of the basis of his investment decision. Joost Italianer, a leading specialist in this field, expects this to result in a low threshold for proving "significant effect".[115]

6.4 Main changes required to implement the Market Abuse Directive[116]

The 'Wet Marktmisbruik' (WMM) or Market Abuse Act of 23 June 2005, that came into force on 1 October 2005, implemented the Market Abuse Directive (MAD) in The Netherlands. This very short act also amended the following Acts;

- 'Wet toezicht effectenverkeer 1995' (ASST 1995) or Act on the Supervision of Securities Trading;
- 'Wet op de economische delicten' (Wed) or Act on economic crimes;
- 'Wetboek van Strafvordering (WvSv) or Criminal Prosecution code.

The relevant articles of the ASST 1995 are contained in chapter XII (sections 45a - 47f). Several sections of the ASST 1995 refer to the 'Besluit marktmisbruik' (Bmm) or Decree on market abuse, an Order in Council / governmental decree which is not a formal Act, for further elaboration of rules set out in the ASST 1995.

The WMM and Bmm are likely to be included in the 'Wet op het financieel toezicht' (Wft) or Act on Financial Supervision, a draft of which Parliament is currently discussing and which might be in force as early as 1 January 2006.[117] Below reference will be made to both the new ASST provisions and the parallel Wft provisions. Where the draft Wft text differs from the updated ASST 1995 text, the latter will be printed. Major differences will be indicated.

In the explanatory memorandum to Parliament accompanying the draft WMM, the Justice Minister indicated that the MAD is aimed at maximum harmonisation of definitions and prohibitions as far as possible, whereas the IDD only contained minimum standards.[118] Therefore WMM will use MAD terminology as far as possible. However, in some respects WMM deviates from MAD.

The Justice Minister indicated in a letter to Parliament accompanying the draft legislation that several exceptions have been made to the principle that Dutch implementing laws use the terminology of Community legislation wherever possible. Such deviation is allowed when it is better to use terminology used in other national legislation, when Community terminology is insufficiently precise and the deviation yields better use of the Dutch language or when amending current Dutch terminology would create confusion in the market.

Thus instead of 'financial instrument' the former term 'security' is kept. On the other hand the meaning of 'security' in the new text of ASST 1995 is widened to comply with the MAD term 'financial instrument'.[119] Under the Wft, which will replace the ASST 1995, the term financial instrument will be used. That term is largely derived from the Directive 93/22/EC and is slightly wider than the ASST term securities as it

[115] J. Italianer; annotation to HR 31- May 2005. JOR 2005, 185 p.1361.
[116] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), Official Journal L 096, 12/04/2003 P. 0016 – 0025.
[117] Advisory Memorandum from the Justice Minister to parliament, staatsblad 2005, nr. 467, p.14. / Draft law number 29708. The last publicised document is the fourth ministerial memorandum of amendments of 20 October 2005.
[118] Italianer/Tillema, Ondernemingsrecht 2005-2, p 34.
[119] Letter to parliament p 1.

also covers currency swaps.[120] In line with MAD, in Wft the term financial instruments also cover commodity derivatives.

6.5 Legislation implementing the Market Abuse Directive

Definition of inside information Art. 1(1) MAD as implemented by Commission Directive 2003/124/EC

Article 46 section 4 ASST 1995/ Article 5:53 section 1 Wft:

Voorwetenschap is bekendheid met informatie die concreet is en die rechtstreeks of middellijk betrekking heeft op de rechtspersoon, vennootschap of instelling waarop de effecten betrekking hebben of op de handel in deze effecten, welke informatie niet openbaar is gemaakt en waarvan openbaarmaking significante invloed zou kunnen hebben op de koers van de effecten of op de koers van daarvan afgeleide effecten.

Inside information shall mean the knowledge of information, that is of a precise nature and that directly or indirectly relates to the legal person, company or institution to which the securities relate or to the trade in such securities, which information has not been made public, and where disclosure can have a significant effect on the price of the securities concerned or on the price of related derivative securities.

Comment
The term 'significant' is new to ASST 1995. Inside information must in the new provisions relate to information that could have a significant influence on the market price of a security.[121] Also the separate definition for commodities is new.

The official Dutch version of the MAD translates 'significant' as 'aanzienlijk'. This translation was found to be less than optimal. Instead the word 'significant' is used in the ASST 1995. The Justice Minister also thought the definition of the term 'issuers of financial instruments' to be too wide. The Dutch ASST text differs from the Dutch version of the Directive.

The term of 'a precise nature' differs from the term 'bijzonderheid' or specific in the former ASST 1995 text. According to the Advisory Memorandum from the Justice Minster to Parliament these terms boil down to the same thing in practice. Also the words 'directly or indirectly' are new in ASST 1995.

The words 'irrespective of the direction of the share price' were dropped from the former text of ASST 1995. According to the Advisory Memorandum this should not be interpreted as if such direction would now become relevant.

The only relevant factor is whether a reasonable investor would base his investment decisions on such information. Such information must thus be specific enough to draw a conclusion as to the possible effect on the price of the securities. This also goes for the words 'as is reasonably to be expected' that are included in Art 46 Section 2 ASST 1995.

[120] Fourth ministerial memorandum of amendments on Wft, p.368.
[121] M. Kolkman in Bedrijfsjuridische berichten 4-10-2005, p.218 and Nederlands Juristen Blad 26-08-2005, p.1544.

Financial Instruments covered: Article 1(3) MAD

As mentioned above, the amendments to ASST 1995 will cover all financial instruments covered by MAD, including commodity derivatives.

Inside Information in relation to commodity derivatives as applied by Directive 2004/72/EC, Art 4

Article 46 section 5 ASST 1995 Article 5:53 section 1 Wft:

Met betrekking tot effecten waarvan de waarde mede wordt bepaald door de waarde van grondstoffen is voorwetenschap bekendheid met niet openbaar gemaakte informatie die concreet is en die rechtstreeks of middellijk betrekking heeft op een of meer van die effecten, van welke informatie beleggers in die effecten bekendmaking mogen verwachten op grond van marktpraktijken die gebruikelijk zijn op de gereglementeerde markt waarop die effecten worden verhandeld. Bij of krachtens algemene maatregel van bestuur kunnen marktpraktijken als bedoeld in de vorige volzin worden aangewezen.

In relation to securities, to whose value the value of raw materials contributes, inside information shall mean the knowledge of information, that has not been made public and is of a precise nature, and that directly or indirectly relates to one or more of those securities, and which information investors in such instruments may expect to be publicised by virtue of market practices that are common on the regulated market on which such instruments are traded. By or pursuant to an order in council market practices as referred to in the previous sentence may be designated.

Article 46 section 6 ASST 1995 / Article 5:56 section 4 Wft:

Van informatie waarvan beleggers bekendmaking mogen verwachten als bedoeld in het vijfde lid is sprake indien deze van dien aard is dat deze:

a) routinematig beschikbaar wordt gesteld aan de beleggers in die effecten;
b) openbaar moet worden gemaakt overeenkomstig de met betrekking tot de desbetreffende gereglementeerde markt geldende wettelijke voorschriften of volgens de op die gereglementeerde markt gehanteerde marktregels, overeenkomsten of gangbare.

Information shall be deemed to be of such kind that investors may expect its publication as referred to in section 5 if such information is of such a nature that it:

a) a)is made available on a routine basis to investors in such securities;
b) is required to be publicized in accordance with the legal provisions that apply to the relevant regulated market or to the market regulations, agreements or common practices observed at such regulated markets.

Inside Information in relation to intermediaries Article 1(1) MAD

There are no special articles implementing this provision. The position of an intermediary should be examined under article 46a ASST 1995 (see below under f) 'Disclosing or recommending (Art 3) MAD'), and under article 46 section 1 sub c (see below under c) 'Definition of insider Art 2(1) MAD').

Article 2 sub g of the Bmm Order in Council states that the prohibition of art 46 section 1 and 46 section 3 ASST 1995 does not apply to acts performed in good faith by an intermediary when providing services to his client if the only inside information he possesses relates to his client's trade.

Definition of insider dealing Art 2(1) MAD

Article 46 section 1 ASST 1995 / Article 5:56 section 1 Wft:

1. Het is een ieder die behoort tot een in het tweede lid genoemde categorie natuurlijke personen of rechtspersonen verboden om gebruik te maken van voorwetenschap door een transactie te verrichten of te bewerkstelligen:	a) It shall be prohibited for any person who is included in the category of natural persons or legal persons as referred to in the second section to use inside information by carrying out a transaction or causing a transaction to be carried out:
a) in of vanuit Nederland of een staat die geen lid-staat is in effecten die zijn toegelaten tot de handel op een gereglementeerde markt die gelegen is of werkzaam is in Nederland of waarvoor toelating tot die handel is aangevraagd;	a) within or from The Netherlands or a state that is not a member-state in securities that have been admitted to trading on a regulated market that is situated or operates within The Netherlands or where a request for admission to trading has been made;
b) in of vanuit Nederland in effecten die zijn toegelaten tot de handel op een gereglementeerde markt die gelegen is of werkzaam is in een andere lid-staat of die zijn toegelaten tot de handel op een effectenbeurs die is gevestigd en van overheidswege toegelaten in een staat die geen lid-staat is, of in effecten waarvoor toelating tot die handel is aangevraagd; of	b) within or from The Netherlands in securities that have been admitted to trading on a regulated market that is situated or operates within another member-state or which have been admitted to trading on a stock market that has been established and has been granted leave to operate by the government of a state that is not a member-state, or in securities where an application for admission to trading has been made;
c) in of vanuit Nederland of een staat die geen lid-staat is in effecten, niet zijnde effecten als bedoeld onder a of b, waarvan de waarde mede wordt bepaald door de onder a of b bedoelde effecten.	c) within or from The Netherlands or a state that is not a member-state in securities, not being securities as referred to under a. or b., the value of which is established by amongst others the securities as referred to under a. or b.

Comment

The criterion 'using' is introduced in the amendments to ASST 1995. The IDD prohibited insiders from "taking advantage of" inside information to deal, but Dutch law simply prohibited anyone in possession of inside information from dealing. According to the Advisory Memorandum from the Justice Minister to Parliament, a person uses inside information if and when a causal relationship exists between the knowledge and the transaction.

According to a further Explanatory Memorandum to Parliament a primary insider who enters into a transaction, uses inside information if he knows or should have known that a non-public special circumstance exists that, if published could or would be likely to have a significant influence on the price of securities.

It is not clear that the Netherlands has fully implemented the provisions of Article 2(1) MAD in relation to "trying to acquire or dispose of" financial instruments.

For secondary insiders to violate the law, an extra requirement must be fulfilled: they must know or ought reasonably to have known that the information is inside information as defined in ASST 1995.

Article 46 section 8 allows for categories of acts to be exempted from the prohibition of art 46 section 1 and 46 section 3 ASST 1995. Article 2 of the Bmm Order in Council lists such categories. In that Order in Council the former exemptions for employee stock options and Chinese wall situations have not been included.[122]

In accordance with the new ASST 1995 text, the legislation covers not only dealing in securities that have been admitted to trading on a regulated market but also dealing in securities where an application for admission to trading has been made. It also extends beyond securities listed on a recognised stock exchange to cover all MAD financial instruments traded on a regulated market.

Definition of insider Art 2(1) MAD

Article 46 section 2 ASST 1995 / Article 5:56 section 2 Wft:

2. De in het eerste lid bedoelde categorieën zijn:
   a) natuurlijke personen of rechtspersonen die over voorwetenschap beschikken vanwege het feit dat zij het dagelijks beleid bepalen of mede bepalen, dan wel toezicht houden op het beleid en de algemene gang van zaken van de rechtspersoon, vennootschap of instelling die effecten heeft uitgegeven als bedoeld in het eerste lid, waarop de voorwetenschap betrekking heeft;
   b) natuurlijke personen of rechtspersonen die over voorwetenschap beschikken

2. The categories referred to in the first section are:
   a) natural persons or legal persons that have inside information due to the fact that they set out the day to day policy or contribute thereto, or supervise policy and the general course of action of the legal person, company or institution which has issued securities as referred to in the first section, to which the inside information relates;
   b) natural persons or legal persons that have inside information due to the fact that they have at their disposal a qualified participation in the legal person, company or

[122] J. Italianer and A.P. Tillema, ondernemingsrecht 2003-12, p.433.

vanwege het feit dat zij beschikken over een gekwalificeerde deelneming in de rechtspersoon, vennootschap of instelling, die effecten heeft uitgegeven als bedoeld in het eerste lid, waarop de voorwetenschap betrekking heeft;

c) natuurlijke personen of rechtspersonen die toegang hebben tot informatie als bedoeld in het vierde of vijfde lid uit hoofde van de uitoefening van werk, beroep of functie;

d) natuurlijke personen of rechtspersonen die over voorwetenschap beschikken uit hoofde van betrokkenheid bij strafbare feiten.

institution which has issued securities as referred to in the first section, to which the inside information relates;

c) natural persons or legal persons that have access to information as referred to in the fourth or fifth section by virtue of the exercise of their employment, profession or function;

d) natural persons or legal persons that have inside information by virtue of their involvement in criminal offences.

Comment
As the MAD term ‘shareholding’ was considered to be too wide to be useful, it was narrowed down to ‘qualified holding’, as defined in article 1 under f of ASST 1995. Anyone with an interest of over 10% may be deemed to be involved with the institution to such a degree that he should be deemed to be a primary insider.[123] People working with the institution as external counsel may be included in category c.

Corporate insiders Art 2(2) MAD

See articles 46 section 1 and art. 46 section 2 sub c ASST 1995 above.

Completion of transactions Art 2(3)

Article 46 section 7 ASST 1995 / Article 5:56 section 5 Wft:

De verboden, bedoeld in het eerste en derde lid, zijn niet van toepassing op het verrichten of bewerkstelligen van transacties in effecten:

a) ter nakoming van een opeisbare verbintenis die reeds bestond op het tijdstip waarop degene die de transactie verrichtte of bewerkstelligde kennis kreeg van de informatie, bedoeld in het vierde lid, met betrekking tot de rechtspersoon, vennootschap of instelling waarop die effecten betrekking hebben;

The prohibitions referred to in the first and third sections, shall not apply to carrying out transactions in securities or causing transactions to be carried out transactions in securities:

a) in order to comply with an enforceable obligation that pre-existed at the time the person carrying out the transaction or causing the transaction to be carried out obtained knowledge of the information referred to in the fourth section, relating to the legal person, company or institution to which the securities relate;

[123] Fourth ministerial memorandum of amendments to Wft p.601.

Disclosing or recommending (Art 3) MAD

Article 46a section 1 ASST 1995 / Article 5:57 section 1 Wft:

Het is een ieder die behoort tot een in het tweede lid van artikel 46, onder a, b of d, bedoelde categorie alsmede een ieder die beschikt over voorwetenschap en behoort tot de in het tweede lid, onder c, bedoelde categorie verboden om in of vanuit een in artikel 46, eerste lid, onder a, b, of c bedoelde staat, voor zover het effecten betreft als bedoeld in het desbetreffende onderdeel:

a) de informatie waarop zijn voorwetenschap betrekking heeft aan een derde mee te delen, anders dan in de normale uitoefening van zijn werk, beroep of functie; of
b) een derde aan te bevelen of ertoe aan te zetten transacties te verrichten of te bewerkstelligen in die effecten.

It shall be prohibited for any person who belongs to a category referred to in the second section under a, b, c or d of article 46, as well as any person who has inside information and who belongs to the category referred to under the second section under c, within or from a state as referred to in article 46 section one under a, b or c, in as far as securities that are related to in such part are concerned:

a) to pass the inside information to a third person, unless acting in the normal course of the exercise of his employment, profession or function; or
b) to recommend or induce a third person to carry out transactions in such securities or to cause transactions in such securities to be carried out.

Article 46a section 2 ASST 1995 / Article 5:57 section 2 Wft:

Het verbod, bedoeld in het eerste lid, is van overeenkomstige toepassing op ieder ander die weet of redelijkerwijs moet vermoeden dat hij over voorwetenschap beschikt.

The prohibition in the first section applies by analogy to any other person who knows or ought to have known that he possesses inside information.

Article 46a section 3 ASST 1995 / Article 5:57 section 3 Wft:

Bij algemene maatregel van bestuur worden regels gesteld met betrekking tot de gevallen waarin en de omstandigheden waaronder sprake is van meedelen in het kader van de normale uitoefening van werk, beroep of functie, als bedoeld in het eerste lid, onder a.

By Order in Council rules will be laid down regarding the cases in which and circumstances under which information is considered to be disclosed in the normal course of the exercise of employment, profession or function as referred to in section 1 a.

Comment
In the Order in Council relating to the implementation of article 46 ASST 1995, the Finance Minister has stated[124] that if a company contacts (potential) shareholders in the context of its intention to make a public offering of shares or an issue of shares, such contact is deemed to be made in the normal course of the exercise of employment, profession or function.

[124] AFM interpretation on sounding.

Furthermore the Dutch competent authority, the Dutch Financial Markets Authority' (AFM) has on its' website[125] issued guidance on the treatment of contacts between a company and (potential) shareholders under article 46a ASST 1995. The Justice Minister has done the same in the fourth ministerial memorandum of amendments to the Wft draft (p. 602).

If a company is considering a major decision like a merger, transfer of business, management buy out, acquisition or a divestiture, it may want to sound out its (potential) shareholders to see whether such a transaction is feasible, or to see how such shareholders are intending to vote on matters that require approval by the shareholders meeting or to obtain their opinion of such intended major strategic decisions.

If the company sounds out shareholders in this way and this is deemed necessary by the company in order to assess the chances of success, AFM views such sounding out as contributing to the proper functioning of the markets and therefore AFM will consider it to be in the normal course of the exercise of employment, profession or function. The (potential) shareholder that has been sounded out will consequently have inside information. Therefore he may not trade in shares of the company and may not pass the information to third parties. It is the responsibility of the company to make sure the group of persons sounded out is as small as possible.

Secondary insiders (Art 4) MAD

Article 46 section 3 ASST 1995 / Article 5:56 section 3 Wft:

Het is een ieder die niet behoort tot een in het tweede lid genoemde categorie en die weet of redelijkerwijs moet vermoeden dat hij over voorwetenschap beschikt, verboden om gebruik te maken van die voorwetenschap door:

a) in of vanuit Nederland of een staat die geen lid-staat is een transactie te verrichten of te bewerkstelligen in effecten als bedoeld in artikel 46, eerste lid, onder a;
b) in of vanuit Nederland een transactie te verrichten of te bewerkstelligen in effecten als bedoeld in artikel 46, eerste lid, onder b; of
c) in of vanuit Nederland of een staat die geen lid-staat is een transactie te verrichten of te bewerkstelligen in effecten als bedoeld in artikel 46, eerste lid, onder c.

It shall be prohibited for any person not belonging to a category mentioned in the second section who knows or ought reasonably to have known that he possesses inside information, to use that inside information by:

a) carrying out a transaction or causing a transaction to be carried out in securities as referred to in article 46 section one under a. within or from The Netherlands or a state that is not a member-state;
b) carrying out a transaction or causing a transaction to be carried out in securities as referred to in article 46 section one under b. within or from The Netherlands;
c) carrying out a transaction or causing a transaction to be carried out in securities as referred to in article 46 section one under c. within or from The Netherlands or a state that is not a member-state.

[125] www.afm.nl, information in both Dutch and English.

Comment
The distinction between primary and secondary insiders is new to ASST 1995. Up to the 1 October 2005 version of ASST 1995, Dutch law was more severe than IDD as it did not make the distinction and thus treated both categories equally.[126]

Also new to ASST 1995 is that for secondary insiders to violate the law an extra requirement must be fulfilled: they must know or should reasonably have known that their knowledge is inside information as defined in ASST 1995. Primary insiders are deemed to have knowledge as a consequence of their employment or functions or being in a special relationship with the legal person, company or institution.

Article 46 section 8 ASST 1995 / Article 5:56 section 6 Wft allows for categories of acts to be exempted from the prohibition of art 46 sections 1 and 3 ASST 1995 / Article 5:56 sections 1 and 3 Wft. Article 2 of the Bmm Order in Council states such categories.

6.6 Problems of interpretation and implementation

As MAD was only implemented on 1 October 2005, no such problems have yet emerged. In Dutch literature it has been argued that, as Dutch implementation was overdue, the provisions of MAD would have been directly effective under Dutch law. No attempts to test this theory appear to have been made.

[126] J. Italianer and A.P. Tillema, Ondernemingsrecht 2003, p.431.

Table of Legislation

EU Directives

Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ 1989 L334/30.

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market abuse, OJ 2003 L 96/16.

Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.

Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

National Legislation

United Kingdom

Companies Act 1980.
Company Securities (Insider Dealing) Act 1985.
Financial Services Act 1986.
Financial Services and Markets Act 2000.
Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005, SI 2005/381.

Germany

Wertpapierhandelsgesetz, (WpHG) (Securities Trading Act) of 26 July 1994.
Anlegerschutzverbesserungsgesetz (AnSVG) (Investor Protection Act) of 30 October 2004.

France

Ordinance No 67-833 of September 28, 1967, JO September 29, 1967 at 9589.
Law No 70-1208, JO December 24, 1970 at 11891.
Law No 89-531 of August 2, 1989.
Reglement COB No 90-08 relatif a l'Utilisation d'une Information Privilegiee (COB Regulation on the Use of Inside Information) of July 17, 1990.
Law No 96-597 of July 2, 1996.
Law No 2003-706 of August 1, 2003.
Reglement General de l'Autorite des Marches Financiers, JO November 24, 2004.

Spain

Ley del Mercado de Valores (Securities Market Act), Ley 24/1988, 28 July 1988, BOE 29 July 1988.
Ley 9/1991 of 22 March 1991 (Law amending the Ley 24/1988), BOE 27 March 1997.
Ley 37/1998 of 16 November 1998 (Law amending the Ley 24/1988).
Ley 44/2002 of 22 November 2002 (Law on Reform of the Financial System).

The Netherlands

Act of 2 February 1989, Stb 1989, 16.
Wet toezicht effectenverkeer 1992 (Act on Supervision of Securities Trading) of 1 July 1992, Stb 1992, 378.
Wet toezicht effectenverkeer 1995 (Act on Supervision of Securities Trading).
Wet Marktmisbruik (Market Abuse Act) of 23 June 2005.

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