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Improving Securities Regulation in the EC: The French Example

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Improving Securities Regulation in the EC: The French Example

Introduction

Five years almost to the day, after Germany's unconditional surrender, France is taking the first decisive step in the construction of Europe, and is associating Germany with it. . . . Europe will not be made all at once, or as a single whole; it will be built of concrete achievements which first create de facto solidarity.

(Robert Schuman, French politician, in a speech to a press conference at the Quai d'Orsay on May 9, 1950, the day on which he proposed the Schuman plan for a European Coal and Steel Community, the first of the European Communities.)

The internationalization of the world's securities markets provides a solid example of the effect that one area of harmonization of European law has on the rest of the world. The directives issued by the European Community (EC) in the area of securities regulation

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1 John Paxton, Dictionary of the European Communities, 228 (2nd ed. 1982).
3 The idea of a united Europe dates back to medieval times with the religion-oriented conception of a united Christendom. Although religious freedom was often at stake, the benefits of a united Europe were acknowledged early on by philosophers, scholars and even politicians. Such benefits included easier travel, stronger defense capabilities, diversification and increased availability of goods and services, and broadened opportunity for the exchange of ideas. R. Owen & M. Dynes, The Times Guide to 1992, Britain in A Europe Without Frontiers, A Comprehensive Handbook 39-40 (1989).

Later proponents of these ideas, however, failed in practice to honor the essentially moral premise of unity by seeking to accomplish the end by unjustifiable and forceful means. Charlemagne, Napoleon and Hitler are, perhaps, the most famous and extreme examples of military leaders in history who attempted to unify Europe under largely absolutist control. The backlash did not prompt the abandonment of the idea of unification but rather fostered a more democratic approach to its attainment. After World War II, the approach concentrated on efforts towards unification of defense. However, with the French veto of the European Defense Community in 1954, this defense-first orientation was dropped in favor of economic union as a first step. Id.

In the early 1950's, economic union was fostered by the French. On May 9, 1950, French Foreign Minister Robert Schuman called for the pooling of coal and steel resources of France, Germany and other European nations. To coordinate this effort, Schuman advocated the creation of a transnational institution empowered to legislate relevant policy and enforce ensuing regulations. This led to the establishment of the first official European Community: the European Coal and Steel Community (ECSC) establishing supra-national regulatory and enforcement institutions and chaired by Frenchman Jean Monnet. Led by Monnet, the foreign ministers of the ECSC member states — France, Federal Republic of Germany, Italy, Belgium, the Netherlands and Luxembourg — began
are intended to facilitate international trading of securities and promote the image of integrity in the European markets.\textsuperscript{4} No doubt, the EC is closer to meeting these goals, as evidenced by its large share of the increase in multinational stock listings, its availability of foreign securities, and consequently, the overall volume of trading internationally.\textsuperscript{5} Yet, this growth in cross-border securities transactions is not without repercussion, in particular the parallel growth in cross-border violations of securities laws.\textsuperscript{6} With internationalization, national and transnational securities regulation is becoming increasingly complex, as laws vary from country to country. Though some similarities can be found, innumerable differences have produced ambiguities capitalized upon by past, current, and prospective insiders and tippees.

Mr. Richard Breerdon, Chairman of the SEC, has cautioned, "it is important that national borders should not be used to shield fraud."\textsuperscript{7} To illustrate the SEC's concern, one-third of the recent insider trading cases involved some form of international investigation, thus making it essential to be able to pursue offenders across national borders.\textsuperscript{8} From the United States perspective, the SEC can only do so much.\textsuperscript{9} As such, the need for the EC to assume its share work on the Treaty of Rome. \textit{Id.} at 40-41. \textit{See Treaty Establishing The European Economic Community} [hereinafter EEC Treaty] arts. 85-86.


\textsuperscript{5} Note for example the Big Bang in England and Le Petit Bourse in France.


\textsuperscript{8} The SEC took the initiative in persuading Congress to pass legislation increasing its scope of authority abroad to investigate suspected violations of US securities laws in foreign states. The \textit{Insider Trading and Securities Fraud Enforcement Act} (ITSFEA) of 1988 was passed pursuant to these efforts by the SEC. ITSFEA requires reciprocity by foreign securities commissions before a foreign securities official may gather information in the US regarding suspected violations of their country's respective laws. Michael D. Mann & Joseph G. Mari, \textit{Developments in International Securities Law Enforcement}, 683 INT'L SEC. MKT. 821, 906 (1990). For the text of ITSFEA see Pub. L. No. 100-704, 102 Stat. 4677 (codified in 15 U.S.C. §§ 71-78 (1988)).

\textsuperscript{9} For a good review of the present laws addressing insider trading in the United States, see Stutz, \textit{supra} note 6, at 139-47. For a summary of current United States responses to Internationalization, see Michael A. Gerstenzang, \textit{Insider Trading and the Internationalization of Securities Markets}, 27 \textit{COLUM. J. TRANSNAT'L L.} 409, 425-41, (1989) (addressing usage of Federal Rule 37 to compel discovery and bilateral and multilateral agreements and explaining the rejection of the extra-territoriality approach of waiver by conduct).
of responsibility in this international arena cannot be underscored enough.

Part I of this Comment briefly outlines the European Community Directive on Insider Trading and surveys its strengths and weaknesses. Part II looks at the state of regulation in France, using that country as a study to ascertain how well one Member State has managed to curtail insider trading over the years. Part III identifies possible avenues to eradicate the most significant shortcomings in form, substance, and practice, and concludes by urging the adoption of a follow-up directive to establish minimum standards of surveillance, enforcement, and sanctioning of insider trading within the European Community.

I. European Insider Trading Directive
   A. The European Community Securities Markets

As noted before, the EC has consistently endeavored to increase the integrity of the European market as a whole by establishing some bright lines of conduct to be considered undesirable or illegal within the EC. The vehicle by which the Commission of the EC aims to accomplish these objectives is the Council Directive.

Although Council Directives are binding insofar as their intended result must be implemented by a prescribed deadline, they are not codified law. Rather, they constitute a mandate to member states to enact laws and regulations at the national level as may be necessary in order to comply with (or, at least, comply with the spirit of) the Directive by aligning national law with the common denominators they establish.

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10 France is chosen because it was the first European Country to enact a statutory prohibition against insider trading as well as the first country to create a real securities exchange commission in Europe.
11 One example of a failed effort is the Code of Conduct for transactions in transferable securities. Although this provided some ethical guidelines, the Commission made a fatal decision in not imposing strict regulation. For the text of the guideline, see Recommendation of the Commission Concerning a European Code of Conduct Relating to Transactions in Transferrable Securities, 1977 O.J. (L 212) 37.
12 The Commission has also adopted a draft proposal for a directive prohibiting money laundering in reaction to growing anxiety over organized crime. The directive would require financial institutions and other large cash flow businesses to keep customer identification on file and report suspicious transactions. In addition, money laundering would be made a criminal offense. Council of 10 June 1991 on Prevention of Use of Financial System for Purpose of Money Laundering, 1991 O.J. (L 166) 77.
14 RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 122 (3d. ed. 1988) (Comparing the force of a directive with the force of an EEC regulation which is self-executing and creating rights and obligations for Member States and their citizens as well).
15 Two authors commenting on the Single European Act note with caution that removing the power of Member States to veto any proposed legislation (by switching from a requirement of unanimity to qualified majority voting) might have deleterious effects. In-
The White Paper, prepared by the Commission in response to the EC Council of Ministers' request for a detailed and scheduled program for completion of the internal market, substantially eased the burden on Member States to harmonize laws. Recognizing that complete harmonization was often politically and substantively impractical, the Commission shifted its focus from harmonizing national laws to achieving mutual recognition. Relaxing the harmonization requirement reflected the desire of the Commission to speed the adoption of the 1992 proposals. Nevertheless, the effect is still laudable: where some member states had no legislation in a variety of areas of securities operations, mutual recognition forces these states to adopt, at the very least, minimum standards. It should be noted, too, that some commentators do not view this shift as "precluding regulatory evolution to commonality," but rather as a first step toward actual harmonization.

No doubt, by issuing disclosure directives relating to stock exchange admissions, listing particulars, interim reports, major shareholdings, and public offer prospecti, the EC market has become more transparent. These general disclosure directives are supplemented by the insider trading directive, which, although problematic, represents a giant step towards the healthy development of markets and the harmonization of EC securities regulation.

17 White & Case, supra note 13, at 5.
18 Id.
19 Non-EC member states have also increased the extent of their legislation on insider trading. In Switzerland, for example, Article 161 of the Swiss Penal Code, effective July 1, 1988, made some necessary changes in Swiss law governing insider trading. For example, the failure in legislation to prohibit the use of insider trading by the insider himself and not just disclosure to and use by tippees and the error in narrowly defining inside information as a "business secret." H.R. Steiner, Switzerland, Int'l Bus. Law, Mar. 1989, at 138, 140.
20 See generally Manning Gilbert Warren III, Globalization Harmonization of Securities Laws, 31 Harv. Int'l L.J. 185, 192 (1990)(explaining reciprocity as a prelude to a global securities code). But see id. at 231 (expressing remaining concern that numerous "regulatory cracks" remain as the unwanted child of expediency).
22 See supra note 4.
23 In some aspects it is also a quantum leap from U.S. regulations. See e.g., Thomas Lee Hazen, Defining Illegal Insider Trading—Lessons From The European Economic Community Directive on Insider Trading, J. Law and Contemp. Problems (forthcoming 1992)(on file with author).
B. The EC Insider Trading Directive

A Council Directive on insider trading was first proposed in 1987, then revised in 1988, and finally adopted by the Council in 1989. The strong support for measures outlawing insider trading is evidenced by the Council’s unanimous decision on June 19, 1989 to adopt this Directive, which mandates compliance by Member States before June 1, 1992.

The basic purpose of the Directive is to set forth the EC’s view that insider trading endangers the smooth functioning of the internal securities markets by undermining investor confidence. Further, the goal of the Directive is to promote the adoption of certain measures likely to foster such confidence by affording assurances to investors that “they are placed on equal footing and that they will be protected against the improper use of inside information.”

The standards proposed at the Community level are quite high. The European Community Commission’s goal is to encourage a high level of protection in order to diminish the present uncertainty of whether such actions are punished or rewarded. Specifically, each state is charged with the duty to design sanctions sufficient to promote compliance. Moreover, the Commission states in Article 6 of the Directive that Member States are entitled to maintain more comprehensive or stringent standards at their discretion.

1. Basic Elements of the Directive

The foundation of the Directive is based on Article 100(a) of the Treaty of Rome, which states that “the Council shall, acting by qualified majority on a proposal from the Commission in cooperation with the European Parliament, adopt one or several measures which would be incompatible with the Treaty if they were adopted unilaterally by a Member State.”

24 See generally EUR. PARL. Doc. (COM No. 111) 8 (1987).
27 Article 190 of the EEC Treaty requires that all regulations, directives and decisions of the Council and the Commission shall state the reasons on which they are based. To supplement the Directive, Member States of the Council of Europe proposed a treaty on insider trading in September 1989. The aim of the multinational treaty is to increase awareness and identification of illegal transactions including insider trading, giving of false information, manipulation of securities prices and money laundering and also to facilitate discovery in investigations. The treaty became effective on October 1, 1991. EEC TREATY art. 190.
29 Id. at 32, art. 13.
30 Id. at 31, art. 6. It has been argued that:
[It] seems utterly improbable that a member state would be willing to extend these definitions because it would probably be inequitable. [O]ne is therefore led to believe that the formula of article 6 refers to the scope of the prohibition of insider trading and to the penalties attached to the violation of such prohibitions, rather than the definition of insider trading.
Fournasier, supra note 26, at 164.
with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

Article 1.1 of the Directive defines "inside information" as:

"Information which has not been made public of a precise nature relating to one or several issuers of transferrable securities or to one or several transferrable securities, which, if made public, would be likely to have a significant effect on the price of the transferrable security or securities in question."

As such, inside information is non-public information of a precise nature concerning a security or its issuer, which, if made public, would be likely to affect its pricing.

Article 2.1 defines an "insider" as 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 an issuer, or
- because he has access to such information by virtue of the exercise of his employment, profession or duties, possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, transferrable securities of the issuer or issuers to which that information relates.

Insiders fall into one of two classes: primary insiders or those acquiring information via their status as employees, shareholders or professionals, and secondary insiders or those typically referred to as tippees.

Article 3 of the Directive outlaws three activities: trading as an insider, disclosing inside information, and tipping or otherwise procuring third parties to trade. Article Four of the Directive demands the application of the insider trading prohibition to secondary
insiders, or more commonly, tippees.36 The prohibition, however, extends only to "first generation" tippees leaving the Member States the prerogative for further extension to remote tippees.37

Next, warranted attention is given to the process of determining the locus of violations. This Article simplifies this difficult process with a general rule that a violation is committed at the place of market execution.38 License for exchange of information between Member States is also established with a view to facilitating each state's capabilities for detection and investigation.39 Finally, Member States are given discretion with regard to the implementation of sanctions, so long as the methods chosen are sufficient to promote compliance with measures specified by the Directive.40

2. Strengths of the Directive

The plain fact that the Commission actually issued the Directive is widely recognized as a major step in the right direction since a majority of Europeans have long viewed these otherwise controversial activities as time-honored traditions.

The legal basis of the Directive is also commendable. The original proposal of the Directive rested on Article 54(3)(g) of the Treaty of Rome, which implicitly directs the focus on the harmonization of fair behavior standards towards investors. This in turn, necessarily gives attention to fraud analysis and fiduciary duty considerations.41 However, as noted above, the legal basis of the Directive as adopted is Article 100(a),42 which focuses instead on streamlining the function of the unified securities markets to enhance the overall efficiency of the marketplace.43 The Directive's basis is important because it necessarily has a bearing on the interpretation of a given act.44 Proponents of the change in basis note that although it seems that concern for the individual investor is displaced, the change is likely to enable respective authorities to indirectly, but more effectively, serve consumer interests by providing a more simplistic evaluation

36 Id. art. 4.
37 Id. art. 6.
38 Id. art. 5. Actions may, however, be brought in other states as well.
39 Id. at 32, art. 10.2.
40 Id. art. 13.
41 For an excellent discussion on the motivation behind the change in legal basis, see Manning Gilbert Warren III, The Regulation of Insider Trading in the European Community, 48 WASH. & LEE L. REV. 1037, 1048-1049 (1991). The text of Article 54(3)(g) of the Treaty of Rome reads "[t]he Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular "by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms ... with a view to making such safeguards equivalent throughout the Community." EEC TREATY art. 54(3).
43 Id.
44 Fournasier, supra note 26, at 156.
Consistent with the approbation of this change in the legal basis, the Directive is hailed by many commentators for its bold move in actually defining illegal insider trading precisely and comprehensively. In particular, authors who compare the EC Directive with the present status of insider trading laws in the US are particularly pleased with the way the Directive clearly demarcates to whom the prohibition extends; in particular, to persons not in a fiduciary or other special relationship vis-a-vis the entity whose information is being used.

The fact that the Directive expressly provides for cooperation by competent authorities for exchange of information between EC Member States aids in the enforcement of respective insider trading laws. Similarly, the inclusion of the companion provision allowing the EC to conclude similar agreements with non-EC countries to foster efforts toward enforcement worldwide is applauded by commentators optimistic that blocking and banking secrecy laws will be effectively bypassed as a result.

3. Weaknesses of the Directive

Although the Directive has been widely praised, loopholes do exist. One commentator notes that the Directive's failure to explicitly require Member States to extend the anti-tipping provision to secondary insiders is effectively disabling. The focus of these crit-

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45 Warren, supra note 41, at 1054-55.
46 See, e.g., Hazen, supra note 23.
47 See, Fournasier, supra note 26, at 163 (commenting that "[n]ot only are these definitions precise enough to warrant uniform implementation in all Member States, but they are so comprehensive that it is difficult to imagine what could be left, as far as the definition of insider trading is concerned, to Member States discretion ....").
48 See Hazen, supra note 23.
49 Directive, supra note 4, at 32, art. 10. Section 1 of this article is qualified by § 2 which provides:

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

(a) where communication of the information might adversely affect the sovereignty, security or public policy of the State addressed;
(b) where judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the state addressed or where final judgement has already been passed on such persons for the same actions by the competent authorities of the state addressed.

Id.
50 Blocking laws protect state interests while secrecy laws protect the privacy of the individual parties. For an overview of various secrecy and blocking laws see Michael D. Mann & Joseph G. Mari, Current Issues in International Law Enforcement, 614 INT'L SEC. MKT. 9, 68-71 (1988).
51 Directive, supra note 4, at 32, art. 11; see also, Problems with the SEC's Enforcement of U.S. Securities Laws in Cases Involving Suspicious Trades Originating from Abroad, H.R. REP. No. 1065, 100th Cong. 2d Sess. 5, n.63 (1988)(expressing the Congressional description of the process of "layering").
52 See Hazen, supra note 23. Hazen further comments that the EC affirmative disclosure mandate is over regulatory (manuscript at 6-7)(cautioning about overregulation and
criticisms is the perceived failure by the drafters in making this an element of the Directive rather than an option for the Member States to select.

Further, market shopping, or regulatory arbitrage, may not be sufficiently curtailed. Given the disparity of legal systems and existing regulations of Member States, there has not been a high degree of consistency in the style of enacted regulations. Prior to the adoption of the EC Directive, France and Great Britain already had in place the most extensive insider trading regulations of the EC member states. While only minor changes needed to be made to achieve compliance in these countries, primary legislation was necessary in Italy, Belgium and Ireland, and drastic changes were required in Germany and Luxembourg, which previously relied on self-regulatory mechanisms. Understandably, laws and attitudes in each country regarding insider trading are evolving at different rates. The fear of regulatory arbitrage is therefore very real.

This problem is exacerbated by the fact that the Commission has established no institutional mechanisms for surveillance, coordination or enforcement to support its regulatory blueprint. Even if regulatory disparities dissipate, if no commensurate efforts are made to perfect enforcement, the Directive will remain toothless. On the darkest side, one commentator confronts the tacit reality that, as a method of combatting intensive competition, Member States themselves may ipso facto encourage arbitrageurs and discourage competent enforcement. In addition, the standards set forth in the Directive are by no means harmonious with US law and are therefore necessarily limited in application to Member States.

Overall, the Directive is condemned as purely academic in its pursuits; as it stands now, the Directive is in danger of falling into disrepute if effective enforcement is not accomplished. Originally stating that encouraging prompt disclosure is one thing, but mandating it is quite another).

53 See Warren, supra note 20, at 189-90 (describing the basis of the fear of regulatory arbitrage).

54 While there are aspects of both the French and British pre-existing insider trading laws in the EC Insider trading Directive, only Belgium and Luxembourg have elected to closely follow the wording of the Directive. Eddy O. Wymeerch, EEC Booklet, INT'L SEC. REG. (Robert C. Rosen, ed.) (1991).


56 Italy and Belgium have been slow runners in many areas of implementation. After missing the October 1, 1989 deadline for implementing national laws sufficient to comply with the UCITS directive, which addresses worldwide trading of unit trusts, the Commission sent out warning letters demanding an explanation for failure to comply. 1988 O.J. (L 100) 123; White & Case, supra note 13, at 5.

57 See Warren, supra note 20, at 232 (noting that economic benefits are unlikely to be shared equally among the Member States and that these inequalities may disrupt what harmony has been achieved).

58 Gerstenzang, supra note 9, at 459.
the European Parliament made extensive proposals for harmonization of penalties, civil remedies, or criminalization of insider trading; unfortunately, these proposals were ultimately rejected.\textsuperscript{59}

As adopted, the Directive merely provides that each Member State shall determine the penalties to be applied for infringement of the measures taken, but that penalties must be sufficient to promote compliance.\textsuperscript{60} In the event that a Member State's enactments are questionable they will be subject to review by the Commission and, if necessary the European Court of Justice, where a final determination on sufficiency will be made.\textsuperscript{61} Although broad interpretations of the Directive do allow for such sanctions to take penal, administrative or civil forms, express language is necessary to eradicate this fatal flaw in the legislation.\textsuperscript{62}

Other commentators criticize the Directive's failure to address a more austere problem — the insurance of competent adjudication.\textsuperscript{63} These authors note that even if surveillance and enforcement mechanisms are established by the different Member States and are facially sufficient, judges in most EC countries treat insider trading as "a gentlemanly misunderstanding rather than a crime."\textsuperscript{64} The need, therefore, for harmonized, stringent, and enforceable laws and pen-


\textsuperscript{60} Directive, supra note 4, at 32, art. 13.


\textsuperscript{62} Fournasier, supra note 26, at 166 (noting that the decision to make insider trading a criminal offense, administrative offense, or a tort is linked to the margin of discretion of Member States).

\textsuperscript{63} See, e.g., Warren, supra note 20, at 189-90.

\textsuperscript{64} Id. Credit is to be given, however, to the French judge handling the second heavily publicized incident of insider trading in France, L'Affaire Pechiney. Judge Boizette has continued to pursue the investigation after numerous pitfalls and dead ends thanks to recent headway precipitated by newly acquired trading information from Switzerland. Le Figaro, Nov. 14, 1989, at 1.

Discovery of L'Affaire Pechiney came as a result of an SEC led investigation into the trading of securities in a U.S. packing company, Triangle Industries, Inc. on the New York Stock Exchange. L'Affaire Pechiney as it came to be called involved a takeover bid for Triangle Industries by the state-owned metals company, Pechiney S.A. The substantial increase in foreign trading of the securities of Triangle Industries just prior to the public announcement of the takeover bid tipped off the S.E.C. that insider trading might be the cause of one-third of the orders originating from France. See Andy Rosenbaum, French Insider Dealing Case Threatens Minister, The Daily Telegraph, Nov. 18, 1991, at 23.

As Pechiney was a largely state owned company, the investigation implicated persons in the French government, including Alain Boublil, former chief aide of France's Finance Minister, Pierre Beregevoy and close friends of President Francois Mitterrand. See Former Beregevoy Aide Accused in Pechiney Triangle Case, Proprietary to the United Press International (Paris), Nov. 7, 1991. Boublil has been charged with providing information to French and foreign investors regarding the Pechiney bid; however, legal experts in Paris say that the fact that he is not facing charges of deriving personal profit will make it extremely difficult to prove him guilty. Id. The investigation is still ongoing and it marks the first time an indictment has taken place.
alties is plain.\textsuperscript{65}

With these weaknesses in mind, an examination of the implementation of insider trading laws in a Member State is in order. France has been chosen because it was the first European country to enact a statutory prohibition against insider trading.\textsuperscript{66} Furthermore, France serves as a mature case study to ascertain the likelihood of whether a Member State can effectively remedy the weaknesses in the EC Directive.

II. France

A. General Background

Insider trading legislation has existed in France since 1967,\textsuperscript{67} and was amended and upgraded in 1970,\textsuperscript{68} 1982,\textsuperscript{69} and again in 1988\textsuperscript{70} and 1989, after the first big insider trading scandals in France created a plethora of publicity and embarrassment for government officials indirectly implicated in the affair.\textsuperscript{71} Prior to this, the veil


\textsuperscript{67} Id.


\textsuperscript{69} Loi No. 82-1172, 1982 J.O. 15, 1983 D.S.L. 86.

\textsuperscript{70} Loi No. 88-70, 1988 J.O. 1111, 1988 D.S.L. 133.

\textsuperscript{71} The first major insider trading incident, known as the Société Generale scandal involved allegations that an investment group improperly bought and sold shares of the French bank, based on alleged information and involvement by French government officials. This was the first insider trading case which damaged the reputation of the socialist government and implicated officials and close friends of President Mitterand. See generally Rosenbaum, supra note 64, at 23; Christopher Elliot, DTI Was About To Quiz Maxwell In Share Deals Inquiry, THE DAILY TELEGRAPH, Nov. 10, 1991, at 1.

At the time initial inquiries were made into Société Generale trading, the COB had a relatively toothless image, but recently the COB has managed to play a foraging role in attempts to resolve the case. At present a Lebanese businessman is facing charges of insider dealing in connection with the Société Generale stock and is on bail awaiting trial. Id. The investigation is, however, still ongoing and interestingly, one of the chief witnesses, British publisher and tycoon, and friend of Mitterand, Robert Maxwell died mysteriously in November, 1991, just after the COB had requested Britain's Trade and Industry Ministry to interview Maxwell as a witness in the French investigation. Of course, this will prove to be a setback in the investigation but at least it seems that the COB is breaking ground in hopes of shattering its previously toothless image.

For a full and colorful account of the circumstances leading up to Maxwell's death, see Trevor Fishlock, Focus on the Death of a Magnate Maxwell: Mystery of the Lost Tycoon, Today in Jerusalem Maxwell Will be Buried, But the Questions Surrounding His Death Will Not Be Laid to Rest, THE DAILY TELEGRAPH, Nov. 10, 1991, at 16. See also Family Lawyer Says Maxwell May Have Been Murdered, THE REUTER BUS. REPORT (Spain), Nov. 10, 1991; Publisher Maxwell Buried in Jerusalem; Investigation: Hands Aboard the Tycoon's Yacht Are Told Not to Leave the Canary Islands as a Probe Into the British Publisher's Mysterious Death Continues, L.A. TIMES, Monday, Nov. 11, 1991, at D2. Officials from the British department of trade are now in charge of monitoring the Serious Fraud Office Investigation. As for the status of the COB's requests, the British "Home Office," which is the authority charged with the duty of handling overseas
over the French corporate world allowed access to information only by the privileged few who freely enjoyed the traditional raping of the fruits of their employment.\textsuperscript{72}

The first step motivating change occurred when the French government decided to promote Paris as an international financial market and encourage wider public investment on the French Bourse.\textsuperscript{73} Enabling and implementing legislation was accordingly passed. The Ordinance of September 28, 1967 created the Commission des Op\-\erations de Bourse ("COB"), the French watchdog equivalent of the United States Securities and Exchange Commission.\textsuperscript{74} The COB is a government agency responsible for insuring the protection of savings invested in securities and other types of investments giving rise to public offerings.\textsuperscript{75} Like the SEC, the COB also provides checks to monitor the sufficiency and accuracy of information provided to investors.\textsuperscript{76}

According to the ordinance, the COB’s role is to oversee the smooth functioning of the markets for negotiable securities, quoted financial products and negotiable futures contracts.\textsuperscript{77} In addition, the COB has regulatory power concerning market functions and professional practice rules applicable to persons making public offerings and related professionals who participate in or manage public offerings and other portfolio securities.\textsuperscript{78}

\begin{itemize}
  \item requests for help, has as yet to comment about the affair. Stewart Tendler, \textit{DTI Will Keep Watch On Fraud Investigation}, The Times, Dec. 6, 1991.
  \item French authorities have taken three basic measures to facilitate international activity:
    \begin{enumerate}
      \item lightening foreign exchange control regulations;
      \item modernizing the French Stock Exchange to increase its use by foreign issuers and investors;
      \item making an effort to harmonize stock exchange regulations within the EEC, and cultivating international cooperation between the COB and its equivalent foreign commissions.
    \end{enumerate}
  \item Harmonisation Project Vol. II, Int’l Bar Ass’n, Sec. on Bus. Law 28-29.
  \item Ordonnance No. 67-833, 1967 J.O. 9589, 1967 D.S.L. 373. French Constitutional law provides that the judiciary branch is kept separate from the executive branch. However, the legislature felt that effective management of the markets merited the formation of an administrative body with powers of referral to the courts. \textbf{RIDER} \& \textbf{FFRENCH}, \textit{supra note 72}, at 233. Before the COB was created, the French markets were regulated by the Comite des Bourses de Valeur in conjunction with the Chambre Syndicale. \textit{Id.}
  \item Harmonisation Project, \textit{supra note 73}, at 3.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
\end{itemize}
B. Specific Laws

Inside information is statutorily defined, and French courts have interpreted the statute to cover information that is precise, specific and certain. """"Insiders"" or insiders may not complete a stock exchange transaction or knowingly permit the completion of the same by another on the basis of such information prior to public notification. As clarified by COB regulations, the law prohibits any kind of trading, be it direct or indirect, by the Chairman of the Board, President, Vice President, general managers, directors (and their spouses) or persons who, by virtue of their professional activity, possess privileged information about an issuer or about a potential fluctuation in the price of a security, futures contract or options contract. The category of indirect insiders is given broad interpretation by French courts, which have found, for example, journalists and architects guilty of insider trading.

In addition, anti-fraud provisions provide that anyone who knowingly disseminates to the public false or misleading information concerning the prospectus or situation of an issuer or a security which could affect the price of a listed corporation's shares is liable with the same sanctions applying as under violations of insider trading rules. Further, Article 10-3 of Ordinance 67-833 of September 28, 1967 regulates related insider transactions intended to manipulate share prices.

Two significant changes in the law were made in response to the EC Directive. First, French insider trading laws formerly governed only those transactions that took place on official stock exchanges and did not apply to over-the-counter transactions (hors-cote). The standard set forth in the EC Directive demanded application to any transferrable security admitted to trading on a stock exchange, be the security actually traded on or off the exchange or through a professional intermediary.

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82 Id. The original 1967 law had a reporting requirement effective as to all directors, officers and key executives and applying to all securities transactions. As this imposed a heavy administrative burden on the COB, the wording was changed (at the COB's request) to a more broad prohibition on insider trading. This change was incorporated in Law No. 701208 of December 23, 1970 which amended Article 10-1 of the 1967 ordinance. Ordonnance No. 67-833, 1967 J.O. 9589, 1967 D.S.L. 373.
83 Stutz, supra note 6, at 159.
85 Smallhoover, supra note 81 (manuscript at 12).
86 22 Sec. and Commodities Reg. 137, 143 (1989).
87 Id.
extend their insider trading laws. Secondary insiders, tippers and tippees who were not expressly covered by the French laws prior to 1989 are now included.\textsuperscript{88}

Although strict construction of the Ordinance does not, per se, prohibit tippees from trading on the information, Article 460 of the French Penal Code, which makes it a crime to knowingly receive objects stolen, taken away, or misappropriated, has recently been invoked to curtail this activity.\textsuperscript{89}

The September 1967 Ordinance defines and provides penal sanctions for the criminal offense of insider trading.\textsuperscript{90} Investigations are conducted by the COB.\textsuperscript{91} Any individual who takes any action to impede a COB investigation is also guilty of a criminal offense.\textsuperscript{92} Although some investigations have been initiated by the COB and it seems that these numbers will rise,\textsuperscript{93} to date the ultimate number of suits actually filed by the public prosecutor is quite low and certainly does not reflect the number of violations committed.\textsuperscript{94} In the cases that do arise, the COB’s opinion must be filed and is typically a powerful exhibit in the case.\textsuperscript{95} In practice, the Courts rule in favor of the Commission’s position.\textsuperscript{96} Given the COB’s recent “get tough” attitude, the Courts are likely to follow suit.\textsuperscript{97}

This more aggressive approach was motivated by the legislatures’ broadening of the COB’s investigatory powers in response to widespread criticisms.\textsuperscript{98} In large part, these legislative changes attempt to remodel the COB to more closely resemble its original model, the SEC.\textsuperscript{99} Law No. 89-531 of August 2, 1989 contains a

\textsuperscript{88} Id.
\textsuperscript{91} Criminal prosecutions themselves are handled by public prosecutors. HARMONISATION PROJECT, supra note 73, at 9.
\textsuperscript{92} Id. at 3.
\textsuperscript{93} Although the COB may initiate investigations, the COB may not file suit itself as the SEC can. See \textit{Bill to Strengthen COB Approved By French Cabinet}, 2 Int’l. Sec. Reg. Rep. 4 (BNA) (Mar. 15, 1989); \textit{Council Slows COB’s Progress on Path to Independence}, 2 Int’l Sec. Reg. Rep. 3 (BNA) (Aug. 2, 1989).
\textsuperscript{95} RIDER & FFRENCH, supra note 72, at 233.
\textsuperscript{96} Interview with Joseph Smallhoover, Law Offices of S.G. Archibald, Paris, France (Sept. 1991).
\textsuperscript{97} RIDER & FFRENCH, supra note 72, at 233.
\textsuperscript{98} This increase in investigatory power is found in Law No. 88-70 of January 22, 1988, incorporated into Ordonnance of September 28, 1967. 1967 J.O. 9589, 1967 D.S.L. 373.
\textsuperscript{99} The SEC model and ITSFEA component have nonetheless been widely criticized. See, e.g., Thomas, supra note 2, at 133 (concluding that although Congress acknowledges the problems involved in “melting the waxen wings of insiders,” the body has yet to offer viable, concrete solutions).
number of provisions which emulate the SEC regulations. First, the statute enables the COB to require the production of documents and testimony from any person or entity. Second, the new law allows the COB to question suspects and obtain search and seizure orders. Third, in addition to enabling the COB to obtain freezing of assets orders, the law now grants the COB the power to impose sanctions for insider trading violations in the form of administrative fines in the amount of 6,000 to 10,000,000 francs or ten times the profit derived from the prohibited securities transactions, as well as fines of 10,000 to 100,000 francs for tipping. It also enables the COB to sanction those individuals who refuse to comply with its requests.

The COB's budget has quadrupled in size since 1985 as a result of substantial increases in funding. Now estimated at $17 million, the budget is proportional to that of the SEC, considering market size. As a result, the COB can now employ 210 people, which is roughly double the number employed in 1985. The number presiding on the governing board was duly increased from five to nine members to reflect these increases in funding and manpower.

With regard to the Directive's provision on agreements with its foreign counterparts, the COB has entered into bilateral agreements with other EC and non-EC states pledging mutual cooperation in securities law enforcement. The first in this series of agreements was with the SEC on December 14, 1989. To be sure, the relationship between the COB and the SEC has always been relatively strong, but prior to the enactment of Article 5 Bis of Law No. 89-531, the COB's powers were greatly constrained by French law limit-

101 Prior to this the COB could only subpoena stock market professionals. Id. (article 2 amending article 5B of the Sept. 28, 1967 Ordonnance).
102 Id. art. 5.
103 Id. art. 8-1.
104 Ten million French Francs is roughly the equivalent of $1.6 Million. WALL ST. J., April 20, 1992, at C5.
105 Law of August 2, 1989, incorporated into Ordonnance of September 28, 1967. 1967 J.O. 9589, 1967 D.S.L. 373, art. 9-2. Prior to this one of the strongest weapons the COB could resort to was publicizing the details of the case. RIDER & FFRENCH, supra note 72, at 239.
107 Prior to these increases, the French Government was criticized for its hypocritical desire for public confidence in the integrity of its markets without any complementary grant of resources or provisions. RIDER & FFRENCH, supra note 72, at 239.
The old legislation essentially forbade nationals from divulging economic, commercial, industrial, financial or technical matters to foreign authorities absent explicit agreement. Before 1989, the French blocking law was, for all intents and purposes, widely applied. Indeed, in the 1984 case, *Graco, Inc. v. Kremlin, Inc.*, the U.S. District Court ruled the French blocking law virtually impassable.

The new law which amends prior law on insider trading and is similar to the International Securities Enforcement Cooperation Act of 1988, grants the COB the authority to use its powers in aiding foreign securities authorities who request assistance in investigations within their foreign jurisdiction. The key concept is reciprocity. The COB may only assist authorities from those countries whose laws provide for reciprocal assistance to the COB.

The SEC/COB agreement is bifurcated. The first in the series is an agreement providing for exchange of information between the two authorities pursuant to inquiries regarding possible violations of the securities laws of each country. There are two basic limitations on this provision. First and foremost, the COB need not and in fact must not, comply with such requests if compliance would endanger France's sovereignty, essential economic interests, or public order. Second, requests for information may not be honored where criminal proceedings have either commenced, a final decision has

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112 Id.


114 Gerstenzang, supra note 9, at 423.

115 For a brief outline of the law as originally proposed and as adopted, see Thomas, supra note 2, at 117-21.

116 Harmonisation Project, supra note 73, at 5-7.


118 U.S. Securities and Exchange Commission News Release No. 89115.-85, dated December 14, 1989. However, neither the SEC nor the COB have shown much initiative in investigating possible violations originating from states which have not respectively executed bilateral accords.


120 Id.

121 Before the negotiation of the SEC/COB accord, the only authority under which the SEC had to request information under was the Hague Convention. Complete analysis of such proceedings must include reference to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, designed to facilitate evidence gathering by providing the structure of Letters of Request. The basic governing principle, as stated by the Chairman of the convention is that 'any system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the state of execution and must also be 'utilizable' in the forum of the state of origin where the action is pending. Maarten Kluwer, Practical Handbook on the Operation of the Hague
been rendered in France, or sanctions have already been imposed in a matter arising from the same facts and circumstances.\textsuperscript{122} This agreement is unusual when compared to Memoranda of Understanding entered into between other foreign securities authorities, because it is only the second of its kind to actually \textit{obligate} each agency to provide such mutual assistance.\textsuperscript{123}

The second part of the SEC/COB agreement, known as the French Understanding, provides a framework for cooperation and consultation between the authorities in order to coordinate market oversight, and to resolve differences that may exist between the respective regulatory systems.\textsuperscript{124} The two parts together make the relationship between the COB and the SEC unmatched by other countries.\textsuperscript{125} As such, the agreement has been hailed as the strongest element of French law on insider trading.

Memoranda of Understanding preceding the French agreement should be amended and reworded to insure that the agreement is binding and compliance is obligated. To be sure, the French/U.S. accord must withstand the test of time and variety of human transgressions through regular use. However, it can be considered a turning point in the French effort to control the fallout caused by the increased internationalization of the world’s securities markets. Unfortunately, it may also be testimony to the degree to which the COB is dependent on the troubleshooting abilities of the SEC. The COB’s next step is to fortify its own methods of surveillance in the

\textsuperscript{122} The new law does, however, allow for collaboration. \textit{Id.}

\textsuperscript{123} An accord with the Netherlands three days prior was the first. In general, Memoranda of Understanding do not carry the same status as treaties, but as such, enter into force upon signature and require no ratification by the Senate or its foreign equivalent. Astrid R. Baumgardner, "SEC/COB Agreements" \textit{The French Perspective}, N.Y. L.J., June 21, 1990, \textit{available in LEXIS}, Nexis Library, Omni File.


\textsuperscript{125} These and similar efforts have been commended by recent authors who acknowledge that "legal and attitudinal changes, both in the U.S and worldwide, regarding insider trading has changed the enforcement landscape in dramatic ways over the past fifteen years." Stuart J. Baskin, \textit{Insider Trading}, U.S. SEC. & INV. REG. HANDBOOK (Jerry Markham, Peter Farmery, Keith Walmsley, Eric Roiter & Michael Grison, eds., forthcoming 1992). Baskin comments that both the theories and practices of insider trading enforcement have become broadly accepted and expanded as regulators and prosecutors aggressively seek to police perceived systemic defects in the world’s securities markets. \textit{Id.}
C. Overall Analysis of French Regulation of Insider Trading

Although the French can be congratulated for their primacy in providing a regulatory model of insider trading, concern still remains that such regulations are superficial due to the lack of administrative requirements for disclosure and methods of surveillance and enforcement. Although recent cases served to increase public awareness and induce efforts to police insider trading, it is questionable that French participants in the world markets consider insider trading as immoral behavior. Perhaps the COB's recent crackdown signifies a new era. Although twenty-five years have passed since insider trading was initially proscribed, the new laws and agreements require a longer test period before investors should place their confidence in the French markets. To date, the COB is still being accused of laxity in the use of its new power to impose civil fines, in handing relatively few cases over to the public prosecutor, and in merely persuading people to reverse their transactions rather than to institute formal action.

III. Possible Future Avenues

If the EC is serious about enforcing insider trading violations, the Community must work to achieve a high level of coordination and cooperation among Member States and other countries. A number of alternatives should be explored: first, the issuance of a supplementary directive or an amendment of the existing Directive to specifically set forth enforcement mechanisms and sanctions for insider trading; second, the creation of an EC securities commission; third, the negotiation of an EC securities commission Memorandum of Understanding with the United States and other countries similar to the bilateral agreement between the COB and the SEC; and fourth, the exploration of the benefits of establishing a workable supranational regulatory body.

126 For an overview of this act see id. (manuscript at 14-16, on file with author).
129 See Shields, supra note 94.
130 See Baumgardner, supra note 123, at 5.
131 See Greenhouse, supra note 108, at D1, D6.
133 Id.
134 This idea was first proposed by RIDE & FFRENCH, supra note 72, at 234.
135 See, e.g., Warren, supra note 20 at 231-32 (discussing such an international body).
To date, uniformity in enforcement has been idealistic, leaving original goals like the curtailment of market shopping unattained.\textsuperscript{136} It is important for the legislature of each EC Member State to strengthen the national law by studying the lessons learned by France, other member states, and non-EC nations. Civil remedies aimed at insider trader profits should be effected in all states as they have proven to be a powerful mechanism of enforcement and deterrence in the U.S., where the law demands disgorgement of profits, confiscation of directors' short swing gains, and other remedies for off-market trading.\textsuperscript{137} Further, civil and criminal enforcement mechanisms should be made fundamental by issuing an enforcement directive to insure that the passing of the initial Insider Trading Directive will prove to be more than a mere academic exercise.\textsuperscript{138} In executing this endeavor, other defects may be cured along the way. For example, one author suggests that the Commission's reservations regarding stipulation of tippee liability can be remedied "by providing well defined mens rea rules and by attaching legal significance to institutional precautions against tips." \textsuperscript{139}

However, there may be a fundamental legal problem in that Article 189 of the Treaty of Rome may proscribe a more specific amended or follow-up directive. Although it states that a regulation shall be binding in its entirety and directly applicable in all Member States, Article 189 provides that a "directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the national authorities the choice of forms and methods."\textsuperscript{140} However, other EC directives have reached farther into the state realm of prescription than the Treaty of Rome seemingly allows. As the EC matures, it seems that clarification or amendment of Article 189 will become necessary; the insider trading directive is but one example of this basic problem plaguing the majority of legislation passed by the EC.

If its creation is authorized, the European securities commission

\textsuperscript{136} New Belgium and Luxembourg legislation modelled after the EC directive support this goal. \textit{See Wymeerch, supra} note 54.


\textsuperscript{138} However, The Hague Convention only assists evidence gathering in civil and commercial matters, and does not address criminal proceedings. \textit{See Kluwer, supra} note 121 at 20. Still, whatever the nature of the proceedings, there is general agreement that the principle advocating that sanctions should remain in the exclusive prerogative of Member States should be abandoned. \textit{See, e.g., Warren, supra} note 41 at 1074.

\textsuperscript{139} Wallace, \textit{supra} note 137, at 280.

\textsuperscript{140} EEC TREATY art. 189. \textit{See also Hopt, supra} note 132, at 74 (noting that Article 13 of the Directive follows the traditional pattern of leaving it to the discretion of the Member States to determine the penalties to be applied for infringement of the measures taken pursuant to the Directive).
could consist of members of the different states led by a panel charged with the responsibility of proposing recommendations on surfacing issues. It might also provide a Member State's commission with a method of appeal when a national judge renders a decision arguably conflicting with the spirit of the Directive.\textsuperscript{141} Once a European securities commission is established, negotiation of a United States-EC Memorandum of Understanding in the spirit of the SEC/COB Administrative Agreement would be one step away. Such an agreement would be beneficial because it would expedite the processing of requests for information and the handling of cases by making the process systematic.\textsuperscript{142} Individualized bilateral memoranda of understanding might then concentrate on the special needs of each market.

The creation of a European securities commission and the negotiation of an EC/US Memorandum of Understanding are, however, unlikely at best. The refusal of Member States to relinquish political sovereignty inevitably perpetuates resistance to harmonization and total integration. Thus, the chances of attaining the degree of political cooperation which these alternatives necessitate is remote. Nonetheless, the adoption of the Insider Trading Directive is a classic initial step to European integration in accord with Schuman's prophesy that "Europe will not be made all at once, or as a single whole; it will be built of concrete achievements which first create de facto solidarity."\textsuperscript{143}

Indeed, if the Member States of the European Community overcome the present obstacles and implement these alternatives, the European securities commission could then effectively serve as a prototype for the development of an international regulatory commission.\textsuperscript{144} The establishment of this body would be instrumental in fostering confidence in the world's markets by promoting integrity.\textsuperscript{145} One organization known as the International Organization of Securities Commissions seems to be independently working towards this end.\textsuperscript{146} However, global regulatory consensus is the nec-

\begin{itemize}
  \item \textsuperscript{141} See Warren, supra note 20, at 231 (suggesting that the EC regulatory institution might be organized either as special body of the EC Commission or as an independent agency).
  \item \textsuperscript{142} 22 Sec. and Commodities Reg. 137, 146-47 (July 5, 1989).
  \item \textsuperscript{143} See Paxton, supra note 1 at 228.
  \item \textsuperscript{144} Warren, supra note 20, at 232.
  \item \textsuperscript{145} For one discussion of such a world wide regulatory agency see Gerstenzang, supra note 9, at 439.
  \item \textsuperscript{146} The organization, headquartered in Montreal, charges itself with four basic aims:
    \begin{itemize}
      \item to cooperate together to ensure a better regulation of the markets, on the domestic as well as on the international level in order to maintain just and efficient securities markets;
      \item to exchange information on their respective experiences in order to promote the development of domestic markets;
      \item to unite their efforts to establish standards and an effective surveillance of international securities transactions;
    \end{itemize}
\end{itemize}
necessary, yet highly unlikely, prerequisite.\textsuperscript{147}

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