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The Directive On Insider Dealing

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Abstract

This Article discusses the Community directive on insider dealing strictly from the point of view of Community law, and more specifically of what may be called the Community's constitutional law - the powers of the institutions involved in the making and in the implementation of law - rather than from the point of view of insider trading as an economic phenomenon and the ways it is perceived and dealt with in Community law.

THE DIRECTIVE ON INSIDER DEALING

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INTRODUCTION

In recent years there has been a remarkable amount of legislative activity in Europe to combat insider dealing (or insider trading) at the national as well as at the European Community (the "EC" or the "Community") levels.¹ This trend reflects a sharp increase in stock market transactions, corresponding to a widespread movement towards concentrations on the one hand and to closer links among stock exchanges on the other throughout the Western world.²

From the Community's point of view in particular, the goal of a large integrated market by the end of 1992, pursuant to the Single European Act,³ has brought about two developments. First, restructuring of undertakings has occurred at both the national and Community levels, in order to give optimum size to undertakings for the production of goods and the provision of services in view of the new challenge of competition. Second, there has also been an international restructuring of undertakings across the Community's external borders, in order to satisfy the desire of non-EC companies to get a foothold in the single market after 1992.

It is in this context of intense activity aimed at mergers and acquisitions that insider dealing has revealed itself as a problem and as a threat to the correct and smooth functioning of stock exchanges in the Community. A few instances involving convictions or suspicions of insider trading have given rise

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1. See INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 6.13, at 6-45 (United Kingdom), § 7.16, at 7-37 (France), § 8.11, at 8-27 (the Netherlands), § 8A.13, at 8A-47 (Belgium) (H. Bloomenthal ed. 1987).

2. See Internationalization of the Securities Market, Exchange Act Release No. 21,958, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,759, at 87,385 (Apr. 18, 1985).

3. Single European Act, O.J. L 169/1 (1987), Common Mkt. Rep. (CCH) ¶ 21,000 [hereinafter Single European Act], amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 11 [hereinafter EEC Treaty].

to scandals that have attained political relevance⁴ and so have contributed to the necessity of speedily solving the problem.

This Article will discuss the Community directive on insider dealing (the "Directive on Insider Dealing" or the "Directive") strictly from the point of view of Community law, and more specifically of what may be called the Community's constitutional law—the powers of the institutions involved in the making and in the implementation of law—rather than from the point of view of insider trading as an economic phenomenon and the ways it is perceived and dealt with in Community law.⁵

I. *THE INSIDER TRADING DIRECTIVE AND THE COOPERATION PROCEDURE*

On July 18, 1989, the Council of Ministers of the European Communities (the "Council") adopted a common position with a view to the adoption of a directive on insider dealing (the "Amended Proposal").⁶ In accordance with the cooperation procedure established by the Single European Act,

4. Kamm, *Five Indicted in France for Trading of Triangle Shares During Takeover*, Wall St. J., Feb. 17, 1989, at A11, col. 2; Forman, *Old World Traditions Include Insider Trading*, Wall St. J., Feb. 8, 1989, at C1, col. 3; Lohr, *Guinness Scandal Roils Britain*, N.Y. Times, Jan. 30, 1987, at D1, col. 3; Lohr, *Ouster at London Stock Firm*, N.Y. Times, Nov. 12, 1986, at D5, col. 1.

5. The Directive on Insider Dealing began as Proposal for a Council Directive Coordinating Regulations on Insider Trading, COM(87) 111 final, O.J. C 153/8 (1987) [hereinafter First Proposal]. Subsequently, the European Parliament issued an opinion on the proposal. Opinion of European Parliament on Proposal from the Commission to the Council for a Directive Coordinating Regulations on Insider Trading, O.J. C 187/93 (1988). Pursuant to the opinion of the Parliament, the original proposal was then amended by the Council as Amendment to the Proposal for a Council Directive Coordinating Regulations on Insider Trading, COM(88) 549 final, O.J. C 277/13 (1988). The amended proposal was adopted by the Council on July 18, 1989. Common Position Adopted by the Council on July 18, 1989 with a View to the Adoption of a Directive Coordinating Regulations on Insider Dealing, Eur. Par. Sess. Docs., ser. C, Doc. C 3-0018/89 (July 28, 1989) [hereinafter Amended Proposal]. The Amended Proposal consists of four parts: the Council Letter, the Common Position of the Council (the "Common Position"), the Council's Reasons (the "Council Reasons"), and the Commission Communication (the "Commission Communication"). *Id.* The Amended Proposal was approved by the Parliament on October 11, 1989 in accordance with the cooperation procedure. The Amended Proposal was subsequently adopted by the Council without discussion. Council Directive of 13 November 1989 Coordinating Regulations on Insider Dealing, O.J. L 334/30 (1989), *reprinted infra* pp. 178-84 [hereinafter Directive on Insider Dealing].

6. Amended Proposal, *supra* note 5.

which, among other things, introduced this procedure for the adoption of certain Community acts, the Council sent the Amended Proposal to the European Parliament (the "Parliament") duly accompanied by a statement of the Council's reasons.⁷ The Parliament may approve the Amended Proposal either explicitly or tacitly by letting time elapse, propose

7. The cooperation procedure was established by the Single European Act. Single European Act, *supra* note 3, art. 7, O.J. L 169/5, Common Mkt. Rep. (CCH) ¶ 21,000, ¶ 21,060. Article 7 states:

Where, in pursuance of this Treaty, the Council acts in cooperation with the European Parliament, the following procedure shall apply:

(a) The Council, acting by a qualified majority under the conditions of paragraph 1, on a proposal from the Commission and after obtaining the Opinion of the European Parliament, shall adopt a common position.

(b) The Council's common position shall be communicated to the European Parliament. The Council and the Commission shall inform the European Parliament fully of the reasons which led the Council to adopt its common position and also of the Commission's position.

If, within three months of such communication, the European Parliament approves this common position or has not taken a decision within that period, the Council shall definitively adopt the act in question in accordance with the common position.

(c) The European Parliament may within the period of three months referred to in point (b) by an absolute majority of its component members propose amendments to the Council's common position. The European Parliament may also, by the same majority, reject the Council's common position. The result of the proceedings shall be transmitted to the Council and the Commission.

If the European Parliament has rejected the Council's common position, unanimity shall be required for the Council to act on a second reading.

(d) The Commission shall, within a period of one month, re-examine the proposal on the basis of which the Council adopted its common position, by taking into account the amendments proposed by the European Parliament.

The Commission shall forward to the Council, at the same time as its re-examined proposal, the amendments of the European Parliament which it has not accepted, and shall express its opinion on them. The Council may adopt these amendments unanimously.

(e) The Council acting by a qualified majority, shall adopt the Proposal as re-examined by the Commission.

Unanimity shall be required for the Council to amend the proposal as re-examined by the Commission.

(f) In the cases referred to in points (c), (d) and (e), the Council shall be required to act within a period of three months. If no decision is taken within this period, the Commission proposal shall be deemed not to have been adopted.

(g) The periods referred to in points (b) and (f) may be extended by a maximum of one month by common accord between the Council and the European Parliament.

Id. (amending EEC Treaty, *supra* note 3, art. 149(2)).

amendments to it, or reject it out of hand.⁸ Bearing in mind the opinion delivered by the Parliament in the previous phase of the procedure,⁹ it was reasonable to assume that the Amended Proposal would be approved and that the Council would consequently adopt the draft.

Because the Amended Proposal was adopted unanimously by the Council (as explicitly and somewhat teasingly stated in the Council reasons),¹⁰ eventual adoption by the Council was to be expected in any event. According to the cooperation procedure, the Council can adopt a directive unanimously even if it is rejected by Parliament or modified in a new proposal by the Commission of the European Communities (the "Commission") following amendments put forward by the Parliament.¹¹

The initial proposal for the Directive on Insider Dealing was submitted by the Commission to the Council on May 25, 1987.¹² The Council adopted the Directive on November 13, 1989.¹³ Only twenty-nine months elapsed between the date of the first proposal and the adoption of that Directive, a particularly short period by any standard of Community law-making records.

A very simple pattern governs the provisions of the Directive on Insider Dealing. First, the Directive defines both "inside information" and "insider."¹⁴ Second, the Directive sets out two specific obligations for Member States: (1) to prohibit the use of insider information by insiders,¹⁵ and (2) to sanction properly violations of this prohibition.¹⁶ Third, the Directive establishes a system of cooperation among competent national authorities in exchanging information on insider trading.¹⁷ Finally, there is a provision allowing for future international

8. *See id.*

9. *See* Legislative Resolution, O.J. C 187/93 (1988).

10. *See* Amended Proposal, *supra* note 5, Eur. Par. Sess. Docs. ser. C, Doc. C3-0018/89, Council Reasons, at 2.

11. *See* EEC Treaty, *supra* note 3, art. 149(2)(c), *added by* Single European Act, *supra* note 3, art. 7, O.J. L 169/5, Common Mkt. Rep. (CCH) ¶ 21,000, ¶ 21,060.

12. Proposal for a Council Directive, O.J. C 153/8 (1987).

13. Directive on Insider Dealing, *supra* note 5, *reprinted infra* pp. 178-84.

14. *Id.* art. 1, at 31, *reprinted infra* p. 180.

15. *Id.* arts. 2-4, at 31, *reprinted infra* pp. 180-81.

16. *Id.* art. 13, at 32, *reprinted infra* p. 184.

17. *Id.* arts. 8-10, at 32, *reprinted infra* pp. 182-83.

agreements on insider trading to be entered into by the Community.¹⁸

The Council's reasons for adopting the text are most synthetically expressed in the Council's Statement to the Parliament, contained in the Amended Proposal, in the following way:

1. Transferable securities markets play a central role in a modern market economy, ensuring that economic operators have the necessary sources of finance placed at their disposal. It is therefore essential that such markets operate smoothly. Consequently, *it is necessary to guarantee both the greatest possible balance between demand and supply and equality of opportunity for all investors.*
2. The aim of the Directive is therefore to prohibit insider dealing enabling individuals in possession of inside information to take advantage of it at the expense of other investors, thus undermining confidence in equality of opportunity and affecting the smooth running of the transferable securities market.
3. The attempt to arrive at Community rules on the subject arose from the observation that in several Member States there are no provisions prohibiting insider dealing and that, where rules do exist in Member States, there are considerable differences between them.¹⁹

If one considers that insider trading can hardly be said to affect the balance between demand and supply of means of financing, one is left with the only other stated objective of the Directive, which is to guarantee equality of opportunity for all investors.²⁰ This observation is important in determining the correct legal basis of the Directive on Insider Dealing. The aim of ensuring equal opportunities for investors is already clearly stated in the preamble to the Directive, where it is nevertheless somewhat overshadowed among other considerations.²¹

After considering the legal basis of the Directive on Insider Dealing, this Article will examine some questions con-

18. *Id.* art. 11, at 32, *reprinted infra* pp. 183-84.

19. Amended Proposal, *supra* note 5, Eur. Par. Sess. Docs. ser. C, Doc. C3-0018/89, Council Reasons, at 2-3 (emphasis added).

20. *See id.*

21. *See* Directive on Insider Dealing, *supra* note 5, preamble, O.J. L 334/30, *reprinted infra* pp. 178-79.

cerning the implementation of the Directive by the Community's Member States and mutual assistance in the exchange of information among Member States. This Article will also consider where competence lies in the application of the Directive to non-Member States.

II. *THE LEGAL BASIS OF THE DIRECTIVE*

The proposal for a directive on insider dealing was originally put forward by the Commission on the basis of Article 54(3)(g) of the EEC Treaty (the "Treaty").²² The Commission presented the proposed insider dealing directive as constituting an essential supplement to the directives already adopted or being considered by the Council in the securities field.

The Council has adopted three directives that affect the securities market and is considering a fourth. The earliest directive adopted regulates coordination of the conditions for the admission of securities to an official stock exchange listing (the "Directive on Admission to Securities Listing").²³ The second directive adopted coordinates the requirements for the drafting, scrutiny, and distribution of the listing particulars to be published for the admission of securities to an official stock exchange listing (the "Directive on Prospectuses").²⁴ The third directive already adopted concerns information to be published on a regular basis by companies whose shares have been admitted to an official stock exchange listing (the "Direc-

22. See First Proposal, *supra* note 5, at 8. Article 54(3)(g) provides:

The 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 within the meaning of the second paragraph of Article 58 [of the EEC Treaty] with a view to making such safeguards equivalent throughout the Community.

EEC Treaty, *supra* note 3, art. 54(3)(g), 1973 Gr. Brit. T. S. No. 1, at 23-24, 298 U.N.T.S. 11, 38-39. "'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making." *Id.* art. 58, 1973 Gr. Brit T.S. No. 1, at 25, 298 U.N.T.S. at 40.

23. Council Directive No. 79/279, O.J. L 66/21 (1979), Common Mkt. Rep. (CCH) ¶ 1721 [hereinafter Directive on Admission to Securities Listing].

24. Council Directive No. 80/390, O.J. L 100/1 (1980), Common Mkt. Rep. (CCH) ¶ 1731 [hereinafter Directive on Prospectuses].

tive on Regularly Published Information").²⁵ The directive that has been proposed, but not yet adopted, is intended to set requirements as to what information is to be published when major holdings in the capital of a listed company are disposed of or acquired (the "Proposal for a Directive on Holdings").²⁶

The Commission has stated that, like these four directives, the Directive on Insider Dealing also aims at providing effective protection for investors on the securities markets, ensuring the proper operation of securities markets throughout the Community, and promoting greater interpenetration of national securities markets at the Community level.²⁷

The directives that have already been adopted are based on both Article 54 and Article 100 of the EEC Treaty.²⁸ However, the Proposal for a Directive on Holdings and the original proposal for an insider trading directive were based on Article 54 alone.²⁹ The Directive on Insider Dealing, however, is based on Article 100a.³⁰

It may be of interest here to discuss briefly the appropri-

25. Council Directive No. 82/121, O.J. L 48/26 (1982), Common Mkt. Rep. (CCH) ¶ 1741 [hereinafter Directive on Regularly Published Information].

26. Proposal for Council Directive No. 351/12, O.J. C 351/35 (1985) [hereinafter Proposal for Directive on Holdings].

27. See Amended Proposal, *supra* note 5, Eur. Par. Sess. Docs., ser. C, Doc. C3-0018/89, Commission Communication, at 2.

28. See Directive on Regularly Published Information, *supra* note 25, preamble, O.J. L 48/26, Common Mkt. Rep. (CCH) ¶ 1741; Directive on Prospectuses, *supra* note 24, preamble, O.J. L 100/1, Common Mkt. Rep. (CCH) ¶ 1731; Directive on Admission to Securities Listings, *supra* note 26, preamble, O.J. L 66/21, Common Mkt. Rep. (CCH) ¶ 1721. Article 100 states that "[t]he Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." EEC Treaty, *supra* note 3, art. 100, 1973 Gr. Brit. T.S. No. 1, at 37, 298 U.N.T.S. at 54.

29. See First Proposal, *supra* note 5, preamble, O.J. C 153/8; Proposal for Directive on Holdings, *supra* note 26, preamble, O.J. C 351/35.

30. Directive on Insider Dealing, *supra* note 5, preamble, O.J. L 334/30. Article 100a states:

By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

ateness of these different legal bases. First, as one commentator has pointed out, the Community system is based on powers of distribution, and consequently, to the extent that a power is conferred upon the Community, it is subtracted from the Member States.³¹ Second, because the legal basis of an act determines the procedure applicable for its adoption, an incorrect legal basis entailing a wrong procedure may affect the legality of the act.³² Finally, according to the case law of the Court of Justice of the European Communities (the "Court"), the legal basis of an act must be determined objectively in the light of its purpose so that the choice of legal basis, unless challenged, necessarily has a bearing on the interpretation to be given to the act.

A discussion of the legal bases of the directives already enacted may also shed some light on the question of the appropriate legal basis of the Proposal for a Directive on Holdings, as well as of all future directives concerning the securities market. Such a discussion may even have a bearing on the international competence of the Community in this field. Before addressing these issues, it is worth pointing out that the Single European Act not only introduced the new Article 100a, but also modified Article 54 on the point of applicable procedure.³³ Under both Article 54 and Article 100a, the cooperation procedure now applies.

The Council's rationale for adopting the three securities related directives currently in force based on Article 54 and Article 100 of the Treaty is worthy of consideration. The preambles of these acts, which give the reasons for their adoption and consequently the justification of the legal basis chosen by

EEC Treaty, *supra* note 3, art. 100a, *added by* Single European Act, *supra* note 3, art. 18, O.J. L 169/8, Common Mkt. Rep. (CCH) ¶ 21,000, ¶ 21,170.

31. See Haagsma, *The European Community's Environmental Policy: A Case-Study in Federalism*, 12 *FORDHAM INT'L L.J.* 311, 314 (1989).

32. See *infra* note 36 and accompanying text.

33. EEC Treaty, *supra* note 3, art. 54(2), *added by* Single European Act, *supra* note 3, art. 6, O.J. L 169/5, Common Mkt. Rep. (CCH) ¶ 21,000, ¶ 21,050. Article 6 provides:

In Article 54(2) of the EEC Treaty the terms "the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly", shall be replaced by "the Council shall, acting on a proposal from the Commission, in cooperation with the European Parliament and after consulting the Economic and Social Committee".

Id.

the drafters, indicate that the acts are mainly intended to coordinate national rules on guarantees offered by companies to their members and creditors.³⁴ It is only in a subsidiary way that the preambles assess that such coordination will contribute to the correct and smooth functioning of a capital market in the Community.³⁵ This purpose would not justify a double legal basis, because, according to the Court, it is the main objective pursued that determines the correct legal bases of an act.³⁶

Therefore, it cannot be because the purpose of creating a common market for capital is incidentally pursued that the three directives already enacted also invoke Article 100. On the contrary, the very reason for invoking Article 100 is explicitly stated in the Directive on Admission to Securities Listing. This Directive states:

Whereas such coordination must therefore apply to securities, independently of the legal status of their issuers, and must therefore also apply to securities issued by non-mem-

34. Directive on Regularly Published Information, *supra* note 23, preamble, O.J. L 48/26 (coordination of requirements for regular information to be published by companies will improve protection of investors and make protection more equivalent); Directive on Prospectuses, *supra* note 24, preamble, O.J. L 100/1 (differences in safeguards required by Member States in area of listing of particulars for admission of securities to stock exchanges should be eliminated by coordinating the rules and regulations without necessarily making them completely uniform); Directive on Admission to Securities Listing, *supra* note 25, preamble, O.J. L 66/21 (coordination of conditions for admission of securities to official listing on stock exchanges will provide equivalent protection for investors at Community level, by establishing uniform guarantees offered to investors in Member States).

35. Directive on Regularly Published Information, *supra* note 23, preamble, O.J. L 48/26 (coordination of requirements for publication of regular information by companies admitted to official stock exchange listing will, in so doing, contribute towards establishment of genuine Community capital market by permitting fuller interpenetration of securities markets); Directive on Prospectuses, *supra* note 24, preamble, O.J. L 100/1 (coordination of rules and regulations for listing of particulars for admission of securities to stock exchanges will, at same time, take into account liberalization of Community capital movements and fact that mechanism for checking at time securities are offered does not yet exist); Directive on Admission to Securities Listing, *supra* note 25, preamble, O.J. L 66/21 (coordination of requirements for admission to stock exchanges will accordingly make for greater interpenetration of national securities markets).

36. See *United Kingdom v. Council*, Case 68/86, 1988 E.C.R. ___, Common Mkt. Rep. (CCH) ¶14,475 (measure is not void for failure to meet duty to state reasons for measure where legal basis stated is correct); *Commission v. Council*, Case 45/86, 1987 E.C.R. 1493, Common Mkt. Rep. (CCH) ¶ 14,421 (regulation on generalized tariff preferences declared void due to incorrect legal basis).

ber States or their regional or local authorities or international public bodies; whereas this Directive therefore covers entities not covered by the second paragraph of Article 58 of the Treaty and goes beyond the scope of Article 54(3)(g) while directly affecting the establishment and functioning of the common market within the meaning of Article 100.³⁷

It seems here that the Community's legislators believed that, because the main purpose of the Directive cannot be pursued on the basis of Article 54, with regard to entities other than those contemplated in Article 58,³⁸ Article 100 should be invoked to cover the latter.

As for the Directive on Prospectuses, the same explanation seems to result from the following wording:

Whereas such coordination must apply to securities independently of the legal status of the issuing undertaking, and accordingly, in so far as this Directive applies to entities to which no reference is made in the second paragraph of Article 58 of the Treaty and goes beyond the scope of Article 54(3)(g), it must be based also on Article 100.³⁹

Similar wording may be found in the last recitals of the Directive on Regularly Published Information, where, nevertheless, non-EC companies, not regulatory authorities, are referred to:

Whereas, so as to ensure the effective protection of investors and the proper operation of stock exchanges, the rules relating to regular information to be published by companies, the shares of which are admitted to [an] official stock exchange listing within the Community, should apply not only to companies from Member States, but also to companies from non-member countries.⁴⁰

At this point in the analysis, one wonders whether the reasoning behind the choice of legal basis for the directives already enacted is not contradictory, and ultimately wrong. In effect, Article 54 is to be found in that part of the EEC Treaty

37. Directive on Admission to Securities Listing, *supra* note 25, preamble, O.J. L 66/21.

38. EEC Treaty, *supra* note 3, art. 58, 1973 Gr. Brit. T.S. No. 1, at 25, 298 U.N.T.S. 11, 40. See *supra* note 22 for the text of Article 54(3)(g).

39. Directive on Prospectuses, *supra* note 24, preamble, O.J. L 100/1, at 2.

40. Directive on Regularly Published Information, *supra* note 23, preamble, O.J. L 48/26, at 27.

concerning the right of establishment, and the guarantees referred to in Article 54(3)(g) probably need coordination in order to inspire confidence in an economic agent dealing with a company established in its Member State but registered in another Member State. Article 54 is probably not intended to offer guarantees to investors on the securities market as such. Article 54 applies only to companies registered in Member States as these entities alone enjoy the right of establishment under the Treaty. Therefore, where the recitals of those certain directives state that each instrument “go[es] beyond the scope of Article 54(3)(g),” what is meant, though perhaps unintentionally, may well be that these directives are *ultra vires* insofar as they claim to coordinate the safeguards which are required of companies or firms for the protection of the interests of members and others. And the recourse to Article 100 to cover entities not contemplated by Article 58⁴¹ seems rather to show that the real aim pursued by these directives is not to coordinate guarantees according to Article 54—in the framework of the right of establishment—but to regulate the financial market in which all traded securities and all issuers are to be dealt with, whether or not the undertakings concerned enjoy the right of establishment under the Treaty or not.

If this argument is correct as regards the three directives in force, it must *a fortiori* be so in respect of the Directive on Insider Dealing, where no guarantee is required (or coordinated) from companies, whether or not falling within the Article 58 definition.

If the coordination provided for in these directives aims at ensuring better conditions of capital supply to companies, it then pursues the objective of removing obstacles to the free movement of capital, not of legal persons, as is the aim of Article 54. The three directives should then have been based solely on Article 100, as they were all enacted before the Treaty was amended by the Single European Act. This argument may be deemed of little relevance, because Article 100 was in fact used as one of the legal bases of the three directives, even if for the wrong reasons, and because Article 100a replaced Article 54 as the legal basis of the Directive on Insider Dealing. Still, it may be relevant to future legislation concern-

41. See *supra* note 22 and accompanying text.

ing the securities market in so far as it applies to guarantees such as disclosures required from companies.

It may also be claimed that, whatever the legal basis of securities related legislation before the Single European Act entered into force, it is now clear that the new Article 100a provides the appropriate legal basis. As a matter of fact, Articles 54, 100, and 100a coexist in the Treaty, as amended by the Single European Act, so that one cannot assume that the last has entirely replaced the previous two. It will therefore be necessary in the future to distinguish with some rigor the differing scope of application of the three provisions.

Article 54(3)(g) will still be applied whenever coordination of guarantees from companies is deemed necessary in order to facilitate their intra-Community movement through the setting up of branches or agencies. On the other hand, a measure based on Article 100a is deemed to aim at establishing or ensuring the correct functioning of the internal market through harmonization of national rules, rather than at removing obstacles to the establishment and the proper functioning of the common market, as is the case of measures based on Article 100. It results from this that Articles 54 and 100a have different areas of application, and Article 100 applies only where the other two do not. Consequently, future Community legislation amending the three directives currently in force concerning the securities market or requiring disclosures from companies the securities of which are listed on stock exchanges, will probably be based on Article 54 or Article 100a, in order either to favor the right of establishment or to regulate the capital market, depending on the aim pursued.

It can be seen that by introducing the new Article 100a into the Treaty, the Single European Act has not only modified the decision-making procedures, but has also widened the scope of Community power in regulating the Common Market—in particular, the capital market. In effect, Article 100 empowers the Community only to approximate national provisions that directly affect the establishment or functioning of the Common Market, while the measures that can be adopted under Article 100a are qualified as having *as their object* the establishment and functioning of the Community market itself.

It may be questioned whether the change in the legal basis

of the Directive on Insider Dealing, from Article 54 to Article 100a, only reflects the change in the Treaty introduced by the Single European Act or whether it implies a change of conception, such as a change in policy outlook.

In this particular case, the change of the legal basis has not entailed any change in the procedure for the adoption of the Directive on Insider Dealing, at least as regards the powers of Parliament. In effect, both Articles 54 and 100a provide for the cooperation procedure.⁴² One may be tempted to assume that the Court would not find any reason to consider such a change, even if it proved wrong, as affecting the validity of the act. In effect, in *Commission v. Council* ("Containers"),⁴³ the Court stated:

The first consideration is that, since the entry into force of the Single European Act the procedural requirements of Article 28 are identical to those of Article 113, whereas Article 235 involves different rules for arriving at the will of the Council. Consequently, the divergence between the parties over the choice of Article 28 or Article 113 as the legal basis of the regulation which is being challenged, has in this case a purely formal significance, for it can have no legal consequence. . . .

It results from the above that, without its being necessary to rule on the line of demarcation between the respective scope of application of Articles 28 and 113, the Council acted incorrectly in basing its enactment of the disputed regulation on Article 235.⁴⁴

Even so, such a change of legal basis is likely to affect the interpretation of the Directive on Insider Dealing when it is applied by Community institutions. This may be so, for example, when the application is by the Commission in monitoring the implementation of the Directive, or by the Court in scrutinizing claimed violations of the Directive, or by Member States' organs in adapting national legislation to Community law or in interpreting at the judicial level such national legislation.

On the other hand, the change of legal basis has not been

42. See *supra* notes 7, 30, 33.

43. *Commission v. Council*, Case 275/87, 1989 E.C.R. __ (judgment of Feb. 2, 1989).

44. *Id.* at __ (trans. by author).

accompanied by any consequential change in the wording of the Directive on Insider Dealing. This is not, however, sufficient evidence that no change in policy has occurred. The same provisions may very well serve different purposes and so may acquire different scope and meaning. This remains true even if, as is the case here, the preamble itself has been left unaltered.

Based as it is on Article 100a, the Directive on Insider Dealing should be seen, not just as a sequel to the three previous directives concerning the securities markets and thus as another new piece of the Community legislation implementing Article 54(3)(g), but rather as the first explicit step taken towards regulating the single financial market of the Community. The implementation of the Directive on Insider Dealing will, therefore, have to be assessed against the criterion of Member States' responsibility for correct compliance with Community law and for the proper functioning of the financial market, rather than against the criterion of loyal and fair behavior of companies toward investors. This may have some real impact on the attitude of the Commission and the Court in exercising their powers under Articles 169, 173, and 177 of the EEC Treaty.⁴⁵

III. THE IMPLEMENTATION OF THE DIRECTIVE

The nature of a directive is that it binds the Member States to which it is addressed only as to the goal that it sets up, leaving the Member States free to choose the appropriate legal means in order to satisfy their obligation to attain that goal.⁴⁶ It is, therefore, important to assess the preciseness of the provisions contained in the Directive on Insider Dealing in order to appraise the margin of discretion left to the Member States in implementing that Directive.

From this point of view, the definitions of "insider" and of "inside information" provided for in the Directive on Insider Dealing appear precise enough, so that in practice hardly any

45. See EEC Treaty, *supra* note 3, arts. 169, 173, 177, 1973 Gr. Brit. T.S. No. 1, at 56-58, 298 U.N.T.S. at 75-77.

46. See *id.* art. 189, 1973 Gr. Brit. T.S. No. 1, at 60, 298 U.N.T.S. at 78-79. "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.* at 60, 298 U.N.T.S. at 79.

margin of discretion is left to Member States as far as those notions are concerned. According to article 1 of the Directive, "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.⁴⁷

Article 1 then goes on to define rather meticulously the notion of "transferable securities" in a way that apparently leaves nothing open to discretion.⁴⁸

The notion of a primary insider results from article 2, which deals with prohibitions to be imposed on such an actor. An "insider" is any person who holds inside information obtained by one of several means: membership in the administration, management, or supervisory bodies of the issuer; holdings in the capital of the issuer; or access to such information through the exercise of one's employment, profession, or duties.⁴⁹

The notion of secondary insider results from article 4, which extends the prohibitions imposed on the primary insider by article 2 to the secondary insider. It covers "any person other than those referred to in that article [2] who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a [primary insider]."⁵⁰

Not 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, especially given the language of article 6, which states that "[e]ach Member State may adopt provisions more stringent than those laid down by this Directive or additional provisions, provided that such provisions are ap-

47. Directive on Insider Dealing, *supra* note 5, art. 1(1), O.J. L 334/31, *reprinted infra* p. 180.

48. *Id.* art. 1(2), *reprinted infra* p. 180.

49. *Id.* art. 2(1), *reprinted infra* p. 180.

50. *Id.* art. 4, *reprinted infra* p. 181.

plied generally.”⁵¹ It is hardly conceivable that a Member State could enlarge the notion of insider trading by adding to the definitions of insider or inside information. Even if one were to accept theoretically such a possibility, it seems utterly improbable that a Member State would be willing to extend these definitions because it would probably be inequitable, and certainly self-penalizing, to do so just at a moment when the national securities market is to become a part of a single Community market. One 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 to the definition of insider trading as set forth in the Directive.

This is confirmed by the text of the Directive itself. Article 2(2) provides that where the insider is a company or other type of legal person, the prohibition of insider trading applies to the natural persons who take part in the decision to carry out the transaction.⁵² Member States are not, however, prevented from extending the prohibition to the legal person itself through the use of article 6.

Article 2(3), like article 2(2), limits the application of the Directive. Article 2(3) prohibits only insider trading transactions effected through a professional intermediary and allows Member States to exclude transactions effected without the involvement of a professional intermediary outside an organized market. Member States are thus left with the option to extend the prohibition to the latter transactions.⁵³ The same is true of article 2(4), exempting from the scope of the Directive transactions carried out directly or indirectly by a sovereign state in pursuit of monetary exchange rate or public debt-management policies.⁵⁴ Article 2(4) also gives discretion to a Member State to extend the exception to transactions carried out by its federated states or other similar local authorities in respect of the management of their public debt by use of article 6 powers.

In turn, article 5 determines the minimum territorial scope of application of the prohibition of insider trading,⁵⁵ by

51. *Id.* art. 6, reprinted *infra* p. 182.

52. *Id.* art. 2(2), reprinted *infra* pp. 180-81.

53. *Id.* art. 2(3), reprinted *infra* p. 181.

54. *Id.* art. 2(4), reprinted *infra* p. 181.

55. *Id.* art. 5, reprinted *infra* pp. 181-82.

prohibiting such transactions carried out on an organized market situated or operating within a national territory, leaving to Member States the option of extending the prohibition to other markets.

Finally, and most important, because article 4 prohibits secondary insiders from insider trading but not from irregular disclosure of inside information or from tipping, article 6 explicitly provides that each Member State may prohibit such activity by adopting more stringent provisions.⁵⁶

Member States are bound under Community law to prohibit insider dealing within the limits so determined. Insider dealing is currently (prior to the implementation of the Directive on Insider Dealing) deemed to be a criminal offense in the United Kingdom,⁵⁷ Denmark,⁵⁸ and France.⁵⁹ It is a simple breach of a professional code of conduct in the Federal Republic of Germany ("West Germany"),⁶⁰ and it is not specifically dealt with in the other Member States. It may be anticipated that, in the three first-mentioned Member States, the current prohibition is in conformity with the Directive and need not therefore be altered to ensure compliance with it for this purpose, although definitions may have to be adapted. It appears equally obvious that such is not the case with West Germany.

The Court does not accept *de facto* compliance with Community law as legally sufficient, but insists on explicit conformity of national legislation with Community law.⁶¹ Member States, other than France, Denmark, and the United Kingdom, must determine what needs to be done in order to comply with the Directive's obligation to prohibit insider dealing.

From a general and abstract point of view, in order to pro-

56. *Id.* art. 6, reprinted *infra* p. 182.

57. Company Securities (Insider Dealing) Act 1985, ch. 8 (imposing criminal sanctions), amended by Financial Services Act 1986, ch. 60 (imposing civil sanctions).

58. Stock Exchange Laws, Article 39 (1986).

59. Law No. 83-1, Jan. 3, 1983, 1983 J.O. 162, 1983 D.S.L. 89 replacing Art. 10-1 of Law No. 70-1208, Dec. 23, 1970, 1970 J.O. 11,981, 1971 D.S.L. 17, replacing Art. 162-1 and adding Art. 10-1 to Ordinance No. 67-833, Sept. 28, 1967, 1967 J.O. 9589, 1967 D.S.L. 42, adding Art. 162-1 to Law No. 66-537, July 24, 1966, 1966 J.O. 6402, 1966 D.S.L. 265.

60. See *Neufassung der Insider Regeln*, in AKTIEN GESELLSCHAFT 1988, at 293.

61. See *Commission v. Italy*, Case 22/87, 1989 E.C.R. ___ (judgment of Feb. 2, 1989); *Commission v. Germany*, Case 29/84, 1985 E.C.R. 1667, 1673, Common Mkt. Rep. (CCH) ¶ 14,203, at 16,241-16,242.

hibit insider dealing, national legislation may make it a criminal offense, an administrative offense, or a tort. A Member State could not simply leave it to professions (note that not only intermediaries but also and primarily other persons are covered by the definitions) to qualify insider dealing as professional misbehavior or a breach of a code of conduct freely accepted by economic agents on the market. This is so because the obligation to prohibit insider dealing is put, by the Directive on Insider Dealing, on Member States, not on private parties or on corporate bodies lacking compelling public authority. A Member State could not make it a civil tort giving rise simply to compensation since a civil tort is not "prohibited" as such, and compensation is not a "penalty" as contemplated in article 13 of the Directive.⁶²

This brings one to the observation that the decision whether to make insider dealing a criminal offense, an administrative offense, or a tort is directly linked to the next question, which is the margin of discretion left to Member States in choosing the appropriate sanction. In effect, the different types of prohibitions envisaged are characterized in part by the type of sanction to be applied.

On this point, article 13 states that "[e]ach Member State shall determine penalties to be applied for infringement of the measures taken pursuant to this Directive. The penalties shall be sufficient to promote compliance with those measures."⁶³ Such a loosely drafted provision leaves open to Member States a wide range of options as to the choice of penalties and, consequently, as to the very nature of the prohibition of insider trading. One can reasonably and safely assume that the margin of discretion for Member States in implementing the Directive extends to several areas. First, discretion applies to the qualification of the legal nature of the prohibition, whether penal, administrative, or civil. Second, Member States have discretion in determining the competent authority to review an infringement and the applicable procedure for such review. Finally, there is discretion in choosing the penalty or penalties to

62. See Directive on Insider Dealing, *supra* note 5, art. 13, O.J. L 334/32, *reprinted infra* p. 184; Amended Proposal, *supra* note 5, Eur. Par. Sess. Docs., ser. C, Doc. C3-0018/89; Commission Communication, at 6.

63. Directive on Insider Dealing, *supra* note 5, art. 13, O.J. L 334/32, *reprinted infra* p. 184.

be applied. In such circumstances, one can expect that insider trading as a forbidden activity will come under the same definition in all Member States, but will be dealt with differently under national law as far as its legal qualification and the applicable penalties are concerned.

Only the future can supply a reliable answer to the question of whether these possible differences in national legislation are capable of distorting the workings of securities markets to such an extent as to jeopardize the integrated securities market of the Community. If this were to be the case, then new Community legislation would have to be adopted in order more strictly to coordinate national provisions. Meanwhile, one must bear in mind that under Community law, the judgment implied in article 13 as to the severity of the penalties, which "shall be sufficient to promote compliance"⁶⁴ with the national measures taken pursuant to the Directive on Insider Dealing, belongs of course to each individual Member State in the first instance, but is subject to scrutiny by the Commission, and eventually by the Court, as to its conformity with that Directive. This seems seriously to narrow the margin of discretion left to Member States and the consequent risk of discrepancies between national laws.

IV. MUTUAL ASSISTANCE IN EXCHANGE OF INFORMATION

In order to combat insider dealing, it is essential for national authorities to cooperate in exchanging certain information. At the international level, such a need is usually satisfied by bilateral agreements. At the European level, a convention has been worked out by the Council of Europe and is currently open for signature.⁶⁵ At the Community level, cooperation between competent authorities is provided for in articles 8, 9, and 10 of the Directive on Insider Dealing.⁶⁶

Such a need for tight cooperation and mutual assistance in exchange of information comes from the very fact that securi-

64. *Id.*

65. Convention on Insider Trading, *opened for signature* April 20, 1989, Eur. T.S. No. 130 [hereinafter Convention].

66. See Directive on Insider Dealing, *supra* note 5, arts. 8-10, O.J. L 334/32, *reprinted infra* pp. 182-83.

ties markets are increasingly open to foreign investors and that their identity is usually not disclosed by stock brokers when selling or buying on behalf of their clients. This is stated in the preamble to the Council of Europe Convention (the "Convention") in the following manner: "Considering that, because of the internationalisation of markets and the ease of present-day communications, operations of this nature [*i.e.*, insider trading] are carried out sometimes on the market of a State by persons not resident in that State or acting through persons not resident there"⁶⁷

It seems reasonable to expect cooperation to be more effective under the Directive on Insider Dealing than under the Convention for two reasons. The first is that the Directive not only defines insider trading in a more precise and more comprehensive way than the Convention, but it also enjoins Member States to prohibit and to sanction insider trading,⁶⁸ while the Convention confines itself to providing for mutual assistance between Contracting Parties, whatever attitude they may take in respect of insider trading.⁶⁹ It is to be expected that a greater uniformity of attitudes toward insider trading will entail greater efficiency in exchanging information about it.

The second reason for expecting tighter cooperation and greater efficacy under the Directive is that according to article 8(1) thereof, "each Member State shall designate the administrative authority or authorities competent, if necessary in collaboration with other authorities to ensure that the provisions adopted pursuant to this Directive are applied,"⁷⁰ and according to subdivision (2) of the same article, "the competent authorities must be given all supervisory and investigatory powers that are necessary for the exercise of their functions, where appropriate in collaboration with other authorities."⁷¹ Under these provisions, there must always be in each Member State one or more authorities responsible for cooperation, which is, or are, to be administrative, rather than judicial, in nature. This will make exchange of information less formal and will,

67. Convention, *supra* note 65, preamble, Eur. T.S. No. 130, at 2.

68. See *supra* notes 47-63 and accompanying text.

69. Convention, *supra* note 65, arts. 2-10, Eur. T.S. No. 130, at 3-5.

70. Directive on Insider Dealing, *supra* note 5, art. 8(1), O.J. L 334/32, reprinted *infra* p. 182.

71. *Id.* art. 8(2), reprinted *infra* p. 182.

hopefully, entail the setting up of a reasonably homogenous network of national authorities endowed with the necessary powers to carry out their duties. Insofar as current national law does not provide for such a competent authority or for such powers, it must be modified to that end.

For its part, the Convention only provides for such cooperation as is possible under existing national laws and puts no obligation on the Contracting Parties to amend their legislation in order to supply their competent authorities, which in this case may be administrative as well as judicial, with all supervisory and investigatory powers necessary for the exercise of their duties.⁷²

Moreover, the Convention and the Directive on Insider Dealing are conceived as a first step towards an increasingly effective system for combating insider trading, and both provide for mechanisms to prepare the next steps. But while the Convention provides only for a meeting of experts charged with the tasks of making suggestions,⁷³ the Directive on Insider Dealing simply extends the competences and activity of the existing "Contact Committee" set up by article 20 of the Directive on Admission to Securities Listing to the new area of insider trading.⁷⁴ Accordingly, the Contact Committee shall

72. Convention, *supra* note 65, art. 6(1)-(3), Eur. T.S. No. 130, at 3-4.

73. *Id.* art. 18, at 6.

74. Directive on Insider Dealing, *supra* note 5, art. 12, O.J. L 334/32, reprinted *infra* p. 184. Article 20 of the Directive on Admission to Securities Listing states:

1. A Contact Committee (hereinafter called "the Committee") shall be set up alongside the Commission. Its function shall be:
 - (a) without prejudice to Articles 169 and 170 of the EEC Treaty to facilitate the harmonized implementation of this Directive through regular consultations on any practical problems arising from its application and on which exchanges of view are deemed useful;
 - (b) to facilitate the establishment of a concerted attitude between the Member States on the more stringent or additional conditions and obligations which, pursuant to Article 5 of this Directive, they may lay down at [the] national level;
 - (c) to advise the Commission, if necessary, on any supplements or amendments to be made to this Directive or on any adjustments to be made in accordance with Article 21.
2. It shall not be the function of the Committee to appraise the merits of the decisions taken by the competent authorities in individual cases.
3. The Committee shall be composed of persons appointed by the Member States and of representatives of the Commission. The chairman shall be a representative of the Commission. Secretarial services shall be provided by the Commission.

have two additional functions. First, it will allow for regular consultation on any practical problems that arise from the application of the Directive on Insider Dealing when exchanges of view are deemed useful.⁷⁵ Second, the Contact Committee will, when necessary, advise the Commission on changes to be made to that Directive.⁷⁶ The very fact that these tasks are conferred on a standing committee accustomed to working together warrants the hope of greater efficiency.

The rules of professional secrecy which are to govern the exchange of information and the definition of circumstances where assistance may be refused are substantially the same under the Convention and the Directive on Insider Dealing.⁷⁷

V. THE EXTERNAL COMPETENCE OF THE COMMUNITY

Article 11 of the Directive on Insider Dealing states that "[t]he Community may, in conformity with the Treaty, conclude agreements with non-member countries on the matters governed by this Directive."⁷⁸ At first sight this might appear as a simple, straightforward statement. In fact, it becomes a very puzzling provision when considering what it is meant to achieve and its actual legal effect.

Notably, the provision is drafted with the verb "may." The provision could be intended to confer competence on the Community in the field of foreign relations, enabling it to conclude agreements on insider trading. The Council, in a directive adopted pursuant to Article 100a,⁷⁹ may be saying not only that such are the Community rules on insider trading, but also that these rules may be altered through international agreements to be concluded by the Community. This cannot be the

4. Meetings of the Committee shall be convened by its chairman, either on his own initiative or at the request of one Member State delegation. The Committee shall draw up its rules of procedure.

Directive on Admission to Securities Listing, *supra* note 25, art. 20, O.J. L 66/21, at 24-25.

75. Directive on Insider Dealing, *supra* note 5, art. 12, O.J. L 334/32, *reprinted infra* p. 184.

76. *Id.*

77. Compare *id.* art. 9, O.J. L 334/32, *reprinted infra* pp. 182-83 with Convention, *supra* note 65, art. 6(4)-(5) Eur. T.S. No. 130, at 4.

78. Directive on Insider Dealing, *supra* note 5, art. 11, O.J. L 334/32, *reprinted infra* pp. 183-84.

79. See *supra* notes 30-45 and accompanying text.

case under Community law, however, as interpreted by the Court of Justice.

According to the Court, no Community institution, be it the Council or any other, acting alone or in accordance with whatever procedure involving several institutions, has the power to confer competence on the Community as a subject of international law.⁸⁰ It is true that, according to the Court, the external competence of the Community may result, "not only from an express conferment by the Treaty . . . but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions,"⁸¹ but, such competence derives from the system of the Treaty itself, which attaches consequences to the adoption of common rules or to the possibility of adopting them.

In *Commission v. Council* ("AETR"), the Court said:

In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.

As and when such common rules come into being, the Community alone is in a position to assume and to carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.⁸²

This is a definition of an "exclusive competence," a competence that Member States no longer possess and only the Community can exercise.

In *Opinion Given Pursuant to Article 228(1) of the EEC Treaty* ("Laying-up Fund Opinion"), the Court stated:

[W]henever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments

80. See *Commission v. Council* ("AETR"), Case 22/70, 1971 E.C.R. 263, Common Mkt. Rep. (CCH) ¶ 8134.

81. *Id.* at 274, Common Mkt. Rep. (CCH) ¶ 8134, at 7525.

82. *Id.*

necessary for the attainment of that objective even in the absence of an express provision in that connexion.

This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable, as is envisaged in the present case by the proposal for a regulation to be submitted to the Council by the Commission, the power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.⁸³

This is a "potential" (or "virtual") competence that the Community possesses, but not to the exclusion of the corresponding competence of Member States (concurrent competence). As soon as the Community makes use of its competence, by issuing common rules either autonomously or conventionally, such competence becomes exclusive. In the meantime, Member States can assume international commitments, just as they can legislate domestically in conformity with existing Community law, provided they do not, in so doing, establish obstacles to the future exercise of Community competence.

Insofar as the Directive on Insider Dealing contains common rules, it results from the Treaty that the Community enjoys an exclusive competence to conclude agreements affecting those rules. In related areas, both the Community and the Member States are entitled to conclude international agreements, the former under Article 100a in particular, the latter as long as there are no common rules likely to be affected, and provided they do not interfere, in so doing, with future developments of Community law. In these circumstances, article 11 of the Directive on Insider Dealing cannot possibly be considered as originally conferring competence on the Community in the field of international relations.

It may be noted though that article 11 refers not to com-

83. Opinion Given Pursuant to Article 228(1) of the EEC Treaty ("Laying-up Fund Opinion"), 1977 E.C.R. 741, 755, Common Mkt. Rep. (CCH) ¶ 8405, at 7301.

mon rules contained in the Directive, but to "matters governed by this Directive."⁸⁴ It could be questioned whether article 11 may be interpreted as assuming Community competence beyond the limits resulting from the normal play of common rules, so operating, to that extent, a change in the nature of such competence from potential to exclusive. Such an interpretation, that would imply, for instance, that Member States did not have the authority to conclude the Council of Europe Convention, is not warranted by the wording of article 11 and could hardly be presumed to represent the will of the Council.

Treaty-making powers of the Community are governed by Article 228 of the Treaty, according to which international agreements are negotiated by the Commission and concluded by the Council.⁸⁵ However, that Article says nothing about the procedure to be followed in negotiating and concluding agreements. It is generally accepted that the negotiating procedure laid down by Article 113(3) of the Treaty in the case of commercial agreements, under which the Council authorizes the Commission to open negotiations and lays down directives for conducting them, applies by analogy to all agreements.⁸⁶ Following a successful negotiation the decision to conclude an agreement is taken by the Council according to the requirements of the Treaty provision under which it is empowered to act in the area to which the agreement relates.

From this point of view article 11 might be considered as authorizing the Commission to negotiate multilateral or bilateral agreements with non-Member Countries on insider trading. If this were the correct interpretation of the article, several consequences would stem from it.

First, "the Community . . . may conclude"⁸⁷ would mean "the Commission is hereby authorized to negotiate," which is a rather surprising way of drafting by any standard. Second,

84. Directive on Insider Dealing, *supra* note 5, art. 11, O.J. L 334/32, *reprinted infra* pp. 183-84.

85. EEC Treaty, *supra* note 3, art. 228, 1973 Gr. Brit. T.S. No. 1, at 71-72, 298 U.N.T.S. 11, 90.

86. *Id.* art. 113, 1973 Gr. Brit. T.S. No. 1, at 42-43, 298 U.N.T.S. at 60. "Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations." *Id.* at 43, 298 U.N.T.S. at 60.

87. Directive on Insider Dealing, *supra* note 5, art. 11, O.J. L 334/32, *reprinted infra* pp. 183-84.

the Commission would be enabled to negotiate with no further action by the Council, which would be contrary to all past practice. Third, such an interpretation would also mean that the authorization to negotiate would have been adopted under the full procedure laid down by Article 100a. According to current practice, however, the full decision-making procedure is applicable only to the conclusion of agreements, whereas authorization to negotiate is considered a "preparatory act" to which it is necessary to apply only the prescribed Council voting rule. Finally, the phrase "in conformity with the Treaty"⁸⁸ would appear meaningless if article 11 is viewed as authorizing the Commission to negotiate. If this phrase means that recourse to appropriate procedures under the Treaty is thereby reserved, then it must necessarily refer to the whole process of treaty-making and more specifically to the conclusion and not only to the negotiation of international agreements. It follows that article 11 can hardly be taken as providing an authorization to negotiate.

The most plausible interpretation of article 11 appears to be one according to which this provision has no particular legal meaning or legal effect, but merely formulates a policy program. It would then mean that "the Community is prepared to conclude appropriate agreements on insider trading with willing third countries." Such a statement, appropriately based on Article 100a, has no bearing on Community competence to conclude such agreements (such a competence flows from the Treaty as interpreted by the Court), nor has it a bearing on the procedures applicable to future negotiation and the conclusion of such agreements, which are to be concluded "in conformity with the Treaty," as explicitly stated.⁸⁹

For all these reasons, one may conclude that, in order to be interpreted consistently with Community law, article 11 must be denied any legal content.

Under the Treaty, as interpreted by the Court, the Community can, using its exclusive or potential competence, as the case may be, commit itself vis-à-vis third countries either to impose new obligations on Member States or to regulate directly,

88. *Id.*

89. *Id.*

in an agreed manner, insider dealing in the unified financial market to which the Single European Act looks toward.

It seems obvious that the Community could assume international commitments under the powers conferred upon it by Article 100a.⁹⁰ Could financial services also become the subject matter of trade agreements within the meaning of Article 113, which provides for a simple procedure, not involving the Parliament, for their conclusion?⁹¹ One may question whether the sentence "in conformity with the Treaty"⁹² in article 11 may be shadowing such an orientation. The recent trend in GATT negotiations, where both the Community and the United States are favoring the inclusion of the exchange of services as part of the definition of international trade and the theoretical possibility of construing stock exchanges as suppliers of financial services could warrant such a solution.

There are signs in positions taken in the past by the Commission that financial services may be included in trade agreements made pursuant to Article 113. In proposing to open negotiations in respect of the United Nations convention on a Code of Conduct for Liner Conferences, the Commission has already shown a preference for an extensive interpretation of Article 113 that covers not only the goods transported (which were not at issue), but also the services of transporting them.⁹³

In the original proposal to conclude an agreement with Switzerland on the establishment of insurance companies, based on Article 113 of the Treaty, the Commission went even further in its interpretation of Article 113 as covering not only actual trade in insurance services, but also the establishment of suppliers of such services.⁹⁴

Finally, the lack of a judicial definition of the notion of

90. See *supra* notes 30-45 and accompanying text.

91. See EEC Treaty, *supra* note 3, art. 113, 1973 Gr. Brit. T.S. No. 1, at 42-3, 298 U.N.T.S. at 60.

92. Directive on Insider Dealing, *supra* note 5, art. 11, O.J. L 334/32, reprinted *infra* pp. 183-84.

93. The proposed negotiation was to be based on Articles 113 and 116 of the EEC Treaty. EEC Treaty, *supra* note 3, arts. 113, 116, 1973 Gr. Brit. T.S. No. 1, at 42, 43, 298 U.N.T.S. at 60, 61; see 6 BULL. OF EUR. COMM., No. 2292, at 56 (1975); AGENCE EUROPE, No. 1773 (New Series) at 5, June 21, 1975 (French Edition).

94. See Proposal for a Council Decision, preamble, O.J. C 154/33 (1983).

commercial policy allows for this expansive interpretation.⁹⁵

Such a development, if it were to take place, would probably be a major step in the direction of extending the scope of Article 113 so as to make it eventually coincide substantially with that of foreign relations of the Community. This development would certainly constitute a major distortion in the interpretation of the system of the Treaty as based on the notion of competences of attribution.

CONCLUSION

In this Article, more questions have been raised than clearly answered—questions about the legal basis of the Directive on Insider Dealing, about the scope of the discretion left to Member States, and about the Directive's effects on the external relations of the Community. Those questions relate to the balance of power between the Community and its Member States, on the one hand, and between the various Community institutions—the Commission, Parliament, and Council—on the other.

Uncertainty as to the correct legal solution to these questions is a clear sign of the Community's youth. The Community is a recently formed political structure, and tension between its institutions is inevitable. Consequently, extra-legal criteria are sometimes applied to the choice of legal basis of an act, and this in turn determines the procedure applicable to the act's adoption. Moreover, having recently been modified by the Single European Act, the Community system is likely to undergo further reform in the near future, thus contributing to the evolutive character of the practices followed by Community institutions.

Finally, the case law of the Court remains limited in the number of decisions relating to the powers of the institutions, the current choice of the legal basis of Community legislation, the scope and the effects of Community acts, and the jurisdiction of the Communities in external relations.

Far from pretending to dispose of these questions, this Article represents a modest sampling of them in the particular case of the Directive on Insider Dealing, which, as we have

95. See *Commission v. Council*, Case 275/87, 1989 E.C.R. __ (judgment of Feb. 2, 1989).

seen, represents a first step towards regulating the single financial market of the Community.

APPENDIX A

Council Directive
of 13 November 1989
coordinating regulations on insider dealing
(89/592/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal for the Commission,⁽¹⁾

In cooperation with the European Parliament,⁽²⁾

Having regard to the opinion of the Economic and Social Committee,⁽³⁾

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

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

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

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

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

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

(1) OJ No C 153, 11. 6. 1987, p.8 and OJ No C 277, 27. 10. 1988, p.13.

(2) OJ No C 187, 18. 7. 1987, p.93 and Decision of 11 October 1989 (not yet published in the Official Journal).

(3) OJ No C 35, 8. 2. 1989, p.22.

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

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

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

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

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

Whereas insider dealing involves taking advantage of inside information; whereas the mere fact that market-makers, bodies authorized to act as *contrepartie*, or stockbrokers with inside information confine themselves, in the first two cases, to pursuing their normal business of buying or selling securities or, in the last, to carrying out an order should not in itself be deemed to constitute use of such inside information; whereas likewise the fact of carrying out transactions with the aim of stabilizing the price of new issues or secondary offers of transferable securities should not in itself be deemed to constitute use of inside information;

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

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

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive:

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

2. 'transferable securities' shall mean:

- (a) shares and debt securities, as well as securities equivalent to shares and debt securities;
- (b) contracts or rights to subscribe for, acquire or dispose of securities referred to in (a);
- (c) futures contracts, options and financial futures in respect of securities referred to in (a);
- (d) index contracts in respect of securities referred to in (a),

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

Article 2

1. Each Member State shall prohibit any person who:

- by virtue of his membership of the administrative, management or supervisory bodies of the issuer,
 - by virtue of his holding in the capital of the issuer, or
 - because he has access to such information by virtue of the exercise of his employment, profession or duties,
- possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.

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

the decision to carry out the transaction for the account of the legal person concerned.

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

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

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

Article 3

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

- (a) disclosing that inside information to any third party unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;
- (b) recommending or procuring a third party, on the basis of that inside information, to acquire or dispose of transferable securities admitted to trading on its securities markets as referred to in Article 1(2) *in fine*.

Article 4

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

Article 5

Each Member State shall apply the prohibitions provided for in Articles 2, 3 and 4, at least to actions undertaken within its territory to the extent that the transferable securities con-

cerned are admitted to trading on a market of a Member State. In any event, each Member State shall regard a transaction as carried out within its territory if it is carried out on a market, as defined in Article 1(2) *in fine*, situated or operating within that territory.

Article 6

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

Article 7

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

Article 8

1. Each Member State shall designate the administrative authority or authorities competent, if necessary in collaboration with other authorities to ensure that the provisions adopted pursuant to this Directive are applied. It shall so inform the Commission which shall transmit that information to all Member States.
2. The competent authorities must be given all supervisory and investigatory powers that are necessary for the exercise of their functions, where appropriate in collaboration with other authorities.

Article 9

Each Member State shall provide that all persons employed or formerly employed by the competent authorities referred to in Article 8 shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to

⁽¹⁾ OJ No L 66, 16. 3. 1979, p.21.

any person or authority except by virtue of provisions laid down by law.

Article 10

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

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

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

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

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

Article 11

The Community may, in conformity with the Treaty, conclude

agreements with non-member countries on the matters governed by this Directive.

Article 12

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

- (a) to permit regular consultation on any practical problems which arise from the application of this Directive and on which exchanges of view are deemed useful;
- (b) to advise the Commission, if necessary, on any additions or amendments to be made to this Directive.

Article 13

Each Member State shall determine the penalties to be applied for infringement of the measures taken pursuant to this Directive. The penalties shall be sufficient to promote compliance with those measures.

Article 14

1. Member States shall take the measures necessary to comply with this Directive before 1 June 1992. They shall forthwith inform the Commission thereof.
2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

Article 15

This Directive is addressed to the Member States.

Done at Brussels, 13 November 1989.

For the Council
The President
P. Bérégovoy