

## THE GERMAN INSIDER TRADING GUIDELINES – SPRING-GUN OR SCARECROW?

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### 1. Introduction

Traditionally, in both German Corporation [1] and Stock Exchange Law [2], there have been no provisions against insider trading. However, during the 1960s, various groups began to consider including a ban on insider trading as a part of stock exchange law. They settled ultimately on devising voluntary Insider Trading Guidelines [3]. The evaluation was motivated by the growing reluctance of investors to support the traditional stock market and the increase of significant losses for uninformed investors in the public limited partnership ventures. No statutory provisions were actually agreed upon and implemented. Indeed, although there is acceptance by major business and banking associations on adherence to the German Insider Trading Guidelines of 1971, there is by no means uniform support.

#### *1.1. Policy Debate in Germany*

The most striking aspect of the lack of uniform acceptance and resulting policy debate is the rare formation of blocks of opinions. The position of German lawyers, which lies almost without exception between reserve and criticism [4], is in complete contrast to the almost unanimously positive opinion of the profession [5]. The review panel for the study of basic problems in banking, which has also dealt with this problem, is divided into majority and strong minority opinions [6]. In essence, the difficulties involved in striving for an optimum solution exacerbate the persisting differences of opinion. The lawyers are disturbed, above all, by the fact that a few “black sheep” come away from the system of the Insider Trading Guidelines not only unshorn but acting in a legal manner. The profession, in contrast, remains satisfied with the correct behavior of the many. The few, who, despite the disapproval of their colleagues, contrive to carry out insider trading, would most certainly not be checked by the much delayed attack of the public

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prosecutor and a ponderous court case. Above all, the burdens arising for the stock exchange and capital market from such a law would bear no relation to the uncertainty of its success. Finally, just as in every technical quality control, the effort required to reach the last five percent of faultlessness is disproportionately high and to reach one hundred percent is prohibitive.

Questions which then arise include: How are members of management who make insider deals dealt with in Germany? How should a foreigner in Germany who is a member of management of a German subsidiary company behave? Out of what legal policy issues have the insider trading restrictions developed?

### *1.2. Development of the Guidelines*

While the Federal Republic of Germany has the Stock Corporation Act of 1965, which has been commended for its advanced approach to regulating corporate structures, the legislation failed to develop uniform provisions to protect investors' rights in the capital market [7]. The Stock Corporation Act outlines the responsibilities of officers and directors of corporations and establishes the rights of shareholders. Such rights, however, yield limited protection during the period of initial issuance and no regulation of the secondary securities market.

The Ministry of Economics created a fiasco with its 1967 Stock Exchange Act reform proposal [8]. As a result, the Panel of Stock Exchange Experts [9] initiated stock exchange reform which focused on methods of self-control in 1968. The actual Guidelines were drafted and proposed in November 1970. The business and financial community quickly gave the Guidelines their support, partly based on their conviction of the appropriateness of the proposal and partly to avoid more restrictive legislation. In November 1974 a parliamentary hearing took place, but on a limited level without disagreeable critics from academia. No action was taken then or in the intervening twelve years [10]. Neither can it be reasonably foreseen in the near future.

The recommendations of the Panel of Stock Exchange Experts were taken up promptly by the leading business and banking associations as well as by the working party of the German stock exchanges. These organizations continue to be the principal supporters of the Insider Trading Guidelines. They have devised and written Semi-Official Commentaries to the Insider Trading Guidelines and to the Guidelines for Dealers and Investment Advisers. At the end of 1971, they structured a Code of Procedure to implement the Guidelines.

This paper will examine the treatment of insider trading under German law [11]. The second section will analyze the existence and range of substantive insider trading prohibitions. The Insider Trade Guidelines will be confronted with respective critical and further-reaching ideas of jurisprudential literature,

including the proposal of a law against unfair stock exchange dealings proposed by a group of private professors [hereinafter referred to as Model Law] [12]. The third section will evaluate current methods of regulation of insider trading, while the fourth section will discuss the effectiveness of the enforcement of the regulations and the outlook for the future.

## 2. The Insider Trading Guidelines and Present Statutory Law

### 2.1. *The Legal Character and the Content of the Guidelines*

#### 2.1.1. *The Legal Character of the Guidelines*

Unconventionally thought out by the well-known economist Stuetzel, and pragmatically put into effect by the profession, the Insider Trading Guidelines have a legal character which is difficult to understand.

The Guidelines are not legal rules of the state; they are not even trade usages, which under German law could have a semi-mandatory character. They were conceived and accepted by those involved in the stock market and insider trading problem as merely voluntary rules to which insiders can both submit and withdraw. Submission is done by means of private contracts [13]. Such contracts are concluded between companies and the insiders belonging to these companies, generally members of management, and these contracts provide for recognition and adherence to the Guidelines and the Code of Procedure together with the respective Semi-Official Commentaries. In actual business practice, the Guidelines are usually a part of the original contract of employment. While self-regulation is usually put into practice under charters and resolutions of associations, conditions of licenses, and policies or recommendations of the organization [14], in this case there is a quite unique construction of parallel (though individual) contracts for the recognition of directives or codes of behavior seeking to accomplish the same objectives. In the event that there is no employment contract, such as with members of the supervisory board, a special arrangement is made. Inasmuch as companies themselves are insiders under the terms of the directives, such as credit banks, they recognize the Guidelines and the procedure, vis-à-vis their head associations, as binding on them [15]. For their own members of management, the credit banks themselves are the contracting parties.

The leading associations of business and finance set up review panels for each stock exchange. The review panels determine whether there has been a violation of the Insider Trading Guidelines by establishing the facts of a case. However, they cannot decide about sanctions or possible litigation, according to German law, because they are merely assessors in the arbitration between the company and its member of management bound by the Guidelines [16]. If the review panel establishes a breach of the trading prohibition [17], the

company or the credit bank and the responsible ministry are informed [18]. The principal sanction is turning the unjust profits over to the company [19]. Neither penal sanctions nor civil liability are applied [20]. In the case of a serious violation, which has considerable consequences and involves gross negligence of the insider, publication of the case could be made without the consent of the insider [21].

### *2.1.2. The Content of the Guidelines*

An initial survey of the contents of the Guidelines reveals a basic prohibition of insider trading [22]. Insiders are principally members of the management, including the executive board of the company and associated domestic companies [23]; domestic shareholders of greater than twenty-five percent participation [24]; certain employees of the company and its domestic associates [25]; credit banks and their supervisory board members, directors, and informed employees [26]. Overseas parent and subsidiary companies do not come under the voluntary Guidelines due to the burdens it would place on them; and voluntary submission could not easily be expected, overseas business and the international relationships would be impaired, and enforcement would be difficult. Receivers of tips are also not included [27].

In contrast, the jurisprudential comments define the word “insider” more widely. Under the Model Law, an insider is “whoever as shareholder by virtue of his position in the enterprise or due to his office or profession possesses knowledge that is not usually available” about matters relating to the liquidity of the company. Thereunder not only are enterprise insiders included, but also auditors, credit banks (without the limitation that they are engaged by the company in particular tasks), investment and property advisors, and further, in accordance therewith, leading officials of the Ministry of Finance, journalists, etc. The receivers of tips, however, are not included under the Model Law as under the Guidelines [28].

Insiders are not permitted to make deals in insider stock to their own or a third party’s advantage based on information that they have obtained due to their particular position [29]. Insider information is first broadly defined as knowledge of circumstances which have not been made or become public which could influence the value of insider stock [30]. Then the Guidelines set forward a conclusive list of specific information [31].

The jurisprudential literature pleads in contrast for a more general definition. The Model Law defines inside information as “not generally available information on the circumstances of the company which could have an effect on the value of the shares of the company” [32]. The yardstick by which the relevance of the information must be determined is whether stockbrokers or investment advisers would attach a meaning to the knowledge that speaks for itself [33]. Certain measures which require immediate publication (such as dividend proposals, capital increases and decreases, foundation of joint owner-

ship enterprises, all further measures so far as they affect substantially the structure of the company) or quarterly reports are *eo ipso* considered to have an effect on the evaluation [34]. The method of enumeration is also applied here, but, in contrast to the Insider Trading Guidelines, its purpose is to establish that certain information is relevant by all means. The certainty of the law is also thereby encouraged [35].

Insider securities are comprised of shares which are officially quoted at the stock exchange or included in the semi-official dealings at the stock exchange. In addition, the term covers securities similar to shares, namely rights of participation in net profits, convertible bonds and profit debentures, and options and preference shares [36]. The term does not cover bonds, however. There is less opportunity for bonds to be involved because inside information occurs more seldom and has less effect on the value, though the problem does exist in the international market [37].

These contractual regulations do not prohibit members of management from purchasing, possessing, and selling shares in their own company, but they prohibit deals made by exploiting inside information [38]. The availability of such activities is important, due to the particular meaning and desirability of the commitment of members of management to the operations of their own company [39].

What about the issue of tips? It is clear that the receiver of tips, lacking the characteristics of an insider as defined in the Insider Trading Guidelines, cannot be included in the prohibitions. As far as the member of management giving the tip is concerned, it depends on the extent to which, by giving the tip, he makes a deal through a third party (“to have made by others”). This concept will be understood by some as “to tolerate”, in which case the giving of the tip, as far as the giver of the tip is concerned, falls under the prevention of insider trading [40]. Yet it seems more correct to see in it an element of “soliciting”; the third parties must have been induced by the outsider to make the deal. If the third party has made the deal as a free agent, which is often the case when tips are given, then the person giving the tip is not caught by the Guidelines [41].

In contrast, the Model Law introduced a prohibition of tipping explicitly [42]. Above all, however, there is unanimity that the problem of insider transactions of credit banks is much more complicated than the exception contained in the Insider Trading Guidelines [43]. This does not concern the insider deals of credit banks themselves which must be forbidden like those of other insiders. Rather, it focuses on the question to what extent credit banks are allowed to use, or under certain conditions (e.g., in order to avert loss to their clients) must use, inside information for the benefit of these clients.

There are three exceptions to prohibited transactions which are listed in the Guidelines. First, transactions made as a result of instructions exempt the participant, though not the instructor [44]. Second, transactions within the

framework of the objectives of the company set out in the articles of incorporation are exempt [45]. This would include the direct purchase of shares on the market in order to form the basis of an already planned take-over. Otherwise, such take-overs would arise from inside information and be banned [46]. Third, the transactions in furtherance of clients' interests or within the framework of otherwise normal trading in securities of the credit bank remain untouched [47].

## *2.2. Insider Trading and Present Statutory Law*

Even though insider trading currently is not regulated directly by company and stock exchange law in Germany, there are one or two limited and not yet tested possibilities of attacking insider trading by means of present statutory law. It must be made clear to the foreign observer, however, that this is a matter of the potential interpretation of certain Acts. Though the legal literature has encouraged the attempted use of the law in this manner, courts have not been able to work on the matter due to lack of complainants. Of course, if there were complainants, it is still open to speculation as to whether the courts would move in this direction. Presumably they would not do so readily and not at all in the first few cases.

### *2.2.1. Criminal Prosecution of Insider Trading*

The Stock Corporation Act explicitly prohibits violation and exploitation of business secrets by members of the executive board and the supervisory board, liquidators, auditors, and their assistants [48]. They are liable for the unauthorized disclosure of secrets of the company, particularly when trading in secrets for money or with the intention of personal gain for self or another [49]. Authorized sanctions include fine or imprisonment. However, this provision, as well as the others, arises exclusively in cases where a complaint is made by the company itself [50]. This is the primary reason why the provisions have not yet been applied by state prosecutors and courts in the prosecutions of alleged insider trading [51].

In addition, the general criminal laws on fraud and fraudulent conversion might be applicable to hard core cases [52]. The decisive element of deceit is deception. Unfortunately, it has been hard to postulate deceit for insider dealing cases since a legal duty of disclosure seems questionable. In the case of fraudulent conversion, the two critical elements of the offense are breach of trust and loss of property of the company. Though a breach of trust generally could be demonstrated, the company rarely suffers an explicit loss of property. The statutes on fraudulent conversions, therefore, would be difficult to apply.

### *2.2.2. Civil Liability for Insider Trading*

In civil law [53], rescission due to fraudulent misrepresentations and

liability for damages could be considered [54]. There is only one decision of the Reichsgericht on point. In the decision of February 3, 1904, it was decided that fraudulent misrepresentations had been committed when a banker offered mining shares at the quoted price of the day even though he knew that the mine had been flooded [55]. The decision is supported by far-reaching, present day duty of disclosure in general [56], and for banks in particular [57], regarding transactions made directly rather than through the stock market. Of course, the argument against the liability, and therefore the criticism of the decision, is that it must remain possible to exploit better market knowledge and painstakingly acquired information [58]. This is also an example of damages to the company. According to a specific provision in the Stock Corporation Act, an auditor and his assistants are liable to pay damages in the case of insider dealings in shares of a company or companies belonging to a group [59].

### *2.2.3. Company Law and the Surrender of Profits*

If one considers the duty not to exploit insider information as falling under the duty of trust towards the company and of not exploiting secrets [60], then it would be possible to develop a duty to hand over profits from such transactions, regardless of assessed damages. Under both the Stock Corporation Act [61] and the general principles of the law of agency [62], the member of management has exploited the company secrets for himself, thereby damaging the interest of the company and its shareholders. There would be no intolerable accumulation of damages and profits to hand over since a realized claim for damages of the party not informed would, to that extent, diminish the profit of the insider.

### *2.2.4. Disclosure*

Action for disclosure against insiders could be realized under present law. On the one hand, it could be inferred that the member of management had the duty of disclosure of inside trading to the company arising from his duty of trust [63]. On the other hand, one could easily imagine that it would be possible to apply the right to information of shareholders in general meetings, arising from company law [64], to the insider trading of members of management.

In summation, it would be possible to develop a relatively extensive system of insider law, if it were desired, without a special statutory provision on insider trading and where none of the four principal methods of regulation [65] would be excluded. Only the establishment of particular commissions or organizations [66] for regulation could not be developed in that manner.

### 3. Methods of Regulation: Policy Aspects

#### 3.1. *The Use of Penal Sanctions against Insiders*

The Insider Trading Guidelines cannot rely on the criminal justice system for support. Because it is a non-statutory, unsanctioned, voluntary missive, conceived by an unofficial body, it cannot look to criminal law for protection of its violations. The general commentaries are silent on the matter, and there are no cases on point.

In the jurisprudential literature, the opinions are divided, even among the specialists in criminal law. Some hold the view that there are one or more elements of a criminal offense in insider deals [67]. Others are of the opinion that the problem must be solved by non-criminal sanctions for the time being [68]. This lack of agreement is in strong contrast to the certainty with which France and England have opted for a criminal penalty of up to two years in prison for insider offenses [69]. It is particularly remarkable for England, where a long tradition of voluntary self-regulation has existed.

It has been suggested, therefore, that Germany officially combine the voluntary Guidelines with a very narrowly drafted state regulation for the serious insider cases which are true financial crimes. The Guidelines would be sufficient for the regular cases of insider trading and its abuses. The theory of such a regulation, however, has been argued against for three reasons. For one thing, the cooperative parts of business and banking would no longer wish to cooperate. Secondly, informational secrets and insights would fall into the hands of the state prosecutor and possibly be used against the businesses and banks in other matters. Thirdly, the prosecutions for white collar crime are anything but encouraging [70].

#### 3.2. *Transfer of Profits*

The transfer of profits to the company which suffered from the insider trading is the principal sanction of the Insider Trading Guidelines. All asset advantages derived from the violation, including avoided losses, must be transferred to the company [71]. In order for a company to maintain a successful claim for the transfer of profits, it must have a contract with the insider which recognizes and submits to the Guidelines. In the case of credit banks, the company that has a right of claim is the one whose securities are the subject of the insider deal. A contract of recognition between a credit bank and on the one side the head associations and on the other its own insiders is for this purpose treated as a contract in favor of a third party [72].

A company is under a duty to exercise its claim for transfer of profit before a court unless the pecuniary circumstances of the company or some other important reason prevents it [73]. There is a statute of limitations of three



months after the management of the company discovers the trading, or five years after the actual event [74]. Should the company fail to exercise its prerogative in time, it loses the claim; no other insider sanctions are available.

If the company prevails in its claim, the gain in property derived by the insider from the prohibited trading must be transferred to the insider's own company rather than the seller or combined enterprise that suffered the damage. Passing the profits to the third party that was not directly involved then represents a penalty in the contract rather than in a damage assessment [75].

The jurisprudential literature has proposed a more far-reaching profit penalty which is set at twice the amount of the profit derived from the trading. The penalty would benefit all others participating on the market who dealt in the securities without the inside information [76]. Of course, such a regulation would create a multitude of fragmented claims of those participating in the market. In order to compensate for these splinter claims, the penalty proposal is coupled with the assignment of the claims to an administrator who pursues them according to a procedure similar to that for bankruptcy [77]. Though the proposal is original and thought-provoking, it may not be pragmatic in terms of application. For instance, if the trading involves many small claims rather than a big market killing [78], the costs of distribution bear no relationship to the amounts due to each claimant. In that case the proposal cannot be justified because it merely burdens the insider and does not profit the individual claimant. It would be preferable to attempt the traditional method of transfer of profit found in agency law.

### 3.3. Civil Liability

The unofficial, voluntary Guidelines do not provide for civil liability though they do not exclude it. In the jurisprudential literature, the value of liability for damages under civil law is in dispute. The company whose securities were traded can only claim damages in the form of a transfer of profits because it usually suffers no material damage. A claim for damages by the party to the contract, who is not aware of the facts, makes sense in the case of non-stock exchange transactions and is certainly *de lege lata* possible [79]. This is different in the case of transactions made on the stock exchange. There the recipient of the deal is a matter of chance. The trader becomes the final beneficiary of the insider information and everyone else who traded on the market at the prevailing rate is left with no recourse [80].

### 3.4. Disclosure

Disclosure as a method of regulation of insider trading exists only peripherally in Germany. The Guidelines do not provide for a particular reporting

procedure for all dealings in securities by insiders, unlike the statutory regulations in the U.S. [81]. If a violation occurs, the review body of the stock exchange informs the legal representatives of the company, the chairman of the supervisory board or his deputy, and the president of credit banks affected, in addition to the federal minister responsible for the stock exchanges. In the case of gross negligence and massive abuse, the result of the review can be publicized without the consent of the trader [82]. Publication means that the review body gives notification of the result of the review to the press, though the cost is not provided and therefore publication is unlikely [83]. Such a step requires not only a hearing for the insider and the unanimity of the review board in its fact finding, but also a pertinent reason for publication supported in written detail. It must include the level of abuse and the personal and professional concerns of the person who took advantage of the inside information in order to benefit from the prohibited trading. If the affected party takes steps against the resolution of the review body through the courts within six weeks, the publication must be held in abeyance until the case has been acted upon by the court.

The jurisprudential literature agrees with the Guidelines in that the pillory should not be a sanction. On the other hand, the media is entitled to the facts and results of a review. Recently, review bodies have accommodated both concerns by holding discussions with the press while protecting the rights and privacy of the insider.

Recommendations for a system of reporting of all dealings in securities by insiders cover two stages: from the insider to his company, and from the company to the stock exchanges [84]. Such a process would demand that the company keep its secrets efficiently, which meets with the approval of the exchanges [85]. However, in German companies which are subject to co-determination on the supervisory board, employees claim the right of speedy and full information despite legally established board secrecy. Sharing information on insider trading with workers' committees and the staff would make it impossible to keep the information from leaking, thus violating the insider's rights and privacy [86].

#### 4. Enforcement, Effectiveness, and Outlook for Insider Trading Regulation in Germany

##### 4.1. *Enforcement of the Insider Trading Guidelines*

Currently, the Insider Trading Guidelines are enforced only by means of non-statutory review bodies which are established at the various stock exchanges. Each review panel consists of a chairman and four assessors who are responsible for reviewing the alleged violations of the Insider Trading Guide-

lines and the Guidelines for Dealers and Investment Advisers. The chairman is a judge who is experienced in commercial matters, while the assessors are drawn from the employers in the financial trading world and from those who deal professionally in securities on the stock exchange. Rather than being appointed, they are elected by the members of the stock exchange licensing authority.

The review procedure begins as a result of a denunciation (including self-denunciation) or ex officio if circumstances make an abuse appear conclusive, supported by credible and concrete facts. It is not the duty of the review body to investigate the suspicious facts in that instance. If, however, there is strong suspicion of abuse regarding insider trading and if the suspicion is not directed against a particular person or group of persons, the review body can resolve to obtain information relating thereto from all persons who might have something to do with it. Such information includes whether and at which credit bank they have placed insider securities during the three months before the coming to light of the insider information, and which transactions in insider securities they have made or commissioned. This investigation is subject to whether the persons questioned have voluntarily submitted to the Guidelines.

The actual review procedure then consists of a preliminary hearing followed by a principal one. The necessary investigations in order to obtain evidence for the principal hearing are undertaken by outsiders appointed by the review body. The outsiders might include auditors, accountants, or members of management. The review body then evaluates the facts gathered for it and comes to a formal decision. The decision consists of a written opinion as to whether there has been insider trading in violation of the Insider Trading Guidelines, whether it can be satisfactorily proven, and whether and to what extent costs should be awarded. The review body, however, does not decide on whether and what type of legal claims could arise from the established facts.

The original Guidelines and Code of Procedure were initially criticized, in spite of their acceptance, as being too narrow, so they were broadened and improved in 1976 [87].

#### *4.2. Effectiveness: Internal Self-Regulation v. Regulation by the Law*

The effectiveness of the German Insider Trading Guidelines is very difficult to judge. It is a fact that a significant number of review panel investigations have been carried out at those exchanges with such bodies. In addition, people concerned with and active in the stock exchange and its related businesses have expressed positive opinions.

The most famous case since the original introduction of the Insider Trading Guidelines was the take-over offer by the August–Thyssen–Huetten AG, Duisburg, to the shareholders of Rheinstahl AG, Essen (Winter 1972–73). In

that case, the review body of the Duesseldorf Stock Exchange carried out a review not only of both parties concerned, but also of six credit banks and some 160 individuals. The investigation extended from March to September of 1973 and ultimately included 172 persons and enterprises, many of whom could be considered insiders based on their relations with Thyssen and Rhestahl. In no case could abuses be established [88]. Yet rumors indicated that there were clear leaks without outright tipping, for example, between family members.

The financial press has reported other reviews in which no abuses were established, including the sale of shares during the time of the spectacular collapse of the Beton- und Monierbau AG [89]. It is difficult to ascertain how many abuses have been factually established by review bodies due to the right of the insider to prevent publication of such findings [90].

The voluntary solution then appears to be clearly inferior compared to a statutory regulation in which the hearings are regularly public and the publications of the judgment are always public. Furthermore, the notoriously difficult question of the superiority of internal self-regulation versus statutory regulation (or a meaningful combination) is often posed and never answered adequately. The conflicting opinions are split into camps similar to those for the insider problem itself [91]. On the one hand, self-regulation supports the community spirit of free will and commitment, creates less bureaucratic expenditure and costs, enhances flexibility of the regulations, is regulated by those with the best knowledge on the subject, and promotes greater knowledge and understanding among the parties concerned. On the other hand, statutory regulation provides greater authority, certainty, and equality through the legal process, open discussion through hearings preceding enactment of the law, neutrality of the state authorities appointed by the state, sufficient powers of full investigation, free choice of sanctions and disclosure, and stimulation of self-regulation by the codification of the main issue [92].

Aside from the issue of positions on this general problem, there are some important aspects of the concrete insider problem. By the end of 1978, practically all the credit banks and 226 enterprises quoted on the stock exchange (representing 84% of share capital) had recognized the Insider Trading Guidelines of 1976. If one adds to this figure the 63 enterprises which still recognize the old version of the Guidelines from 1971, 95.2% of the share capital quoted on the stock exchange is represented [93]. Yet in numbers of companies, this represents only 50% of the stock corporations quoted on the stock exchange. Included are all the blue chip and standard values in which the broad public trades. Not included are many smaller companies, which is a problem because experience demonstrates that the probability of insider dealing is greater in medium and small sized companies [94]. However, above all it must be taken into account that the Insider Trading Guidelines are limited to shares quoted on the stock exchange or dealt with on the open

market. Thus, less than a quarter of all German stock corporations come under the ambit of Insider Trading Guidelines. At the end of 1985, there were only 450 companies with shares quoted on one of the German stock exchanges. While it is true that a number of interesting enterprises have decided to go public since 1984, it is too early to determine whether this marks a reversal of the tide [95].

#### *4.3. Reforms and Priorities*

At the end of 1982 there were only 2,140 stock corporations, while there were about 350,000 companies with limited liability (GmbH) [96]. The insider problem is only one of the many problems confronting the stock corporations and certainly not the most important [97]. Other problems include bleeding out of the stock corporation as a legal form in practice, bad undercapitalization, burdensome legal differences which disadvantage stock corporations (especially in disclosure [98], problematic tax and co-determination laws), and revitalization of the exchanges and trading. German lawyers and recently also economists have addressed the issues; it is now time for the legislators to do so. Whether the legislature will be courageous enough to deal with these basic and complex legal reform problems while it has to enact the European Economic Community's (EEC) directives on Stock Exchange Law is highly improbable.

At a time when, despite a clear uprise of the German economy in the past two years, unemployment, high State indebtedness, and party-political problems are in the forefront of everyone's mind, there is not much inclination to initiate such reforms. This is particularly true considering the high costs of implementation and the necessity of then appointing new authorities. For these reasons, it is unlikely that Germany will have an insider law – whether under a state-controlled securities commission or specialized courts and centralized state prosecutors enforcing criminal statutes – in the foreseeable future.

#### *4.4. Waiting for Europe?*

In 1973, a “European Insider Law” by the EEC was called for [99]. The EEC Commission took the project in hand initially with a recommendation regarding the code of behavior in transactions in securities on July 25, 1977 [100]. The Commission then began preliminary work towards a European directive for the harmonization of law and regulations regarding insider transactions [101]. The attitude of the German professions is to reject the EEC's efforts; the German jurisprudence is still waiting. It is certainly conceivable that Germany will come to a statutory regulation by means of a harmonization of company law with EEC directives, as in other cases, most

notably the Fourth and Seventh Directives which have brought about far-reaching innovations for German company law and disclosure. However, it is not certain. The most recent deliberations on the insider trading issue still lean strongly towards excluding the total complex of sanctions, leaving this matter to the member states. If one believes that an EEC directive also can be enforced by a voluntary, non-statutory form of self-regulation in the member states, then nothing in Germany will change.

## 5. Conclusion

The unusual legal character and lack of ability to enforce the voluntary Insider Trading Guidelines make them a less than ideal method for halting the use of insider information. The four other possible methods of regulation – penal law, civil liability, company law, and disclosure requirements – currently have little practical application to the problem.

Though the profession is satisfied with the use of the voluntary Guidelines, other factions are not. These factions, in concert with the EEC's directives, may force a change in insider regulation in Germany. If the profession does not want the problem addressed by strict state laws, the literature and more and more also the financial press [102] suggest that it should encourage other methods of regulation in addition to the voluntary Guidelines. Such a move would not violate the contractual employment relationship between the insider and his company. Rather, it would further ensure the effectiveness of the Guidelines, and thereby support corporate development in Germany as in other European countries.

## Notes

- [1] The German Act on Stock Corporations (Aktiengesetz) (Sept. 6, 1965, as amended).
- [2] German Stock Exchange Act (Boersengesetz) (June 22, 1896, as amended).
- [3] See generally Schwark, *Boersengesetz*, Kommentar (Munich 1976); Bruns, Rodrian & Stock, *Wertpapier und Boerse* (systematische Textsammlung mit Kurzerlaeuterungen) (Berlin 1971).
- [4] Pfister, *Stand der Insiderdiskussion*, Zeitschrift fuer Unternehmens- und Gesellschaftsrecht (ZGR) 318 (1981). In most recent times a loosening or indeed relaxation of the fronts can be observed. The early cliches of “theory” and “lobby” have given way to a greater understanding for each other. Both sides have similar targets: prevention of insider dealing which is considered an abuse and avoidance of unnecessary costs and burdens for the companies and the exchange. This has been demonstrated during a panel discussion which met first in Berlin in December of 1980, where stock exchange presidents and legal advisers, the presidents and members of review panels, representatives of the central business associations, and professors of law and economics were present.
- [5] *Id.*
- [6] Report of Study Commission on Banking, *Grundsatzfragen der Kreditwirtschaft* 338 (Bonn 1979).
- [7] Kuebler, *Gesellschaftsrecht* 381 *et seq.* (2d ed. Heidelberg 1985).
- [8] For details of the proposal, see Schwark, *supra* note 3, Introduction, at 15.
- [9] For details on this panel, see Bremer, *Wertpapier-Mitteilungen* 898 (1972); Schwark, *supra* note 3, Introduction, at 21. The panel was called upon by the Ministry of Economics.
- [10] Report Vohrer, *Finanzausschuss*, BT-DrS 7/3248, at 3 (1974); BMF *Finanznachrichten* 53/73, at 1 (Nov. 17, 1978).
- [11] The purpose of this article is to analyze the reach of German insider regulation. The pros and cons of regulating insider trading at all are not treated here. As to these, see generally (from an economist’s point of view), H. Schmidt, *Disclosure, Insider Information and Capital Market Functions*, in *Corporate Governance and Directors’ Liabilities – Legal, Economic and Sociological Analyses on Corporate Social Responsibility* 338 (Hopt and Teubner eds., Berlin and New York 1985). See also L. Loss, *Disclosure as Preventive Enforcement in Corporate Governance*, in *Corporate Governance and Directors’ Liabilities* 327; *Colloque international, L’avant-projet de loi fédérale sur les opérations d’inités* (Hirsch ed., Genève 1984).
- [12] Arbeitskreis Gesellschaftsrecht, *Verbot des Insiderhandelns, Rechtspolitische Ueberlegungen und Vorschlag eines Gesetzes gegen unlautere Boersengeschaefte in Wertpapieren* (Heidelberg 1976) [hereinafter cited as *Arbeitskreis Gesellschaftsrecht*].
- [13] Insider Trading Guidelines, Section 5.
- [14] E.g., American National Association of Securities Dealers; New York Stock Exchange; American Stock Exchange; British Panel on Take-Overs and Mergers.
- [15] Insider Trading Guidelines, Section 5, subsection 2.
- [16] Hopt & Will, *Europaeisches Insiderrecht* 116 (Stuttgart 1973); Schwark, *supra* note 3, *Insider Trading Guidelines*, Section 5, Annotation 1.
- [17] Insider Trading Guidelines, Section 3.
- [18] Code of Procedure, Section 5, subsections, 3&5.
- [19] Insider Trading Guidelines, Section 4.
- [20] *Cf.* Insider Trading Guidelines, Section 4, subsection 1.
- [21] Code of Procedure, Section 5, subsection 7.
- [22] Insider Trading Guidelines, Section 1. The central substantive insider dealing prohibition under Section 1 is that “[i]nsiders and third parties in a similar position to them are not permitted at any time or in any way to make or to have made by others transactions in insider securities to their advantage or the advantage of another having exploited inside information which they have obtained by virtue of their position”; e.g., board members, credit banks.

[23] Insider Trading Guidelines, Section 2, subsection 1, subsections a, b.

[24] Insider Trading Guidelines, Section 2, subsection 1, subsection c.

[25] Insider Trading Guidelines, Section 2, subsection 1, subsection d.

[26] Insider Trading Guidelines, Section 2, subsection 1, subsection 2. The inclusion of companies with the insiders is important in order to establish the connection with connected enterprises regulated by the Stock Corporation Act of 1965, Sections 15 *et seq.* and Sections 291 *et seq.* But see Wiedemann, *The German Experience with the Law of Affiliated Enterprises*, in *Groups of Companies in European Laws/Les groupes de sociétés en droit européen* 21 (Hopt ed., Berlin and New York 1982).

Connected enterprises are those held by a majority of capital or votes, dependent and dominating enterprises, combined enterprises, mutually participating enterprises, and parties specified in enterprise contracts. Stock Corporation Act, Sections 15–19, 291–92.

The connected enterprise does not necessarily have to be either a joint stock corporation or a company. It is sufficient, for example, for a merchant or principal shareholder to be considered an enterprise if he controls a joint stock corporation. By the same token, it is not necessary that the shares of the connected enterprise be transacted on the stock exchange. On the other side there are limitations. It is necessary that the member of management of the combined enterprise obtains his knowledge of the inside information through his job. This is evaluated on a case-by-case basis. It will not often be so for subsidiary companies, while it will usually be so for group holding companies. Schwark, *supra* note 3, Insider Trading Guidelines, Section 2, Annotation 2; Bruns, Rodrian & Stoeck, *supra* note 3, Nr. 436 – Insider Trading Guidelines, Section 2, Annotation 12. Even if certain enterprise insiders are not then included, the effect of simplification thereby achieved is to be welcomed.

[27] Insider Trading Guidelines, Section 1. From the point of view of the relationship between expense and profit, this seems to be a reasonable dividing line. However, one should not forget that “by virtue of their position” (*supra* note 22) is a phrase which has a variety of narrower and wider applications. At certain points, the Model Law oversteps the standard interpretation and demands that receivers of tips give up the advantages derived from the exploitation of inside information from the company, if the company is in turn liable to the disadvantaged under the Model Law. Model Law, Sections 26&27.

[28] Model Law, Section 1.

[29] Insider Trading Guidelines, Section 1, subsection 1.

[30] Insider Trading Guidelines, Section 2, subsection 3.

[31] Insider Trading Guidelines, Section 2, subsection 3, subsection 1. Inside information is generally defined as the “knowledge of circumstances neither made nor become known which could have an influence on the value of insider shares.” This wide definition, however, gives a false impression of being a catch-all clause. After the definition, there follows a detailed list of specifically prohibited behaviors. Such prohibitions include knowledge of an alteration of the rate of a dividend, of substantial changes in profit or liquidity of the company, of measures of capital increase and reduction, of the conclusion of a contract of domination or transfer of profit, of a take-over or buy-out arrangement, of full integration with another company, of mergers, of property take-overs, and of conversions. The list is considered final by the head associations of business and banking, and by the working party of the German stock exchanges, as specified in their Semi-Official Observations on the Insider Trading Guidelines, Observation 3 to Section 2, subsection 3.

“Could have an influence on” does not make it a condition that in fact a change in the dividend rate occurs. See Schwark, *supra* note 3, Insider Trading Guidelines, Section 2, Annotation 12. *Contra* Bruns, Rodrian & Stoeck, *supra* note 3, Nr. 436 – Insider Trading Guidelines, Section 2, Annotation 45. Traditionally, in Germany, dividend rates are kept constant by the large enterprises if possible, partly because of capital market policies, partly in order not to disappoint the shareholder now or at a later date in the event of a less good performance. Only more recently



has there been some rethinking by the large German banks, caused by the considerable depreciation requirement of some of them.

[32] Model Law, Section 1, subsection 1.

[33] Model Law, Section 4, subsection 1.

[34] Model Law, Section 4, subsection 2; Sections 21&22.

[35] The well-known problem arising from the American cases, in particular the famous case of *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833 (2d Cir. 1968), regarding how long an insider must hold back information in order to give the general public time to become aware of the publicized information, is solved by Model Law, Section 4, subsection 3. Under that rule, facts are considered to be generally available on the day after they have been publicized in the company gazettes or an otherwise usual way. In the German mining disaster case, it would follow that there could still be inside information. However, the banker who had read the information in the paper would not have been an insider according to the definition in the Model Law, Section 1, subsection 1. He did not obtain the information due to his office or profession. The timing is the critical issue here. The point of time does not normally arise earlier than when the company decides to take up a proposal into its working plan. Reichsgericht (RG), *Juristische Wochenschrift* (JW) 167 (1904), cited as an unreported decision of February 3, 1904, I 404/03, 111 Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 235; *accord* Coing in Staudinger, *Buergerliches Gesetzbuch* (BGB) Allgemeiner Teil, Section 123, Annotation 23c (11th ed. Berlin 1957).

[36] Insider Trading Guidelines, Section 2, subsection 2. The basic set of facts with respect to issuers of the shares is unusually enlarged. Not only the original company is included, but any domestic enterprises which are associated with the company by means of a contract of domination or transfer of profit, by a take-over or buy-out arrangement, through full integration, merger, property take-over, or conversion. Schwark, *supra* note 3, Insider Trading Guidelines, Section 2, Annotation 8. Opinion in some commentaries (e.g., Schwark) is that this enumeration is superfluous because the combined enterprises are already included under Section 2, subsection 1, subsubsection b and Section 2, subsection 3 of the Insider Trading Guidelines. That reliance is misleading, however. Under those sections, the member of management would be forbidden to trade only in shares of his own company; he would still be free to trade in shares of the company to be taken over. Section 2, subsection 2, subsubsection 2, makes it possible to include prohibitions for dealing in shares of both companies involved in the planned combination.

On the other hand, the basic set of facts is considerably restricted. Only shares permitted to be traded in or quoted on one of the domestic stock exchanges or included in regulated free trade will be included in the prohibition. For such stock, the manner of trading (through the exchange, in regulated free trading, or privately on the phone) is of no importance. Insider Trading Guidelines, Section 1; Semi-Official Explanations, Observation 1 (“Dealings not made on the Stock Exchange are also included as forbidden insider dealings.”).

[37] Hopt & Will, *supra* note 16, at 14, 16, 79.

[38] The Semi-Official Commentaries establish that the purchase of shares arising from purchase rights or options is not forbidden insider business, but the purchase of these rights can be a forbidden insider dealing. The opinion that option dealings are not dealings in securities would be too formal, because in such cases only the right to buy or sell shares is acquired. Schwark, *supra* note 3, Insider Trading Guidelines, Section 2, Annotation 9; *cf.* Bruns, Rodrian & Stoeck, *supra* note 3, Nr. 436 – Insider Trading Guidelines, Annotations 11, 15, 18, 19.

[39] Unfortunately, it appears that the involvement of members of management in the last few years in shares of their own company is diminishing. Much of the blame for this has been given to the Insider Trading Guidelines and the insider debate. How much of that is in fact true is very difficult to judge.

[40] Insider Trading Guidelines, Section 1; Bruns, Rodrian & Stoeck, *supra* note 3, Nr. 436 – Insider Trading Guidelines, Annotation 29.

[41] Schwark, *supra* note 3, Insider Trading Guidelines, Section 1, Annotation 2; *cf.*, Bruns, Rodrian & Stoeck, *supra* note 3, Nr. 436 – Insider Trading Guidelines, Annotation 32.

[42] Model Law, Section 1, subsection 2.

[43] Insider Trading Guidelines, Section 1, subsection 2, subsection c. The question is to what extent credit banks are allowed to or even are required to use inside information for the benefit of or to avert loss for their clients. In Germany, as long as there is no statutory insider trading prohibition, a credit bank cannot avoid its duties to give information and advice to its clients. Other countries would deny the banks such latitude. See Hopt, *Der Kapitalanlegerschutz in Recht der Banken 448-78* (Munich 1975) hereinafter *Kapitalanlegerschutz*; Kuebler, 145 *Zeitschrift fuer das gesamte Handelsrecht und Wirtschaftsrecht* (ZHR) 204, 209 (1981); Heinsius, 145 *ZHR* 177, 193 (1981).

[44] Insider Trading Guidelines, Section 1, subsection 2, subsection a.

[45] Insider Trading Guidelines, Section 1, subsection 2, subsection b.

[46] Insider Trading Guidelines, Section 2, subsection 3, subsection c; Bruns, Rodrian & Stoeck, *supra* note 3, Nr. 463 – Insider Trading Guidelines, Section 1, Annotation 40. Insider information exists where there is an intention to purchase or sell a dominating enterprise but not in the case of a property investment plan of a private shareholder which does not directly affect the company. See *Arbeitskreis Gesellschaftsrecht, supra* note 12, at 79.

It should be noted that the problem of insider transactions in take-overs in other countries such as the U.S., England, France, or Belgium also differs markedly from that of Germany. In Germany, take-over offers against the wishes of the management of the target company rarely, if ever, occur. Friendly and unfriendly take-overs are subject only to voluntary self-regulation. See *Leitsaetze fuer oeffentliche freiwillige Kauf- und Umtauschangebote bzw. Aufforderungen zur Abgabe derartiger Angebote in amtlich notierten oder im geregelten Freiverkehr gehandelten Aktien bei Erwerbsrechten*, printed in *Baumbach-Duden-Hopt, Handelsgesetzbuch* (Munich 1985), (18) *Leitsaetze fuer Uebernahmeangebote*. These guiding principles clearly indicate that the Insider Trading Guidelines and the Guidelines for Dealers and Investment Advisors remain unaffected. Compare Hopt, 44 *Rabels Zeitschrift* (RabelZ) 180 (1980).

[47] Insider Trading Guidelines, Section 1, subsection 2, subsection c.

The Model Law, Section 6, also recommends prohibitions for trading in futures, short sales, and all speculative deals of less than six months between purchase and sale or vice versa. The prohibition is without regard to the concrete exploitation of inside information.

[48] Stock Corporation Act, Section 404.

[49] Von Stebut, *Geheimnisschutz und Verschwiegenheitspflicht im Aktienrecht* (Koeln 1972) (short version in 1974 *Betrieb* 613); Ulsenheimer, 1975 *Neue Juristische Wochenschrift* 1999; *Arbeitskreis Gesellschaftsrecht, supra* note 12, at 14; Tiedemann, *Kommentar zum GmbH-Strafrecht und ergaenzender Vorschriften*, Section 85, *Observations* (1981).

[50] Stock Corporation Act, Section 404, subsection 3.

[51] *Arbeitskreis Gesellschaftsrecht, supra* note 12, at 14; Ulsenheimer, *supra* note 49, at 1999.

[52] *Strafgesetzbuch, (StGB)* (Penal Code), Sections 263, 266.

[53] *Buergerliches Gesetzbuch, (BGB)* (Civil Code), Section 123.

[54] Civil Code, Section 823, subsection 2, in connection with Penal Code, Section 263.

[55] *Supra* note 35.

[56] See e.g., Schumacher, *Vertragsaufhebung wegen fahrlaessiger Irrefuehrung unerfahrener Vertragspartner* (Bonn 1979).

[57] Kuebler, *supra* note 43 at 204; Heinsius, *supra* note 43, at 177.

[58] Stock Corporation Act, Section 168, subsection 1 – Commercial Code, Section 323, subsection 1 (as of 1986). Claussen, in *Koelner Kommentar zum Aktiengesetz* (Cologne 1985) (as of 1971/76) Section 168, Annotation 7 relies upon the express prohibition of exploitation under Section 168, subsection 1, phrase 2 of the Stock Corporation Act and is of the view that this norm is “at present the only statutory regulation covering the question of insider dealing.”

[59] Hefermehl in *Soergel-Siebert, BGB I: Allgemeiner Teil*, Section 123 (10th ed. Stuttgart 1967) (banker was able to get information from the newspaper that morning).

[60] Stock Corporation Act, Section 404, subsection 1 (as of 1968); Section 168, subsection 1; Commercial Code, Section 323, subsection 1 (as of 1986).

[61] Stock Corporation Act, Section 88, subsection 2.

[62] Hopt & Will, *supra* note 16, at 114; Wittmann in Staudinger, BGB Schuldrecht: Besonderer Teil, Section 667, Annotation 9 (12th ed. Berlin 1980).

[63] Compare the case law as to bribes, 134 RGZ, at 49; Dilcher in Staudinger BGB, Allgemeiner Teil, Section 123, Annotation 7 (12th ed. Berlin 1980) (disclosure by the agent of receipt of a bribe belongs according thereto to the duties of the agent towards the principal).

[64] Stock Corporation Act, Section 131. Compare Zoellner in Koelner Kommentar zum Aktiengesetz, *supra* note 58, Section 131, Annotation 49 (1980) (personal circumstances of the member of management is a permissible question inasmuch as it is of considerable importance in judging their qualification or fulfillment of duty; that applies in particular if one agrees that there is a duty to hand over insider profits or even that there is criminal liability).

[65] These four methods of regulation are criminal law, surrender of profits provided for under company law, civil liability, and disclosure.

[66] E.g., a registration system such as the one under the American Securities and Exchange Act of 1933, Section 16, or commissions such as the Securities and Exchange Commission in the U.S. or the Commission des Opérations de Bourse in France.

[67] Arbeitskreis Gesellschaftsrecht, *supra* note 12, at 49 (Section 38 of the Model Law: imprisonment up to two years or fine); Alternativ-Entwurf eines Strafgesetzbuches, Besonderer Teil, Straftaten gegen die Wirtschaft, Section 191 (Tuebingen 1977); Scheu, Das Boersenstrafrecht und seine Reform, Doctoral dissertation 150 (Giessen 1974).

[68] Volk, 142 ZHR 1 (1978).

[69] France adopted criminal prohibitions in 1976; England adopted them in 1980.

[70] The position was argued by Judge Kissel, former chairman of the review panel of the Frankfurt Stock Exchange and present president of the Federal Labour Tribunal. Kissel, *Insider – Regeln haben sich bewahrt*, Frankfurter Allgemeine Zeitung Feur Deutschland (FAZ), Dec. 17, 1980, No. 293 at 143; accord Keilholz, Presiding Judge of the Court of Appeals Duesseldorf and former Chairman of the Review Panel of the Duesseldorf Stock Exchange, *Die Aktiengesellschaft* (1981) AG. Report R54.

[71] Insider Trading Guidelines, Section 4: Semi-Official Observations, Observations 2.

[72] Civil Code, Section 328.

[73] Insider Trading Guidelines, Section 4, subsection 2.

[74] Stock Corporation Act, Section 88, subsection 3 (by analogy).

[75] Schwark, *supra* note 3, Nr. 436 – Insider Trading Guidelines, Section 4, Annotation 2; Bruns, Rodrian & Stoeck, *supra* note 3, Nr. 436 – Insider Trading Guidelines, Section 4, Annotations 11–12.

[76] Model Law, Sections 25 *et seq.*

[77] Model Law, Sections 30 *et seq.*

[78] Cf. Hopt & Will, *supra* note 16, at 17 (*des petits allers et retours*).

[79] See *supra* notes 53–59 and accompanying text.

[80] Compare Arbeitskreis Gesellschaftsrecht, *supra* note 12 with Roth, 38 RabelsZ 720 (1974); 1978 *Die Aktiengesellschaft* (AG) 113.

[81] Securities Exchange Act, Section 16.

[82] Code of Procedure, Section 5, subsection 7.

[83] Code of Procedure, Section 5 and Semi-Official Observations, Observation 3.

[84] Model Law, Sections 7&8. Differences of opinion on this matter exist as to whether this responsibility should be codified in the law or enforced by the stock exchanges through argument and possibly insertion on the exchange lists.

[85] Hopt & Will, *supra* note 16, at 173; Model Law, Section 21 *et seq.*; Arbeitskreis Gesellschaftsrecht, *supra* note 12, at 39.

[86] See Hopt, *New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards*, 82 Mich. L. Rev. 1338, 1361 (1984).

[87] The Duesseldorf Review Body in 1973 went beyond the directives on several points – e.g., at that time large shareholders were not included, and shares of the target company were not insider securities for insiders of the company taking over. This, of course, was possible only with the agreement of the parties. Hopt, *Norme etiche e norme giuridiche nel diritto dell'economia: uno studio sull'autodisciplina tedesca degli insiders*, XIX *Rivista delle società* 1046 (1974); cf. Schwark, *Anlegerschutz durch Wirtschaftsrecht* 232 (Munich 1980).

[88] E.g., Review body for insider questions at the Rheinland Westphalia Stock Exchange in the August–Thyssen–Huette AG case and the Dresdner Bank AG case (Sept. 10, 1973), 1973 *Betrieb* 2288 und 2290. Compare report in 1973 *Betrieb* 2234.

[89] Nicht gegen Insider-Richtlinien verstossen, FAZ, Jan. 27, 1981, No. 22 at 9; Wertpapiere, Falsches Spiel, *Der Spiegel*, 1978, No. 45 at 97; Raetsel um eine marode Werft, *Die Zeit*, Mar. 23, 1979, No. 13 at 22.

[90] For an exception to this right, see *supra* note 21 and accompanying text.

[91] See *supra* notes 4–6 and accompanying text.

[92] Hopt, *supra* note 43, at 148–68. The debate is today principally carried out on an international level concerning the myth or reality of Codes of Conduct. Legal Problems of Codes of Conduct for Multinational Enterprises (Horn ed. Amsterdam 1980); Grossfeld in Staudinger, BGB (12th ed. Berlin 1981), EGBGB Internationales Gesellschaftsrecht, Annotations 604 *et seq.*; Hopt, *Recht und Geschaeftsmoral multinationaler Unternehmer*, Festschrift zum 500 jaehrigen Bestehen der Tuebinger Juristenfakultaet 279, 324 *et seq.* (Tuebingen 1977).

[93] Staatssekretaer Haehser, Federal Ministry of Finance, BMF Finanznachrichten 53/78, at 1–2 (Nov. 17, 1978).

[94] Hopt & Will, *supra* note 16, at 35.

[95] Hopt, *Institutional Problems of German Stock Exchange Law and Securities Regulation in Stock Exchange Law and Corporation Law*, Report from a Symposium in Sweden 7 (Lund 1984).

[96] German Central Bank, *Der Aktienmarkt in der Bundesrepublik Deutschland und seine Entwicklungsmoeglichkeiten*, Monatsberichte der Deutschen Bundesbank 12, 13 (Apr. 1984); cf. Hopt, *Risikokapital, Nebenboersen und Anlegerschutz*, 1985 *Wertpapier–Mitteilungen* (WM) 793, 794 (formerly Kuebler, 5 *Die Aktiengesellschaft* 1981, with further references).

[97] Kraus, *Securities Regulations in Germany? Investors' Remedies for Misleading Statements by Insurers*, 18 *Int'l Law* 109, 110 (1984).

[98] The “GmbH & Co.,” a hybrid form between corporation and partnership, has been excluded from disclosure by the German legislation transforming the EEC disclosure directive into German Law in 1985.

[99] Hopt & Will, *supra* note 16.

[100] Official Journal of the European Communities L 212/37 (Aug. 20, 1977); cf. The critical comment by Zahn, ZGR 1981, 101, 124 (far too declamatory, not uniformly enforced).

[101] The working program of the EEC Commission, presented by Delors (Feb. 1986), explicitly includes a directive on insider trading. See *Der einheitliche Binnenmarkt als EG-Hauptanliegen*, *Neue Zuercher Zeitung*, Feb. 20, 1986, No. 42 at 18.

[102] *Der AEG-Kurs und die Folgen*, *Anmerkungen zur Insider-Regelung*, FAZ, Nov. 28, 1985, No. 276 at 15. During the take-over of AEG-Telefunken AG by Daimler–Benz AG in 1985, there were once more clear indications of insider trading.