

INSIDER TRADING
HOW JURISDICTIONS REGULATE IT



OICJ-IOSCO

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Insider Trading – How Jurisdictions Regulate It

Introduction

The objective of this report is to survey the regulations prohibiting insider trading in the jurisdictions of IOSCO members and to define guidelines for the creation or amendment of such regulations. The report consists of two parts: the first - a synthesis of insider trading regulations – describes the most common features of insider trading activity and of regulations designed to prevent it. Although the approach to insider trading regulation in particular countries is similar, there are many significant differences. Consequently, this part of the report concludes with guidelines for the creation (or amendment) of insider trading regulations and an organizational framework to prevent insider trading activity. The second part of the report is a compilation of summaries of insider trading laws and regulations in particular countries and their experiences in the enforcement of such laws and regulations. It is especially useful if the reader desires to compare a particular jurisdiction's insider trading regime to the common features of such regimes internationally, as described in the first part of the report. The second part of the report is based on members' responses to a questionnaire and other publicly available data. Although the summaries of particular jurisdictions' insider trading regimes vary somewhat in their level of detail, the EMC determined to present all information available to it regarding each jurisdiction's insider trading regime. Adopting a common scope for the summaries would have resulted in the suppression of much useful information regarding the regimes of particular jurisdictions. Because, in formulating its conclusions and guidelines, the EMC desired to take advantage of the experience of all IOSCO members regarding the regulation and prevention of insider trading, the jurisdictions covered by this report include both EMC and non-EMC jurisdictions.

Considerable effort was made to present current information on the insider trading regulations of each covered jurisdiction. However, as the laws of a given jurisdiction may have changed subsequent to the date of the EMC's survey, it is possible that the information included in this report has become outdated. *Readers are cautioned not to rely on the statements of the laws and regulations set out in this report, but to verify independently or, in appropriate circumstances, to retain private legal counsel to verify, the status of the law in a particular jurisdiction.*

Part One: A Synthesis of Insider Trading Regulations

1. Basic definitions

Insider trading undermines investor confidence in the fairness and integrity of the securities markets. For this reason, nearly every jurisdiction has enacted legislation prohibiting such activity. Although there are some variations in the legal systems of different countries, the majority of legislators adopting statutes relating to insider trading addressed the following issues: What is inside information? Who can be considered an insider? What activities related to using inside information are prohibited? How to prevent insider trading? What sanctions and enforcement measures should be implemented? These questions are addressed below. The EMC's conclusions from its review of jurisdictions' insider trading regimes are set out in Section 4.

1.1. Inside information

Usually, inside information is defined as information that is non-public and material. Thus, to define inside information the following issues should be addressed: 1) confidentiality, and 2) materiality.

1.1.1. Confidentiality

Jurisdictions address issues relating to confidentiality in a similar manner. The information is confidential until it is made public. However, a few specific points merit further discussion.

1.1.1.1. Procedures for making information public

Particular jurisdictions impose different requirements concerning the publication of information. Some jurisdictions require information to be published in a manner specified in regulations (e.g., by transmission of the information to a designated news agency or by the dissemination of the information by the stock exchange, etc.). Other jurisdictions impose general requirements concerning the method of disseminating information. Still others require only that the information be transferred to a news agency (without defining that agency). While an issuer's adoption of a proper disclosure policy and its prompt disclosure of information represents a mechanism to attract investors and to compete for capital, pure reliance on market incentives for issuers' to adopt best practices relating to the disclosure of material information is not justified. Appropriate disclosure practices should be defined in regulations. One acceptable approach would be for the regulator to specify a news agency that can be relied on to disseminate issuers' reports. EU Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (Market Abuse Directive),¹ which supercedes a previous EU directive on insider trading, provides for the European Commission to define specified "technical modalities of appropriate disclosure of inside information."

However, although a jurisdiction or a particular issuer may have adopted best practices for the dissemination of price sensitive information, issues relating to disclosure may remain, particularly relating to dissemination of information cross-border. One example relates to information concerning a proposed take-over of a company listed on a domestic market, released domestically by the company (e.g., in fulfillment of disclosure requirements on the domestic market). In this situation, the information appears properly to have been disseminated publicly. However, the information may not have been disseminated in other non-domestic markets where the securities are traded in accordance with the disclosure requirements of the non-domestic market. Consequently, traders in the non-domestic market may not receive adequate notice of the publication of material information by the domestic issuer and may be disadvantaged in their ability to make investment decisions relating to those securities. Further, issuers whose securities are traded primarily in large developed markets sometimes demonstrate a lack of consideration for the need to disseminate material information in a timely manner in all markets where their securities are traded. To address such problems, co-operation between regulators internationally should be enhanced (see section 2.6.).

¹ Adopted 3 December 2002, not yet published in the Official Journal of the European Union.

1.1.1.2. Time required to consider information public

A formal disclosure of information does not necessarily mean that information can be considered to be “publicly available.” An assessment of the adequacy of disclosure requires an inquiry into whether investors actually have an opportunity to make investment decisions taking such information into account. This inquiry is particularly relevant in jurisdictions that do not require issuers to follow any special procedure for making information public. In such a case, an “artificial” and ineffective disclosure may be made to circumvent an accusation of insider trading, e.g., by disclosing the information to a news agency not specialized in capital market issues to allow insiders to trade on the information before other non-insider investors can become aware of it.

It is also possible that, even where a jurisdiction has a well developed and regulated infrastructure for the transmission of price sensitive information, insiders can abuse the market if they are permitted to trade shortly after disclosure, before other investors can react to the news. To avoid such problems, trading halts would seem appropriate to permit a fair dissemination of information and to give non-insiders the opportunity to react to the news. According to US regulations, a dissemination of information is completed only “when the public has assimilated the information in the disclosure.”

1.1.1.3. Awareness of the confidentiality of information

Other issues relating to confidentiality arise in situations when a trader trades on the basis of inside information, believing that the information had become public. This can result when the trader obtains the information in exceptional circumstances (see section 1.2.2.2.) or when technical problems occur relating to the dissemination of the information, e.g., the information was sent to the appropriate institution (news agency, market), but for some reason was not properly published. In the first case, the activity of the investor might indicate whether he was aware he was trading on inside information (see section 1.3.4.). In the second case, it seems appropriate that insiders should be required to make sure that the information has been disseminated (or even additionally that non-inside investors had enough time to react - see section 1.1.1.2.) before trading. Some jurisdictions do not penalize trading based on inside information if the trade proves that he had reasonable grounds to believe that the information has been adequately publicly disclosed (see section 1.4.).

1.1.1.4. Legitimate disclosure of information

Another important problem relates to the possibility that professionals retained by the company, e.g., lawyers, accountants, and consultants, etc., and to whom confidential information is disclosed “in the normal course of duties,” will trade on this non-public information. Given an issuer’s practical necessity to share inside information with its professionals, the scope of people who may become privy to confidential inside information can become quite wide. This phenomenon may complicate efforts to prevent the use of inside information and to impose sanctions on such behavior. This problem is discussed further under section 1.4 and some potential remedies are presented in sections 3.2 and 3.4.1.

1.1.2. Materiality

The materiality of information in particular countries generally is defined by reference to: 1) the importance of the information; 2) the scope of the information; and 3) the source of information. Since the definition of “material” information often involves questions of

interpretation, examples of non-material information have been included for clarity (either below or in section 1.4.).

1.1.2.1. Importance

In a majority of the countries examined, information is material if, when made public, it could (“would probably,” “would be likely to”) substantially (“considerably,” “materially”) influence the price (or value) of securities. This definition is common among many jurisdictions (with slight differences in meaning attributable to difficulties of translation). Some jurisdictions also limit “material” information to information that is precise (or “specific”), but generally do not provide a definition of that term.

In some jurisdictions, the materiality of information is evaluated according to potential impact on the behavior of market participants. Under US regulations, information is material if it is of such a nature that someone who has inside knowledge of it “could be expected to trade successfully in the securities in question and make a profit or avoid losses.” In the case of Singapore and Malaysia, information is material if “a reasonable person would expect it to have a material effect on the price of securities.” (Malaysian regulations also provide a catalogue of events, information regarding which is always “material”).

Such an approach to defining materiality expands the possibilities that information may be classified as material. The Malaysian approach of providing a catalogue of events by which material information is defined has been effective in Malaysia in addressing issues relating to insider trading and represents an approach that should be considered by other emerging market jurisdictions when designing or amending insider trading regulations. It should be noted, however, that information related to specific events in a catalogue of events may or may not substantially influence the price or value of a security depending on particular situation of the issuer.

The various definitions set out above reflect that it may be necessary for a regulator or court to make a judgment whether the information could or could not influence the price; whether the investor with inside information “could be expected to trade successfully” in the security;” and whether disclosure of the information would “have a material effect on the price of the securities.” However, price movements in the market after a public disclosure of the information may itself provide evidence of its materiality. In a case where the price of the security moves subsequent to a disclosure, the only issue to address may be whether the price movement was “substantial” enough to demonstrate the information’s materiality. The materiality of the information also can be assessed by reference to the behavior of the person that traded on the inside information - if that a trader concluded a particularly big transaction on the basis of the information in question, this is some evidence that in the trader’s opinion, the information was material (see section 1.3.4.).

Another significant issue is that the materiality of information properly should be evaluated using a dynamic approach, that is, information which is not material today can become material in the future. Issuers should monitor whether information (e.g., which was not published in the prospectus as non-material) has become material due to changing circumstances.

1.1.2.2. Scope

The scope of potential material inside information is defined in many jurisdictions in a similar manner, although with some variations. Differences in the scope of material inside information may be categorized by reference to: 1) the issuers regarding which the information is deemed material; 2) the securities or the markets regarding which the information is deemed material; or 3) other factors.

Issuers

The most common definition of materiality defines the scope of material information by reference to a particular issuer or the securities issued by a particular issuer. However, there are many variations with respect to this issue in the regulations of many jurisdictions. Some countries define material inside information as information relating to “one or more” issuers (securities), while others do not include a specific reference to an issuer. The approach of the latter group appears to assume that if the information relates to more than one issuer (or security), it also has to relate to the individual issuers (or securities) included within the group. On the other hand, jurisdictions that include a specific reference to issuers generally include the kind of information that relates not only to individual issuers (or securities), but also to a group of them. This group, however, must be defined by reference to the materiality of the information to the issuers specifically, not generally. For example, United Kingdom regulations clearly indicate that the information has to relate “to particular securities or to particular issuers of securities and not to securities generally or to issuers generally.” Information that relates to issuers or securities generally is thus excluded from the definition of material inside information.

As indicated above, definitions of inside information generally relate to issuers or securities. In some jurisdictions, the definition also encompasses the entities controlled by the issuer and the entities controlling the issuer. This, in fact, does not alter the “common” definition, since information influencing a controlled or controlling entity, to a certain extent, also influences the issuer. In such a case, it is included in the “common” definition (and if it does not influence the issuer, there is no potential for insider trading).

In some jurisdictions (e.g. Hungary), inside information also can relate to the financial institutions participating in the offering of securities, such as underwriters and distributors.

It appears, however, that the best approach is to include in the definition of inside information only information relating to the issuer, rather than information concerning other entities.

Securities and markets

Typically, definitions of inside information relate to information that is material to the price of securities listed on regulated markets. In some cases, the definition also may cover securities before they are admitted to public trading, e.g., “if the application for such admission or such trading has been made or publicly announced” (Germany). In Paraguay, inside information refers to information related not only to the securities issued by a particular issuer, but also to the securities underwritten by it. Some jurisdictions define inside information also to include information relating to derivative securities whose underlying value is derived from listed securities, including securities issued in other countries (South

Africa). Another jurisdiction defines inside information to include information that can influence the corresponding market price of a particular security, e.g., hedging and arbitrage activities, whether or not executed on the regulated market (Portugal).

Defining inside information by reference to securities listed on regulated markets seems justified for the following reasons: 1) if the securities are not admitted to public trading, the potential that insider trading may harm public investors is very limited, and 2) if the information influences the price of a derivative instrument not traded on a public market, but whose underlying reference value includes a security traded on a public market, it is likely to influence the price of the security itself.

The essence of the scope of inside information seems to be embraced in the Finnish regulations, where such information has to relate to “a security subject to public trade or to other trading procedure organized on a professional basis and available to the public.” Thus, the important point is not whether the information relates to instruments traded on various markets, including those accessible only by qualified investors, but if it relates to instruments that can be bought by small retail investors. Also the Market Abuse Directive concerns “any financial instrument admitted to trading on regulated market (...) or for which a request for admission to trading on such market has been made, irrespectively of whether the transaction itself actually takes place on that market or not.”

The most common and suggested definitions of inside information relate to securities which are admitted to trading on a regulated market (or a “market available to the public”) because insider trading on such information is most damaging to retail investors.

Other factors

In some jurisdictions, regulations also provide that other kinds of information will be deemed to be material. In Peru, information may be material if trading on it by insiders may influence the liquidity of the security traded. In many jurisdictions, there are no limitations relating to the scope of information. Such open definitions are particularly relevant to trading on commodity markets where many factors influence prices. Information relating to weather forecasts may be very sensitive, not only for agriculture commodities (due to the effects of weather on crop yields), but, in some countries, also for other contracts, e.g. energy contracts (due to the effects of weather on the output of wind power stations). The Market Abuse Directive defines inside information in relation to commodity markets as information which is precise and which users of markets on which commodity derivatives are traded “would expect to receive in accordance with accepted market practices on those markets.”

In conclusion, the definition of inside information generally relates to information affecting the price of securities and issuers of securities. However, in relation to derivatives markets for commodities, the definition may be extended to cover information influencing the value of those contracts.

1.1.2.3. Source of information

In some jurisdictions, materiality is also defined by reference to the source of the information. To be material, information has to be acquired from the issuer or from a person connected with the issuer (e.g., in Peru). Pursuant to Jordanian regulations, the person using the information has to be aware that its source is an insider. However, majority of countries

does not define materiality by reference to the source of the information, presumably because such an approach would make enforcement more difficult, particularly against tippees (see sections 1.2.2.1 and 1.3.2).

1.2. Insider

In definitions of insiders, a distinction is usually drawn between two categories of insiders: primary insiders and secondary ones. Such a distinction is justified for a number of reasons. First, primary insiders get information from its source and have the necessary knowledge to assess the materiality of the information. Secondly, they are expected to understand the consequences of trading on confidential information. Hence, the sanctions imposed on primary insiders are usually much harsher than those imposed on secondary ones. Moreover, in some jurisdictions, primary insiders are presumed to have access to inside information, which makes enforcement of insider trading regulations much easier.

An important issue in a jurisdiction's approach to defining insiders is whether corporate entities are included and can be subject to liability under insider trading provisions. In some jurisdictions, both individuals and corporations can be insiders, whereas, in other jurisdictions, corporate entities may not be held liable. Instead, the natural persons who carry out transactions for the account of the legal person are held liable. Subjecting corporate entities to sanctions seems the better approach, because it motivates them to introduce high standards relating to the handling of inside information and for dealing on the company account.

1.2.1. Primary Insider

Definitions of "primary insider" generally include members of management and the supervisory or administrative bodies of the issuer. This definition is sometimes expanded to include employees of the company and those who provide services to the issuer (including outside lawyers, accountants and financial advisers). In some jurisdictions, large shareholders also are included within the definition of primary insider. However, the definition of large shareholder varies from jurisdiction to jurisdiction, e.g., from 5% (China) to 25% (Hungary). Large shareholders are included in the definition of primary insider because they may have (formally or informally) access to more information than retail investors.

In particular jurisdictions, the definition of primary insider is extended to employees of the securities commission (China); to persons making use "of his highly responsible position as an employee or representative of the Central Securities Depository, a clearing house, a securities intermediary, a stock exchange, an option corporation or of an issuer of a security or an organization of the same group or in performing a task commissioned by them" (Finland); to employees of an undertaking associated with the issuer (Germany); to an underwriter, a financial institution participating in an offering, or to a credit institution (Hungary); or to financial institutions responsible for loans to the issuer or to affiliated companies (Peru).

However, comparisons of the definitions of primary insiders in particular jurisdictions may be misleading in that the scope of the prohibition on insider trading to which primary insiders may be subject and the consequences for violating insider trading regulations vary substantially from jurisdiction to jurisdiction. In a majority of jurisdictions, harsher sanctions are imposed on primary insiders and primary insiders are presumed to have knowledge of

inside information. In a minority of jurisdictions, distinctions between primary and secondary insiders are merely definitional. The following discussion focuses on those jurisdictions that have introduced more demanding regulations concerning primary insiders, as this approach is more reasonably calculated to dissuade trading on inside information.

Under Peruvian regulations, the following persons are presumed to have access to inside information:

- a) directors and managers of the issuer, institutional investors, as well as members of any institutional investor investment committee;
- b) directors and managers of companies affiliated to the issuer and to institutional investors;
- c) shareholders that individually or jointly with their spouses and blood relatives up to the first degree of consanguinity hold ten percent or more of the capital stock of the issuer or of institutional investors; and
- d) spouse and blood relatives up to the first degree of consanguinity of the persons mentioned in the foregoing sections.

Paraguayan regulations include an even broader catalogue of persons who are presumed to have access to inside information, “except on contrary evidence.” Proposed regulations in Singapore create a concept of “persons connected to a company.” A person is “connected” if he is an officer or substantial shareholder of the company / related company, or if he is in a position that may reasonably be expected to give him access to price-sensitive information by virtue of a professional or business relationship between himself and the company / related company. In prosecutions of a connected person, the prosecutor must prove that the connected person has either actual knowledge (awareness or understanding) or constructive knowledge (that one using ordinary care and diligence would possess) of inside information. Upon such proof, a connected person is deemed to have known that the information in his possession was undisclosed and price-sensitive, without the prosecution having to prove such knowledge. This presumption may be rebutted by the defendant, who has to prove that he did not have knowledge that the information was undisclosed and price-sensitive.

The concept of primary insiders under US regulations relates to the fiduciary duty of particular persons to the relevant corporation, such as officers, directors, and employees. However, such a fiduciary duty can be “acquired” by persons who provide services to the corporation, like outside lawyers, consultants, investment bankers or others (so called “temporary” or “constructive” insiders (see section 1.2.1.1.)), provided the corporation expects them to keep the information confidential.

Definitions of “primary insider” should encompass the officers in the company generating the inside information, as well as any outside professional service providers having access to inside information. In jurisdictions where the employees of the securities regulator have access to inside information, they should be included within this definition. To facilitate the enforcement of insider trading regulations, a primary insider should have the burden of proof to negate a presumption that he had knowledge of inside information.

1.2.1.1. Temporary insider

A special category of primary insiders are professionals not employed by the company generating the inside information, but having access to this information in furtherance of the

services provided to the company. These “temporary” or “constructive” insiders are usually lawyers, accountants, consultants, investment bankers, etc., who influence material corporate decisions (e.g. concerning mergers) and have the knowledge necessary to assess the materiality of activities undertaken by the company. These “outside insiders” are easily subject to a temptation to trade on inside information. For this reason, professional associations are strongly encouraged to issue strict codes of conduct prohibiting their use of inside information (see sections 3.2 and 3.4.1).

1.2.2. Secondary Insider

Secondary insiders are persons who learn inside information from someone else (not necessarily an insider). They can learn such information due to a special relationship with a person who knows the inside information (a tippee) or in exceptional circumstances (“accidental” insiders).

1.2.2.1. Tippee

Passing material, non-public information by an insider to a second party, for the purpose of enabling that party to trade on it, is tipping. Those who receive information from a primary insider are defined as “tippees.” The regulations of particular jurisdictions address tipping in similar manner - tippees are not allowed to trade on such information. The differences relate to treatment of “secondary tippees” - persons who receive inside information from sources other than a primary insider. Using inside information by secondary tippees is not always considered illegal, e.g. in Singapore (but proposed regulations in Singapore also cover “secondary tippees”).

Best practice is that all the persons trading on inside information should be subject to sanctions. Obviously, broad definitions of insider trading can be criticized if innocent people, without knowledge of the confidentiality and materiality of information, are subjected to criminal penalties. However, the behavior of such investors generally indicates whether they had knowledge that they were trading on inside information (see section 1.3.4).

1.2.2.2. “Accidental” insider

An “accidental” insider is a person that neither has access to inside information, nor was tipped by a person who has access to such information, but learned inside information due to special circumstances. Examples of such circumstances include overhearing a conversation in the lift or by mobile phone, finding confidential documents in the rubbish bin, receiving a fax sent to a wrong number, etc. No distinction generally is recognized for this special category of insiders in the regulations of particular countries. They generally are covered by the general definition of secondary insiders and bear the same responsibility for trading on inside information as other secondary insiders. Their degree of knowledge and intent to trade on inside information generally would be taken into account in assessing whether they have violated insider trading regulations. As in case of tippees, the behavior of such investors generally indicates whether they had knowledge that they were trading on inside information (see section 1.3.4).

1.3. Prohibited activities

In defining insider trading, an appropriate description of the activities that fall within the definition is a key issue. A definition that is too narrow may leave loopholes, whereas a

definition which is too broad would impair legitimate trading. On the other hand, some legislators fear that, by defining insider trading, they create a “roadmap for fraud” by providing guidance to traders as to the activities that do not fall within the statutory prohibition.

However, for practical reasons, penal regulations must be reasonably precise. It is very difficult for a court to subject a person to criminal penalties when the definition of the prohibited activity is vague, such that a person cannot determine with certainty whether actions he is considering are prohibited.

In assessing whether a trader has engaged in insider trading, one of the key issues is to determine whether the trader intentionally traded on inside information. In many jurisdictions, liability under insider trading regulations may depend on the knowledge and awareness of the trader regarding the confidential nature of the information. (For a discussion of other factors, see section 1.3.4.).

Regulations usually prohibit both trading (i.e., the buying and selling securities, including derivatives, when in possession of non-public material information pertaining to the underlying security) and tipping (i.e., conveying material non-public information to a second party to enable that party either to trade in the relevant securities or to tip another party). Moreover, some jurisdictions also prohibit other actions taken on the basis of inside information.

1.3.1. Trading

The regulations of a majority of jurisdictions provide that neither a primary nor a secondary insider may take advantage of a knowledge of inside information by either directly or indirectly acquiring or disposing securities, whether for his own account or for the account of a third party. Many jurisdictions prohibit such behavior only if the person in question knows the information has not been publicly disclosed. Such knowledge may often be proved by identifying the source of the information - if a person knows the information comes from an insider, the person using it should be aware he/she is engaging in insider trading (see section 1.1.2.3.). Some jurisdictions, however, further require proof of an intent to trade on inside information (see section 1.3.4.).

There are slight differences among jurisdictions relating to the specification of the market, trading on which would be a breach of insider trading regulations. In some jurisdictions, only insider trading on a regulated market accessible to the public is prohibited (Austria). Unlike issues relating to the definition of inside information, where the scope of inside information is generally restricted to instruments traded (or which soon will be traded) on a regulated market, it seems logical, that regulations should prohibit any trading based on inside information (provided that this information relates to instruments listed on a regulated market as indicated in section 1.1.2.2.).

It is also bears noting that the regulations in some jurisdictions require that intermediaries prevent trading based on inside information (see section 3.4.2.).

1.3.2. Tipping

The regulations in the jurisdictions surveyed prohibit tipping by primary insiders. Tipping by secondary insiders, however, is not regulated in the same way across jurisdictions. Some jurisdictions do not penalize the mere disclosure of inside information by secondary insiders, while others discourage tippees from communicating inside information to another person. In some jurisdictions, tipping is prohibited only if there is a reasonable cause to believe that the tippee would trade on the information. Pursuant to proposed regulations in Singapore, a person is prohibited from communicating inside information to another person, if he knows, or ought reasonably to know, that the other person would be likely to use the information to deal in securities or to procure another person to deal in securities (see section 1.4.).

A decision not to impose sanctions on secondary tippees who receive inside information is based on a presumption that the tippees may be unaware of the inside character of the information. However, such a treatment of secondary tippees may provide an easy mechanism to circumvent laws against insider trading, as primary insiders may be tempted to engage in insider trading through secondary tippees. Therefore, the better practice is to provide for the imposition of sanctions against both primary tippees that forward inside information to secondary tippees and on the secondary tippees that trade on that information. Exceptions to this general imposition of sanctions could then be provided in the regulations to address situations where the secondary tippee was truly unaware of the inside nature of the information he had received from the primary tippee.

1.3.3. Other uses of inside information

In addition to prohibitions against trading on inside information or tipping others about such information, some jurisdictions have adopted general regulations prohibiting a person's improper "use" of inside information "for his or her own benefit or for the benefit of another person" or a person's receipt of any benefit from the possession of inside information (Czech Republic).

Many jurisdictions define "use" more precisely and do not permit persons with inside information to make buy or sell recommendations or to "procure another person to subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any securities" based on the inside information (Singapore).

While a general definition of "use" generally leads to a more comprehensive prohibition on insider trading and, as such, may be favored by regulators, a broad definition of use where penal sanctions are imposed for insider trading may complicate efforts to achieve convictions. A very general definition of the offence makes it more difficult for people to determine what conduct is prescribed and may run afoul of constitutional requirements relating to legal certainty. For this reason, many jurisdictions have created more detailed regulations.

1.3.4. Intent

In many jurisdictions, insider trading must be undertaken deliberately or, in some jurisdictions "willfully or negligently" (Norway), or "willfully or through gross negligence" (Finland) to be considered an offence. The authorities must prove that the defendant knew

(or, in some countries, should have known) that the information was confidential and material or should have taken proper care to keep such information secret.

Although proving a defendant's intent presents difficulties in some cases, the difficulties are not insurmountable. The defendant's activities often will indicate whether, in his opinion, the information in his possession was material to the valuation of the security. If the trading record of the defendant demonstrates that the transaction that forms the basis of the complaint is not unusual for him, carries an equal amount of risk, and involves a similar amount of money as in other transactions performed by him, then proving an intent to trade on inside information is more difficult. If, however, as is most often the case, the transaction is usually large, carries a high degree of risk, and is unusually profitable, then proof of intent is much easier. A judge or jury may not be easily convinced of a lack of intent to trade on inside information (provided that the judge or jury is familiar with the operation of capital markets - see section 2.7.3.) when, for example, the defendant opened a new investment account, acquired shares of one company for an amount equal to twice his yearly income, and earned an enormous profit when the price of the shares rose upon publication of inside information that was in his possession prior to his acquisition of the shares. In such circumstances, a defendant's argument that he did not realize that the information in his possession was material, confidential, inside information is not very tenable.

Some jurisdictions do not require proof of an intention to trade on inside information or of an intent to disclose inside information to a secondary tippee to establish an insider trading offense. The disadvantage of such an approach is that it may result in an imposition of sanctions against a person who is unaware of the criminal nature of his behavior. However, proof of a specific intent to violate the law is not required to establish an offense in many other types of criminal offenses. If a person exceeds the speed limit in an automobile, he can be found guilty of speeding without proof that he knew the speed limit or that he noticed his excessive speed on the speedometer. Otherwise, it would be almost impossible to enforce speeding limits. Such an approach to the issue of proof of intent is not inappropriate regarding insider trading violations, where proving an actual, specific intent to violate the law may be burdensome.

An intermediate approach to the issue of intent is to include in insider trading regulations a rebuttable presumption that primary insiders have knowledge of inside information and are aware of its inside nature. Proof of intent also should not be required in cases of a disclosure of inside information to secondary tippees. Such presumptions promote the adoption of good policies within companies regarding the handling of inside information.

1.4. Exemptions

As indicated above, in some circumstances, trading on inside information or disclosing such information to a non-insider is not considered a breach of insider trading regulations. Examples of such exemptions are indicated below.

1.4.1. Disclosing information in the normal course of duties

A basic exemption to a prohibition against the disclosure of inside information is a primary insider's disclosure of information, e.g., to bankers, accountants, brokers or attorneys, in the normal course of their employment, profession or duties, or a disclosure of such information required by law. Generally, the persons receiving such information are

bound by professional secrecy laws, regulations, and codes of conduct, and companies generally seek to insure that such professionals have in place appropriate procedures for handling inside information (see section 3.2.).

1.4.2. Operations of the State

The EU Directive on Insider Trading² excludes transactions involving the State, carried out to protect State economic sovereignty, from the scope of insider trading prohibitions. The Directive provides for the immunity of the State, central banks, and persons acting on their behalf for reasons relating to State economic policy from prosecution for violation of insider trading laws. Such regulations are reiterated in the new Market Abuse Directive. Some non-EU countries also have adopted similar provisions providing for immunity from prosecution in the situations described above.

1.4.3. Research based on public data

The objective of investment research is to determine the market value of securities. Obviously, such estimations of market value are not always accurate. For this reason, the availability to a market participant of superior investment research by a particular analyst can give him a clear advantage over other participants in the market. However, neither the dissemination of analysts reports, nor trading based on them, can be considered trading on inside information if the report is based on publicly available information. The market advantage resulting from the analyst's work does not relate to the use of non-public information and could be duplicated by any analyst of similar skill.

Jordanian regulations provide that inside information does not include conclusions based upon financial and economic studies, research and analyses. However, in majority of jurisdictions, this issue is not addressed directly, it being implicit that reports based on public data do not fall within the definition of inside information. However, such reports do create some potential for insider trading. Trading by a person in anticipation of the release of an analyst's report to customers or the general public should be punished as trading on inside information.

1.4.4. Other defenses

Other defenses that may be available to a person charged with insider trading include: 1) the "forced" trading or sharing of information; 2) Chinese Walls; 3) parity of information or 4) a lack of awareness of potential insider trading activity.

1.4.4.1. "Forced" trading or sharing of information

Regulations on insider trading should not restrict otherwise legitimate trading, particularly, if a person must trade in fulfillment of a legal obligation. Such a legal obligation to trade can arise by virtue of underwriting agreements or a necessity to sell shares to redeem units in a collective investment scheme upon a request of the holder. Trading while in possession of inside information can be considered legitimate even if there is no legal obligation to trade if the person proves that he would have acted in the same manner even without the knowledge of inside information.

² Official Journal L 334, 18/11/1989 P. 0030 – 0032 – now superceded by the EU Market Abuse Directive.

Regulations on insider trading also should not prevent a sharing of information otherwise required by law, e.g., with a regulatory authority.

1.4.4.2. Chinese Walls

The basis of a “Chinese Wall” defense is that a particular person who otherwise could be presumed to know inside information in fact did not know it due to internal procedures that restrict the flow of information inside the company. Such a defense is tenable only if the procedures by which information is restricted within the company are very well defined and enforced. Hence, the availability of this defense provides another motivation to companies to institute appropriate procedures regarding the treatment of inside information within the company (see section 3.2).

1.4.4.3. Parity of information

The proposed regulations in Singapore provide for an exemption to the prohibition against insider trading when both parties to the trade know the inside information. Indeed, in such a case, neither of the parties can claim any damage. However, other participants in the market may have grounds to complain. First, trades between two insiders completed just before an announcement of price sensitive information does not contribute to confidence in the marketplace. Secondly, such trade presumably would be completed at a price different from that prevailing on the market. Disclosure that such a trade had been concluded could influence the market price, and if not disclosed, inside knowledge that the trade had been completed would become “derived” inside information. With these considerations in mind, jurisdictions properly may opt against the introduction of a “parity exemption.”

1.4.4.4. Lack of awareness of potential insider trading activity

The level of a person’s awareness about the nature of information in his possession and the possibility of profiting from trading based on this information may bear on whether a person is subjected to liability for insider trading. Under UK regulations, “a person is not guilty of insider trading by virtue of a disclosure of information if he/she shows that he did not at the time expect that any person, because of disclosure, would deal in securities or that the dealing would result in a profit attributable to the fact that the information was price-sensitive information in relation to the securities.” Similarly, under South African regulations, “an individual shall not be guilty of [an] offence if such individual proves on a balance of probabilities that he or she believed, on reasonable grounds, that no person would deal in the securities or financial instruments as a result of [the] disclosure [of the information].” Moreover, an individual also is not guilty of insider trading if he “believed on reasonable grounds that the information had been disclosed widely enough.”

However, jurisdictions may reasonably conclude that the introduction of similar exemptions is not necessary. In jurisdictions where the average judge remains unfamiliar with the operation of capital markets (a not infrequent situation in some emerging markets), such exemptions could increase the difficulties faced by authorities in achieving convictions for insider trading activity (see section 2.7.3.).

2. The role of Supervisory Institutions

2.1. Creating regulations prohibiting insider trading

Securities regulators should issue appropriate regulations, or use their best efforts to cause other authorities to issue laws or regulations, to prevent insider trading. The appropriate scope of such regulations was presented above. However, self-regulatory organizations also can contribute to an effective regime to prohibit insider trading through the issuance of rules binding on their members and the creation of an effective sanctioning regime. In many jurisdictions, self-regulatory organizations have adopted rules prohibiting trading on inside information by members. Examples include self-regulatory organizations of securities dealers, investment advisors, financial analysts, lawyers or accountants who, by virtue of the exercise of their profession or business, regularly may come into possession of inside information. Such rules are usually included in the organizational statutes or the codes of professional conduct of such organizations. Other examples include self-regulatory organizations of securities issuers, banks, members of stock exchanges, and professional investors, such as insurance companies or pension funds (see section 3.2.).

Investment services providers have a special duty to institute adequate internal control procedures to prevent insider trading. In particular, in some jurisdictions, a broker that knows or assumes that an investor has entered an order to execute a trade based on inside information should not accept the order (see section 3.4.2.).

2.2. Supervisory activity relating to insider trading

Regulatory or supervisory institutions are usually governmental or administrative bodies. The typical scope of activity of a regulatory or supervisory institution, in supervising the market relating to potential insider trading information, includes:

- the collection of information concerning suspicious transactions;
- the identification of the parties to suspicious transactions;
- an analysis of the previous activity of identified investors;
- the identification of persons who had access, or could have had access to, inside information; and
- an analysis of relations between persons who had, or could have had access, to inside information or to the parties to suspicious transactions.

Supervision and monitoring are conducted by keeping track of the flow of information on the market (in mass media) and of the transactions conducted on the exchanges (trading volume, market trends, and block transactions). Some countries have implemented electronic, computerized market supervision systems using software that identifies unusual trading activity.

If a suspicious transaction is identified through market surveillance, the regulator undertakes and conducts an inquiry/investigation concerning the suspicious transaction and, if the regulator concludes that insider trading has occurred, may institute an administrative or other civil proceeding seeking the imposition of sanctions on the parties involved. If, under the applicable regime, a person guilty of insider trading is subject to criminal penalties, the regulator generally notifies the public prosecutor if it concludes, as a result of its

investigation, that insider trading has occurred. The public prosecutor may then initiate a criminal proceeding against the offender.

2.3. Regulators' powers to gather information

To detect insider trading, a market regulator usually is granted the power to request relevant explanations and data from the following persons:

- persons with direct access to inside information;
- the issuers of securities traded on organized markets;
- individuals and legal entities that accept orders to buy and sell securities; and
- market infrastructure institutions, e.g., exchanges and clearing houses.

In many jurisdictions, the market regulator has the power to take testimony and to demand a delivery of documents from any person (not only from regulated entities). Moreover, in some jurisdictions, the market regulator is granted the power to search inhabited premises (Peru, Thailand) or to freeze assets (Thailand, Bangladesh).

However, in most jurisdictions, the market regulator usually does not have the power to search inhabited premises, to issue an order freezing assets, to tap telephones, or to bug the house of a suspect, although they often can apply to a court for authority to carry out such measures or to have the police or other authorities carry out such measures.

In most jurisdictions, the market regulator does not act as a public prosecutor and the public prosecutor usually draws up the statement of charges and brings the case in court against the party accused of inside trading. So, where criminal penalties are imposed on insider trading, the role of the market regulator is usually limited to gathering the appropriate evidence of the violation and handing the case over to public prosecutor. In some jurisdictions, the market regulator may have some role in or influence on the work of public prosecutor, e.g., in Poland, the regulator is granted the status of an "injured person" which gives the regulator the right to submit additional evidence in the case and to have access to documentation relating to the case, etc.

However, given the difficulties in certain cases of proving insider trading "beyond a reasonable doubt," in many jurisdictions, a possibility also exists to seek the imposition of civil (see section 2.4.1.) or administrative sanctions (see section 2.4.3.).

The Market Abuse Directive stipulates that the authority with competence relating to market abuse of every EU Member State shall be given all supervisory and investigatory powers either directly or, in collaboration with other authorities, necessary for the exercise of its functions, which shall include at least the right to:

- a) have access to any document and to receive a copy of it;
- b) demand information from any person, and if needed, to require the testimony of a person;
- c) carry out on-site inspections;
- d) require telephone and data traffic records;
- e) request the freezing and/or the sequestration of assets; and
- f) request temporary prohibition of professional activity.

2.4. Sanctions

The sanctions which can be imposed for insider trading activity can be classified as civil, penal and administrative. In some jurisdictions, the regulatory authority is free to choose the appropriate kind of sanction, while in others, there are criteria to be followed while making such choice (e.g., based on the amount of profit, as in Spain). In many jurisdictions, it is legally possible for the authorities to impose more than one type of sanction, but usually only one type of sanction is imposed to avoid challenges to the verdict (e.g., based on claims of double jeopardy). Generally, a trend can be observed among jurisdictions internationally favoring the imposition of administrative sanctions, as administrative proceedings can be carried out quickly and result in a more timely imposition of sanctions. Many jurisdictions have concluded that the efficiency of administrative proceedings results in a more effective prevention of insider trading.

2.4.1. Civil sanctions.

The common aphorism that “anyone can sue anybody for anything” holds true with respect to insider trading. However, the possibility that a person who thinks himself damaged by insider trading activity can obtain compensation from the wrongdoers faces many practical limitations. Some of the more salient factors limiting the prospect of recovering compensation include: 1) the unfamiliarity of many judges in emerging market countries with issues relating to the operation of capital markets (see section 2.7.3.); 2) the long period of time required to prosecute cases in many jurisdictions, during which time the defendants or their assets often disappear; 3) the asymmetry between the capacity of the wrongdoer to pay damages and the amount of damages suffered by investors in the aggregate (the amount in damages paid by the wrongdoer usually must be divided among many investors and the low level of potential individual recoveries takes away the incentive for damaged investors to pursue litigation); and 4) the costs of litigation are often high relative to the potential recoveries, further raising a disincentive to pursue compensation claims.

For these reasons, some jurisdictions grant specific powers to regulatory authorities, particularly to the prosecutor in civil cases, to represent investors. The most specific are the regulations implemented in South Africa, where the Financial Services Board is entitled to bring suit against persons suspected of insider trading. In the event of a successful prosecution, the investors damaged by insider trading activity can receive compensation for their “losses.” In addition, the defendant “will be liable to pay a penalty of up to three times the amount of his ill-gotten gains, plus interest and legal costs.”

2.4.2. Penal sanctions

In a majority of jurisdictions, insider trading activity can be punished with imprisonment (e.g., for up to 10 years in the United States and South Africa) and high fines (e.g., a fine not less than the profit realized and up to 10 times the profits realized). However, the prosecution in a penal case generally must prove the elements of an offense “beyond a reasonable doubt.” This burden of proof makes imposing penal sanctions for insider trading very difficult. In insider trading cases, finding the “smoking gun” is rare and obtaining direct evidence is highly unlikely. To facilitate the handling of capital market crimes, which requires very unique expertise, special divisions in the police, public prosecutor's office and the courts should be created. The creation of such special divisions not only permits officers of those officials to gain a necessary experience, but the special focus of the division obviates

the need for the authorities to determine where to focus the efforts of their officers and officials, e.g., between evident “bloody” crimes and very sophisticated “non-violent” white-collar ones.

2.4.3. Administrative sanctions.

The regulatory and supervisory authorities often have the power to impose administrative sanctions in cases of insider trading. The sanctions against regulated firms include censure, a revocation of license, limitations on the actions or operations of registered securities professionals, and a suspension of registration. A person involved in insider trading also can be disqualified from being appointed to the management of a company for a certain period, ordered to pay the amount of any profit made by insider trading and fined up to a certain amount. In some cases, the supervisory authorities, after imposing administrative sanctions, can notify the public prosecutor, who can initiate a penal action against the insiders.

Many jurisdictions have concluded that the imposition of administrative sanctions is the most efficient way to deter misconduct on the market. Although administrative sanctions are not as severe as penal ones (no one can be sent to prison by administrative means), they can be imposed much faster and the burden of proof (“balance of probabilities” instead of “beyond a reasonable doubt”) facilitates the prosecution of capital market misconduct, where obtaining direct evidence of the violation is almost impossible.

Another advantage of the use of administrative sanctions (as opposed to penal ones) is that they can be imposed also on legal persons, e.g. “if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation” (as in Finland). That possibility further motivates companies to introduce and enforce internal rules of conduct governing the treatment of inside information by company directors, officers and employees (see section 3.2.).

2.5. Compensation to investors

The imposition of penal penalties for infringement of insider trading regulations demonstrates the effectiveness of law enforcement authorities and deters prospective wrongdoers from committing criminal violations of insider trading laws. However, investors that are harmed by insider trading receive no compensation as a result of a criminal prosecution apart from the satisfaction of seeing that justice is done and that the regulatory framework necessary to have confidence in the operation of public markets is being properly enforced. However, this begs the question of how to identify investors that have been harmed by insider trading activities and how to compensate those persons for the harm. The answer to the first part of the question is relatively simple - the proceeds from the fines imposed in penal, administrative or civil proceedings can be used to address issues relating to compensation. However, who should receive those funds?

The potential beneficiaries are: the state budget (i.e., all taxpayers), the regulatory or supervisory authority (i.e., the market - if the authority is financed by the market), a compensation fund (i.e., potentially all investors), or individual investors who were harmed by the insider trading activity. The last solution is the most complicated one, but the most fair for market participants. The system existing in South Africa proves that it is possible to

implement such an approach and that investors may be able to recover damages if they are harmed by insider trading activity.

2.6. Sharing information by supervisory authorities

Because of the globalization of capital markets, the sharing of information among supervisory authorities in different countries is of crucial importance. Initiatives relating to information sharing have been undertaken by IOSCO for many years. IOSCO members have concluded hundreds of bilateral Memoranda of Understanding and a new Multilateral Memoranda of Understanding concerning Consultation and Cooperation and the Exchange of Information.³ Pursuant to the new Multilateral MoU, information sharing will be facilitated due to the multilateral character of the arrangements as well as the scope of matters addressed by it. Numerous IOSCO members have taken steps to adhere to the MoU and it is anticipated that adherents will invoke its provisions and the operational procedures it organizes frequently.

Additionally, according to the Market Abuse Directive, competent authorities of the EU Member States shall co-operate with each other whenever necessary for the purpose of carrying out their duties. Competent authorities of one Member State shall render assistance to competent authorities of other EU Member States. In particular, they shall exchange information and co-operate in investigations of insider trading and market manipulations. Where necessary, the competent authorities are expected to take immediately the necessary measures to gather the required information. A competent authority of one EU Member State also may request that an investigation be carried out by the competent authority of another EU Member State, on the latter's territory. It may further request that some of its own personnel be allowed to accompany the personnel of the competent authority of that other EU Member State during the course of the investigation.

2.7. Educational activity.

Supervisory authorities and self-regulatory organizations should undertake educational activities relating to insider trading. The target group of such activities is quite wide and it includes not only investors, but also all market participants and law enforcement authorities.

2.7.1. Investors

Obviously, the more educated investors are in a jurisdiction, the smaller the potential for fraud. Educated investors are less likely to be misled by rumors and other "inside" information (particularly if there is a defined method for the dissemination of information). Educated investors also are less likely to trade on inside information as they will be aware of the consequences of violations of insider trading regulations. It would be extremely difficult for an educated investor to claim that he was unaware of the confidential and material nature of the inside information or that he was unaware of the prohibition against trading on inside information.

³ IOSCO Public Document No. 126, IOSCO Multilateral MOU, IOSCO (May 2002).

2.7.2. Market participants

Similarly, market participants that are aware of potential sanctions are less likely to engage in insider trading activity. The educational activity directed to them should be focused on promoting ethical rules and informing them about the possible consequences of wrongdoing (not only regarding sanctions that may be imposed by a supervisory authority or court, but also relating to the societal interests associated with the proper operation of markets). Market participants should be aware that insider trading is not acceptable behavior, not only because a violator can be punished, but also because it impairs broader societal interests in the proper functioning of markets that support economic activities in the real economy. Training courses for investors, market participants and professional associations in the securities sector should stress that a necessary component of an effective civil society is the observance of ethical standards of behavior in the marketplace, both in general terms and specifically relating to the use of inside information.

2.7.3. Law enforcement authorities

The level of expertise among prosecutors and judges is an important factor in the efficacy of enforcement activities by authorities other than the regulatory or supervisory agency (i.e., in civil or penal proceedings). The complexity of insider trading schemes, which can involve the use of sophisticated instruments (futures, options) or investment techniques (short selling) makes it difficult for non-professionals to understand how the defendant was profiting from the scheme or (which is even more difficult) how he was avoiding losses. In this regard, it is important for law enforcement personnel to understand the pernicious nature of insider trading activity and the extent to which it can undermine public confidence in the operation of markets. To address these problems, training courses for law enforcement authorities should be arranged on continuous basis by regulatory and supervisory authorities. These courses would be most effective if the jurisdiction also had created special units of prosecutors and judges for dealing with capital market crimes.

3. Duties of the companies exposed to insider trading activity and of SROs

3.1. Disclosure requirements of issuers

The basic provisions of law in every jurisdiction impose an obligation on issuers of securities admitted to listing on regulated markets to inform the public about facts or events that are likely to have a significant influence on the price of their securities. Such facts or events usually concern the company's field of activity that might have an impact on its business, assets or earnings. In the case of bond issuers, the facts or events also may relate generally to the issuer's capacity to meet its obligations.

Issuers whose securities have been admitted to trading on a public market are generally required to communicate such facts or events to the entity supervising the market and to the company managing the exchange (or other market at which the security is traded).

Regulatory authorities often have the ability, on the motion of the issuer, to exempt the issuer from an obligation to disclose significant information to prevent the issuer from suffering damages with regard to its legitimate interests. When granting such exemptions, regulatory authorities usually take into account the possible impact of the information on the price of the issuer's securities, the importance of maintaining the confidentiality of the

information for the issuer's business and the issuer's internal procedures for handling inside information.

Strict disclosure requirements limit the scope of inside information and the time during which the information can be kept non-public, limiting in this way the potential for insider trading.

3.2. Protection of inside information

Regulations in some jurisdictions impose an obligation on issuers of securities admitted to trading on a regulated market to adopt internal rules preventing inside information from becoming available to persons other than those needing it. In particular, internal procedures should make possible the identification of persons who received inside information and the time when they received it. The Austrian Financial Market Authority has the right to determine by decree the principles governing the communication of information within a company, so as to prevent insider trading. Additionally, the Market Abuse Directive provides for the adoption of implementing measures regarding the conditions for the drawing up of a list of persons having access to inside information. According to Danish regulations, "public authorities and undertakings, including securities dealers, lawyers and accountants who - by virtue of the exercise of their profession or business - regularly may come into possession of inside information, shall lay down similar rules. Internal rules issued, shall upon request be submitted to the individual stock exchange or authorized market and the Supervisory Authority."

3.3. Disclosure of insiders' trades

In a majority of jurisdictions, there are strict requirements concerning the release of information on the trades of insiders in the securities related to "their" company. By virtue of such requirements, investors can track insiders' transactions, which is particularly important regarding information that is not (yet) material enough to be reported, but which, however, triggers investment activity by insiders. In some jurisdictions, regulations also have been adopted that limit the ability of insiders to earn short-term profits from their trading activities. In cases where such profits are earned in violation of the regulations, they must be disgorged (although they are required to bear any losses).

3.4. Limiting the trading possibilities of insiders

3.4.1. Trading restrictions on insiders

Sometimes not only regulations, but also internal rules limit trading by members of the board, managing directors and other employees for their own or third party account in the issuer's securities, as well as in any financial contracts based on those securities. To enforce such internal rules, requirements are introduced concerning information on insider's investment accounts and transactions concluded by insiders. In some respects, such internal regulations are much easier to create and enforce than provisions of law.

In Thailand, internal provisions "would prohibit any person, who by virtue of his office or position normally has access to corporate inside information that has not yet been disclosed to the public, from purchasing and then selling, or selling and then purchasing, securities of the company within a certain period of time." In Hungarian regulations, the scope of prohibited activities and the institutions the restriction applies to are much wider.

“With the exception of public offers, executives of an issuer shall not conclude any transaction for the securities issued by the issuer in the period from the statement date of the balance-sheet of the relevant year up to the date of approval of the annual report. This rule shall be applied to persons from among the employees employed by the issuer and the persons defined in the law who participate in preparing the balance sheet. Receivers, liquidators, and fiduciaries and the person in charge of winding up shall not conclude transactions for their own benefit regarding the issuer's self-issued securities affected by their activities.”

Comprehensive regulations concerning trading restrictions imposed on insiders also have been introduced in Finland. According to the Guidelines for Insiders of the Helsinki Stock Exchange, a listed company must define the period when primary insiders and the persons associated with them may not trade in securities issued by the company as the time prior to the publication of an interim report and financial statement bulletin of the company. The period shall cover at least 14 days or if the company publishes its results information at six-month intervals, the period shall cover at least 21 days. The restriction on trading also applies to derivatives contracts, the underlying of which is a share of a company or a security entitling the holder to a share in a company under the Companies Act. Further, pursuant to the Guidelines for Insiders of the Helsinki Stock Exchange, the drawing up of a project-specific register on insiders is recommended when a company expressly defines an issue or arrangement under preparation as a project. The Finnish Financial Supervision Authority also must have the right to access information relating to the management of project-specific inside information within the company. Furthermore, the Finnish Association of Securities Dealers’ has prohibited short-term trading by members of management or personnel of a member organization or persons associated with them. An investment is deemed a short-term investment when the time between the acquisition and disposal, and correspondingly, between the disposal and acquisition, is less than three (3) months.

3.4.2. Preventing insider trading by intermediaries

The most significant issue relating to the behavior of intermediaries with respect to insider trading relates to their receipt of orders indicating potential insider trading activity. The issue is very delicate because the intermediary has two good reasons to accept such an order: 1) to earn the associated commission, and 2) to avoid a law suit and a potential obligation to compensate a customer who does not earn a profit on a trade due to the intermediary’s intervention. The intermediary also has two good reasons not to accept such an order: 1) to avoid aiding and abetting insider trading, and 2) to avoid conducting business with unethical persons who may act as unethically towards the intermediary as they are acting unethically vis à vis the market. However, certain intermediaries may chose to give greater weight to the reasons motivating them to conclude the trade for the customer over the reasons motivating them not to do so. For these reasons, many jurisdictions have introduced regulations to prevent intermediaries from participating in the execution of orders that they suspect are based on inside information and imposing appropriate sanctions in case these regulations are not observed.

A good example of a prohibition against aiding and abetting insider trading that addresses the need not to prevent legitimate trading is that contained in Danish regulations: “if a security dealer knows or assumes that the one who wants to buy or sell securities is in possession of inside information, the securities dealer shall not participate in the completion of the transaction.” Notwithstanding this provision, securities dealers are to pursue normal

business if such business is carried out on behalf of a client and as a normal part of the execution of such client's order or as a normal part of their function as market-maker in the security concerned.

3.5. Possible actions by the issuer in cases of insider trading activity

If the situation on the market indicates that someone is trading on inside information, if possible, the issuer should release the inside information to the market, thereby allowing all investors to make their investment decisions based on the same information and, in this way, stopping the insider trading activity. It also bears noting that, in a similar situation, where market activity indicates that someone may be trading on inside information and there is no such information, the issuer should be encouraged to indicate that no such information exists, stopping in this way possible price manipulation activity. In some countries, (e.g., Spain) the regulator does not need to encourage the issuer to make disclosure, since the regulator is empowered to disclose such information on its own subsidiarily. According to the Market Abuse Directive, if the issuer discloses the inside information to any unauthorized party, “it must make complete and effective public disclosure of this information (...) promptly.”

An issuer also should cooperate with the regulatory authority regarding potential cases of insider trading by passing to the regulator immediately all data concerning the persons who were or could have been in the possession of inside information.

3.6. The role of the SROs

Self-regulatory organizations (SROs) can take a role in adopting insider trading regulations primarily in the following areas: 1) defining disclosure requirements, 2) defining procedures for handling inside information, 3) defining restrictions concerning trading by insiders, 4) limiting possibilities of trading based on inside information, and 5) education. All of these areas were presented above, but it should be stressed that, in jurisdictions that rely on SROs, the efficacy of the SRO's fulfillment of that role in regulating insider trading is crucial. In such jurisdictions, the SRO's adoption of internal regulations, based on contractual obligations, provides another mechanism to require and enforce appropriate behavior on the market in addition to more formal requirements set out in law.

4. Conclusions

Several important conclusions can be drawn from the foregoing comparison of jurisdictions' regulations regarding insider trading. Consequently, the EMC suggests the following guidelines for jurisdictions to consider when adopting or amending insider trading regulations. These guidelines are based on the experiences of particular countries, reference to which is made above. For a more detailed analyses of the solutions adopted in particular jurisdictions, a reading of the second part of this document is recommended.

4.1. Definition of inside information

A definition of inside information should address issues relating to the confidentiality and materiality of the information.

To make the criterion of **confidentiality** clear, the following concepts should be considered:

- strict disclosure requirements (see section 3.1.);
- the procedure for making information public (in some jurisdictions, it would be appropriate that the regulatory authority nominate a specified news agency responsible for dissemination of issuers' reports - see section 1.1.1.1.);
- the imposition of trading halts or requirement for insiders not to trade until investors have the opportunity to assess and act on published information (see section 1.1.1.2.);
- the reporting of insiders' trades (see section 3.3.);
- restrictions on insider trading in periods close to a release of inside information (see section 3.4.1.);
- rules to prevent intermediaries from accepting orders indicating possible insider trading activity (see section 3.4.2.);
- rules to require issuers to adopt procedures for handling inside information which would make it possible to determine the identity of persons who acquired inside information and the time at which they acquired it (see section 3.2.).

To make the criterion of **materiality** clear, the following concepts should be considered:

- the adoption of a catalogue of events in companies that are deemed to be material (see section 1.1.2.1.);
- the adoption of provisions establishing that a movement of the price of a security subsequent to the release of inside information is a good and objective indicator of the materiality of the information (see section 1.1.2.1.);
- the adoption of provisions establishing that the behavior of a person making a trade on the basis of particular information (e.g., that the investor concluded an unusually large transaction), is evidence that, in his or her understanding, the information was material (see section 1.3.4.);
- the adoption of provisions establishing that, to be material, information must relate to the issuer or to the securities listed on a regulated market (see section 1.1.2.2.);
- the adoption of provisions establishing that, with regard to commodities markets, information is material if it may influence the price of the underlying contracts (see section 1.1.2.2.).

4.2. Definition of insider

In setting out the definition of an "insider," the following issues should be addressed:

- Whether all persons having direct access to inside information (not only the management of the issuer) should be considered primary insiders (see section 1.2.1.).
- Whether primary insiders should be presumed to be in possession of inside information and to be aware of its confidentiality and materiality (see section 1.2.1.).
- Whether the sanctions imposed on primary insiders should be more severe than those imposed on secondary insiders (see section 1.2.).
- Whether all persons who acquired inside information from the primary insiders should be considered secondary insiders (see section 1.2.2.).
- Whether secondary insiders should be included within the definition of insider trading activity to the same extent as primary insiders and the appropriate level of sanctions against secondary insiders (see sections 1.2.2.1. and 1.2.2.2.).

4.3. Prohibited activities

In designing the prohibitions included within the scope of insider trading regulations:

- Trading based on inside information, sharing inside information, and making investment recommendations based on inside information all should be prohibited (see section 1.3.).
- Such prohibition should not be limited only to activity on a regulated market (see section 1.3.1.).
- The activities of secondary insiders should be included within the prohibition; in particular, there should be no exemptions for them relating to the sharing of inside information or making investment recommendations (see section 1.3.2.).

4.4. Sanctions

In setting out the sanctions applicable to insider trading, the following issues should be considered:

- Whether civil, administrative or penal sanctions should be imposed for insider trading violations (see section 2.4.). Having in mind the necessity to prove misconduct “beyond a reasonable doubt” when penal sanctions are imposed, some jurisdictions may conclude that civil or administrative sanctions are preferable (see sections 2.4.2. and 2.4.3.).
- Whether a lower level of sanctions should be imposed on secondary insiders (see section 1.3.2.).

4.5. The Powers of Regulators

Regulatory authorities should have the necessary powers:

- To obtain information necessary to the conduct of an insider trading investigation (see sections 2.2. and 2.3.).
- The forgoing powers should not be limited to regulated entities (see sections 2.2 and 2.3.).

4.6. The role of the SROs

Jurisdictions that allocate a regulatory competence to, or that otherwise rely on, self-regulatory organizations to address issues relating to insider trading should:

- Require or encourage the SRO to take a role in preventing and punishing insider trading (see section 3.6.).
- Require or encourage the SRO to adopt rules requiring issuers to adopt internal procedures for handling inside information (see section 3.2.).
- Require or encourage SROs that are professional associations of persons who regularly come into possession of inside information to adopt ethical rules and codes of conduct regarding the handling of inside information (see sections 2.1. and 3.4.1.).
- Require or encourage SROs that are associations of intermediaries to adopt rules prohibiting the acceptance of orders in circumstances that indicate that the customer is intending to violate insider trading regulations (see section 3.4.2.).

- Consider whether the adoption of rules by SROs, based on contractual obligations, could provide an effective mechanism to require and enforce appropriate behavior on the market in addition to more formal requirements set out in law (see section 3.6.).
- Encourage SROs to engage in educational activities promoting fair dealing on the market and increasing awareness of the consequences of trading on inside information. Such activities could be directed towards investors, market participants and law enforcement authorities (see section 2.7.).

Part Two: The Implementation of insider trading rules in the legislation of particular jurisdictions

1. Albania

Insiders

The Albanian Securities and Exchange Commission uses the following definition concerning insider trading: A person who deals, or counsels or procures another person to deal, in securities of a company using information of which he has any knowledge:

- a) that is not publicly available; and
- b) that would, if it were publicly available, materially affect the price of the securities,

commits an offence provided by the Penal Code.

Penalties

According to Albanian legislation, there are two types of sanctions:

- administrative,
- penal (there are two types that can be classified as: penal contravenes and crimes).

An administrative sanction includes a fine imposed independently by the competent administrative body. A penal sanction comprises a fine or a detention imposed by the Court. The Penal Code provides also for additional punishments that can be inflicted during the same proceedings. Some of these additional punishments have an administrative nature, like the abrogation of the right to exercise a certain profession. Other laws can provide limitations of the rights to act of persons that have been punished according to the Penal Code.

Administrative powers

The Commission can take up the following activities regarding potential insider trading:

- a) the collection of information concerning suspicious transactions,
- b) the verification of information in such manner as it may specify,
- c) the inspection, under conditions of secrecy, of any document relating to the business to which the license applies,
- d) investigations of other matters.

The Commission, within the framework of an inquiry/investigation concerning insider trading:

- is entitled to call and examine a witness before the presentation of the case to the prosecutor,
- is entitled to demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case, before the presentation of the case to the prosecutor,

- is entitled to search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case before instituting an inquiry/investigation by on other authority,

but:

- is not entitled to demand the compulsory appearance of a witness,
- is not entitled to appeal to a judicial authority or the police with a request to carry out a search,
- cannot issue an order of provisional detention,
- cannot appeal to a judicial authority or the police with a request to apply the above measures.

The Commission, in relation to a suspected person committing an offence, is not entitled to issue an order freezing assets, but can appeal to a judicial authority or the police to take this measure. The Commission also is neither entitled to tap the phone or bug the house of a suspect nor to appeal to a judicial authority or the police to apply these measures.

The Prosecutor can act in judicial proceedings relating to insider trading in the following ways: 1) the filing of a statement of charges to the Court, 2) the drawing up of a statement of charges, and 3) the institution and conduct of an inquiry/investigation.

2. Austria

Inside information

Central provisions for the abuse of insider information under Austrian law are defined in the Austrian Stock Exchange Act (ASEA). The ASEA distinguishes between “primary insider” and “secondary insider.” Inside information is defined as information consisting of specific confidential facts related to securities or an issuer, which may considerably influence the price of securities if made public. Insider securities are instruments, which have been admitted to trading on a market that is regulated and overseen by an agency recognized by law, and this market is accessible to the public, either directly or indirectly. Such instruments may include: shares, interim certificates, profit sharing certificates, debt securities, mortgage-backed bonds, municipal credit-backed bonds, fixed-rate medium terms notes, notes, certificates of investment funds, participation certificates, contracts or rights to subscribe for them, futures contracts, options and index contracts.

Administrative powers

Regulations provided in the Austrian Securities Supervision Act (ASSA) empower the Austrian Securities Authority (ASA) to prevent the misuse of inside information, and to assist in solving cases of abuse as well as to contribute to the prosecution of such cases. Thus, the ASA has the right to investigate such cases but the judgment is given to the criminal court.

Primary insiders are punishable by law to a prison sentence of not more than two years or to a fine, while secondary insiders are punishable by law to a prison sentence of not more than one year or a fine. In addition, members of a stock exchange can be expelled from the stock exchange.

Providers of investment services, as is stated in the ASSA, must have adequate internal control procedures to prevent insider trading. The same is required from issuers, banks, members of the stock exchange, and professional investors (i.e., insurance companies and pension funds).

The ASA has the right to determine by decree the principles for the communication of information within the company, so as to prevent insider trading.

Issuers of securities admitted to listing on the Official or Semi-Official Market are obliged to inform the public about new facts taking effect in the company's field of activity in the event that, due to their impact on the course of business, assets or earnings, they are likely to have a significant influence on the prices of the securities or, in the case of bonds, facts that could hinder the issuer's capacity to meet its obligations. The ASA may exempt the issuer from the obligation to disclose this information if this serves to prevent the issuer from suffering damages with regard to its legitimate interests.

3. Bangladesh

Insider trading

The Bangladesh Securities and Exchange Commission uses the following definition: Insider trading means the buying, selling or otherwise transferring of securities by an insider based on the undisclosed price sensitive information of the issuer company.

The issues related to insider trading are subject to the following administrative sanctions:

- a suspension or cancellation of registration if the offender is a market intermediary,
- the SEC taking the concerned securities into custody,
- a restriction on the transfer of concerned securities for a certain period.

Administrative powers

The Commission institutes and conducts an administrative proceeding concerning insider trading in relation to relevant persons. These are: the director/sponsor of a company and its major shareholders, its managing agent, banker, auditor, adviser, officer or employee, or any other person who could get inside information because of the relationship with any of the above persons. The Commission conducts the administrative proceedings independently.

The Commission, within the framework of an administrative proceeding concerning the insider trading, is entitled to:

- call and examine a witness,
- demand a compulsory appearance of a witness,
- demand a delivery and retaining of things (documents or other objects), which may constitute evidence in the case,
- search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case.

In relation to a suspected person, the Commission is entitled to appeal to a judicial authority or the police with a request for an order of provisional detention. The Commission is not entitled to issue an order freezing assets, but can appeal to a judicial authority or the police with a request to apply these measures. The Commission is also entitled to appeal to a judicial authority or the police to tap the phone and bug the house of a suspect. Imposing an administrative sanction does not eliminate the possibility of imposing a penal sanction.

The issues related to insider trading are subject to a penal sanction of imprisonment of up to 5 years, a fine, or both. The public prosecutor acts in judicial proceedings in cases concerning insider trading and draws up a statement of charges, but the Commission files the statement of charges to the Court in such cases.

4. Bulgaria

Inside information

The proper administrative body is the Bulgarian National Securities Commission. For the purposes of the Law on Public Offering of Securities, inside information is any data for which no obligation exists to be made public or which has not been made public yet, and which relates to:

1. a public company or issuer of securities traded on regulated markets,
2. to the securities itself,
3. other data which, if made public, might have a significant effect on the price of the securities traded on regulated securities markets.

Insiders

For the purpose of this law, an insider is considered to be:

1. any member of a management or supervisory body of a company;
2. any member of the management or supervisory body or unlimited liability partner in a commercial company related to the company.

Also considered an insider is any person holding, directly or through related persons, more than 10 per cent of the votes in the general meeting of a company, where that person has access to or possesses inside information, as well as any other person who, due to his profession, activities, duties or relations with a company or with the above persons has access to or possesses inside information.

Insider trading

An insider shall be prohibited from:

- transferring for his own account or for the account of a third party the securities to which the inside information possessed by him relates;
- transmitting the inside information possessed by him to a third party not having the capacity of an insider without the consent of the general meeting of the company to which such inside information relates;

- recommending that a third party, on the basis of the inside information possessed by him, acquire or transfer for that party's own account or for the account of someone else the securities to which the inside information possessed by the insider relates.

The prohibition shall also apply to any person who, not being an insider, with full knowledge of the facts, possesses inside information stemming directly or indirectly from an insider. Any person entering into transactions in securities traded on regulated securities markets must declare before the investment intermediary whether he possesses inside information.

Administrative powers

The Commission conducts an instituted administrative proceeding independently. Within the framework of an administrative proceeding concerning insider trading, the Commission is not entitled to call and examine a witness, nor entitled to demand a compulsory appearance of a witness. The Commission is entitled to demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case. Although it is not entitled to search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case, it can appeal to a judicial authority or the police with a request to carry out a search.

In relation to a suspected person, the Commission is not entitled to issue an order of provisional detention. In relation to a suspected person, the Commission is not entitled to issue an order freezing assets. It cannot issue an order to tap the phone and bug the house of a suspect. In all the above-mentioned circumstances, the Commission provides the evidence to the public prosecutor and he undertakes measures within the framework of his competence.

Insider trading is subject to an administrative sanction. A penalty from 2000 to 15000 Leva shall be imposed on any person who commits or allows an offence of insider trading if the act does not constitute a crime. The penalty imposed on legal persons ranges from 10000 to 50000 Leva. The Commission institutes and conducts an administrative proceeding concerning the insider trading irrespective of an offender.

Imposing an administrative sanction does not eliminate the possibility of imposing a penal sanction. The reverse situation is also true.

5. China

Insider Trading

According to the Securities Law of the People's Republic of China, persons with knowledge of inside information on securities trading are prohibited from taking advantage of such inside information to engage in securities trading.

The following persons are deemed persons with knowledge of inside information on securities trading:

- a. directors, supervisors, managers, deputy managers and other senior management persons concerned of companies that issue shares or corporate bonds;
- b. shareholders who hold not less than 5 percent of the shares in a company;

- c. the senior management persons of the holding company of a company that issues shares;
- d. persons who are able to obtain company information concerning the trading of its securities by virtue of the positions they hold in the company;
- e. staff members of the securities regulatory authority, and other persons who administer securities trading pursuant to their statutory duties;
- f. the relevant staff members of public intermediary organizations who participate in securities trading pursuant to their statutory duties and the relevant staff members of securities registration and clearing institutions and securities trading service organizations; and
- g. other persons specified by the securities regulatory authority under the State Council.

Inside information

Inside information is information that has not made public and which, in the course of securities trading, concerns the company's business or financial affairs or may have a significant effect on the market price of the company's securities. The following information belongs to inside information:

- a. company plans concerning a distribution of dividends or an increase in capital;
- b. major changes in the company's equity structure;
- c. major changes in security for the company's debts;
- d. any single mortgage, sale or write-off of a major asset used in the business of the company that exceeds 30 percent of the said asset;
- e. potential liability for major losses to be assumed in accordance with law as a result of an act committed by a company's director(s), supervisor(s), manager, deputy manager(s) or other senior management person(s);
- f. plans concerning the takeover of listed companies; and
- g. other important information determined by the securities regulatory authority under the State Council to have a marked (significant) effect on the trading prices of securities.

No person having knowledge of inside information on securities trading of a company or any other person who has illegally obtained such inside information may purchase the securities of the company or sell such securities he is holding, divulge such information or counsel another person to purchase or sell such securities.

Legal Liability

A person who has knowledge of inside information on securities trading or a person who illegally obtains such information and purchases or sells such securities, divulges such information, or counsels another to purchase or sell such securities, shall be ordered to dispose of the illegally obtained securities according to law. His illegal gains shall be confiscated and, in addition, he shall be imposed a fine of not less than the amount of, but not more than, five times the illegal gains, or a fine of not more than the value of the securities illegally purchased or sold. If the offence constitutes a crime, criminal liability shall be pursued according to law. If a staff member of the securities regulatory authority engages in insider trading, he is given a heavier punishment.

China Securities Regulatory Commission has signed 18 MOUs with 17 authorities in the following 16 countries: Hong Kong, USA, Singapore, Australia, Britain, Japan, Malaysia,

Brazil, Ukraine, France, Luxembourg, Germany, Italy, Egypt, Republic of Korea, and Romania.

6. Croatia

Inside information

Insider trading is regulated by the Law on issuance and trading of securities. The definition of inside information is as follows: all facts that are not known to the public and which pertain to one or more issuers of securities or to the securities themselves and which if made public would probably influence their price.

Insiders

Insiders are persons who possess inside information. They shall be all those persons who learn inside information in performance of their work, tasks, profession, or duty. Members of management, the boards of directors, and other equivalent bodies of issuers of securities shall be considered persons who possess inside information pertaining to the issuer and the company which the issuer controls.

Persons who possess inside information and persons who have learned such information from them and who are aware of the nature of that information must not:

1. realize the advantages offered by access to inside information in buying or selling securities directly or indirectly which are traded on the territory of the Republic of Croatia or securities issued by issuers registered in the Republic of Croatia, regardless of where they are traded,
2. divulge inside information to third parties,
3. realize the advantages offered by access to inside information in furnishing advice to third parties on the purchase or sale, directly or indirectly, of securities traded on the territory of the Republic of Croatia or securities issued by issuers registered in the Republic of Croatia, regardless of where they are traded.

Persons who possess inside information may divulge that information only if they are authorized to do that as part of their business activity or duty.

The persons possessing inside information shall be required to report every transaction whereby they acquire or release, directly or indirectly, securities of the issuers cited above to the issuer, to the Commission and to the exchange on which such securities are listed and must do it within seven days from the date the transaction takes place.

Issuers of securities traded on the territory of the Republic of Croatia must promptly inform the public of all information pertaining to circumstances or decisions which constitute material facts. When a company is unable to make the information public, because it would jeopardize his legitimate interests, it shall inform the Commission, which may exempt it from this obligation, but only for a period not longer than three months.

The Commission may publish regulations in order to prevent the misuse of insider information.

Penalties

A securities company shall commit a misdemeanor, relating to insider trading, if it uses privileged information or divulges it to others. An issuer of securities shall commit a misdemeanor, if it omits to publish material facts. A fine of up to 400,000 Kunas may be pronounced against the legal entity committing a misdemeanor.

A member of the management or board of directors shall be subject to a penalty for a misdemeanor if, under the provisions of the Law or the company's bylaws, he is the person actually responsible within the company for making the significant information public. In such circumstances, a fine of up to 8,000 Kunas could be imposed, but if a serious violation of regulations has been committed in order to realize an unlawful gain, the fine may be as high as 40,000 Kunas.

An individual shall commit a misdemeanor relating to insider trading if the individual possesses inside information and acts contrary to the provisions of the Securities Law.

Whosoever uses or divulges to others privileged information contrary to the provisions of the Securities Law shall be subject to a fine of up to 400,000.00 Kunas or imprisonment not to exceed one year. The maximum fine for a misdemeanor of this kind shall be 400,000.00 Kunas.

When a sizable material loss has occurred due to the commission of the crime regarding insider information or the perpetrator has realized a property gain, he shall be subject to imprisonment not to exceed two years.

7. Cyprus

Insider trading

The Central Bank of Cyprus defines insider trading in the following way: engaging, by a person or persons who is or are in possession of confidential information either directly or through some other person, in any kind of trading in shares, the values of which are likely to be affected by this information.

Administrative powers

The Attorney General acts as a public prosecutor in judicial proceedings in cases concerning insider trading. He draws up a statement of charges in such cases and files a statement of charges to the Court. The Central Bank of Cyprus and the Attorney General institute and conduct an inquiry/investigation concerning insider trading. The inquiry/investigation is conducted independently. These institutions are entitled to call and examine a witness, but the Central Bank of Cyprus is not entitled to demand a compulsory appearance of a witness. The Central Bank is also entitled, within the framework of an inquiry/investigation concerning insider trading, to demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case. It could also search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case.

The Central Bank cannot, in relation to a suspected person:

- issue an order of provisional detention,
- appeal to a judicial authority or the police with a request to apply this measure,
- issue an order freezing assets,
- appeal to a judicial authority or the police with a request to apply this measure,
- issue an order to tap the phone and bug the house of a suspect,
- appeal to a judicial authority or the police to apply the above measures.

Insider trading is not subject to an administrative sanction, but is subject to penal sanctions of imprisonment for seven years or a fine of up to Cł 50.000 or both.

8. Czech Republic

In the Czech Republic, matters of insider trading are regulated in the Securities Act and the Criminal Code.

Inside information

For the purposes of the Securities Act, information that is considered confidential includes any information which:

- (a) has not been made public;
- (b) concerns one or several capital market instruments admitted to trading on a public market, or one or several issuers or other facts, which are significant for changes of the official (market) price or another price of such an instrument;
- (c) if made public, is likely to have a significant effect on the official (market) price or another price of the capital market instrument admitted to trading on a public market as referred to under subsection (b) or the yields from such an instrument.

Insiders and Prohibited Activities

A person who, due to his or her employment, profession, position, share in the registered capital or voting rights of the issuer, or due to his or her job or in relation to the performance of his or her duties, has access to confidential information and acquires such information (hereafter referred to as the “informed person”), is prohibited from using such information for his or her own benefit or for the benefit of another person, especially to acquire or dispose of the capital market instrument to which such information relates.

This prohibition also applies to persons who have acquired confidential information, directly or indirectly, from the informed person, and who know that such information is confidential.

All informed persons are prohibited from disclosing confidential information and must prevent access to such information by any other person, unless disclosure of such information is made in the normal course of the exercise of their duties or employment. An informed person, in particular, is not allowed to recommend to any other person that he acquire or dispose of the investment instrument, which such information concerns.

The Securities Act has a special provision prohibiting of the use of confidential information by securities dealers / brokers.

Exemptions

The provisions do not apply to operations carried out by the Czech National Bank within the scope of its monetary or foreign exchange policy, or in relation to the public-debt management policies of the Czech Republic.

Administrative powers

In the event of a breach of the Securities Act, the Czech Securities Commission is competent to impose administrative sanctions. The Czech Securities Commission may impose measures aimed at eliminating the discovered shortcomings or impose a fine of up to 20 million Czech crowns or may publish a notice of the discovered shortcoming.

Any market participant suspected of a breach of the Securities Act mentioned above is subject to the supervisory powers of the Securities Commission. These include the right to conduct an on-site inspection or commence administrative proceedings against the person in breach. Within the framework of the administrative proceedings, the Securities Commission is entitled to summon witnesses or require documents to be presented.

Should the facts gathered by the Securities Commission give rise to a suspicion that a criminal act has been conducted, the Securities Commission is obliged to file a criminal complaint with the relevant police authorities.

The Criminal Code includes a general provision on the misuse of information in commercial relations, which is also applicable to grievous cases of insider dealing. Depending on the amount of benefit the culprit has gained from violating the insider trading rules, he/she can be sentenced to up to twelve years of imprisonment.

9. Denmark

The Danish legislation concerning market abuse includes provisions relating to inside information and price manipulation. Regulations refer to:

- securities, which are admitted for listing or trading on a stock exchange or which are dealt in an authorized market or similar regulated markets for securities,
- unlisted instruments attached to one or more securities which are admitted for listing or trading on a stock exchange or which are dealt in an authorized market.

Inside information

According to Danish regulations, “inside information” means non-public information on issuers of securities, securities or market conditions with respect to such securities, which would be likely to have an effect on the pricing of one or more securities, if such information was made public. Information shall be considered made public when a relevant and general conveyance of such information has been made to the market. Information submitted to a

stock exchange shall be considered made public once this stock exchange has disseminated such information.

Insider trading

A purchase, sale or recommendation to buy or sell a given security shall not be performed by any person dealing with inside information, which could be of importance to the transaction in question. If a security dealer knows or assumes that the one who wants to buy or sell securities is in possession of inside information, the securities dealer shall not participate in the completion of the transaction. Notwithstanding the above provision, securities dealers are to pursue normal business if such business is carried out on behalf of a client and as a normal part of the execution of such client's order or as a normal part of their function as market-maker in the security concerned. The provisions do not apply to transactions carried out in pursuit of monetary, exchange rate or public debt-management policies by a sovereign State, its central bank or by the person acting on their behalf.

Any person dealing with inside information is prohibited from disclosing such information to any other party unless such disclosure is made within the normal course of the exercise of his employment, profession or duties. Issuers of securities admitted for listing or trading on a stock exchange or for trading at an authorized market shall lay down internal rules for the purpose of preventing inside information from becoming available to others than those needing such information. Public authorities and undertakings, including securities dealers, lawyers and accountants who - by virtue of the exercise of their profession or business - regularly may come into possession of inside information, shall lay down similar rules. If the undertakings are organized as partnerships, limited partnerships or the like, the internal rules shall also apply to the owners of such undertakings. Internal rules issued shall, upon request, be submitted to the individual stock exchange or authorized market and the Supervisory Authority.

10. France

The insider trading offence is regulated by the Ordinance Instituting a Commission des Operations de Bourse and Concerning the Disclosure of Information to holders of Securities and the Publicizing of Certain Stock Exchange Transactions, as well as being specified in the COB's rules.

Inside information and an offence

The offence is the use by insiders of privileged information in order to realize or allow the realization, either directly or through a third party, of one or several transactions on a financial instrument traded on a regulated market before the public has knowledge of the privileged information. Privileged information is precise information, unknown by the public, likely to have an influence on the stock price and the motivation for a share transaction.

Insiders

An insider may be:

- the Chairman, the General Managers, or the members of a company's Board of Directors,

- the members of the Management Board and the members of the Supervisory Board (for companies having this corporate structure),
- the spouses of these persons,
- persons having, within the scope of their profession or functions, privileged information on the outlook or the situation of a company, whose shares are traded on a regulated market, or information on the evolution prospects of a financial instrument admitted to a regulated market.

Penalties

The act of insider trading is punishable by two years imprisonment and a fine of 10 million FRF, which sum can be increased up to ten times the profit realized, but which may not in any case be less than the profit realized.

11. Finland

Inside information

According to the Penal Code, “inside information” is information which:

1. refers to a fact relating to a security subject to public trade or to other trading procedure organized on a professional basis and available to the public in order to bring together buyers and sellers of securities,
2. has not been published or which has not otherwise been available in the market,
3. is likely to have a material effect on the value or price of the said security.

Information produced by combining information available in the public domain for private purposes shall not be deemed inside information.

The abuse of inside information in the Penal code

According to the Penal Code, anyone who in order to gain material benefit for himself or for another willfully or through gross negligence makes use of inside information relating to a security subject to public trade or to other trading procedure organized on a professional basis and available to the public in order to bring together buyers and sellers of securities by:

1. disposing of or acquiring the security on his own behalf or on behalf of another, or
2. directly or indirectly advising another party in a transaction relating to the security,

shall be sentenced for *abuse of inside information to a fine or to imprisonment not exceeding two years*. An attempt to commit such a violation shall be punishable.

If, in the willful abuse of inside information,

1. the purpose is to acquire an exceptionally great benefit or considerable personal gain,
2. the offender, when committing the offence, makes use of his highly responsible position as an employee or representative of the Central Securities Depository, a clearing house, a securities intermediary, a stock exchange, an option corporation or of an issuer of a

security or an organization of the same group or in performing a task commissioned by them, or

3. the offence is committed with exceptional deliberateness,

and if the abuse of inside information is deemed gross also when assessed as a whole, the offender shall be sentenced for *gross abuse of inside information to imprisonment of at least four months and at most four years*. An attempt to commit such a violation shall be punishable.

Insider securities

The provisions of the Penal Code apply to a security, which is transferable and issued or meant to be issued to the public together with several other securities with similar rights. This may, for example, be a certificate that is issued for:

1. a share or other participation in a company or the right to a dividend, interest or other proceeds or to subscription connected thereto;
2. a unit in a bond or other corresponding obligation of the debtor or the right to interest or proceeds connected to the said unit or obligation;
3. a combination of the rights referred to in subparagraphs 1 and 2;
4. a right to purchase or to sell relating to the said rights;
5. a unit in a fund or a unit in an undertaking for collective investment in transferable securities comparable thereto; as well as for
6. a right other than one referred to above based on a contract or an obligation.

The provision of abuse of inside information applies only if a security stated above is subject to public trade or to other trading procedure organized on a professional basis and available to the public in order to bring together buyers and sellers of securities.

The provisions of the Penal Code on a security also apply to standardized options or futures as well as to a derivatives contract comparable to standardized options and futures, the underlying of which is a security subject to public trade or to another trading procedure organized on a professional basis and available to the public in order to bring together buyers and sellers of securities. The provisions of the Penal Code apply regardless whether an agreement has been made on the delivery of the underlying of the derivatives contract or on a compensation for the performance.

Penal liability of a legal person

The Penal Code's provisions of the corporate criminal liability which also apply to the abuse of inside information states that, a corporation, in whose operations an offence has been committed may be sentenced to a corporate fine, if a person belonging to a statutory organ or other management thereof, or exercising actual power of decision therein, has been an accomplice to an offence or allowed the commission of the offence, or if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.

Forfeiture and damages

According to the Securities Markets Act, the proceeds of abuse of inside information can be ordered forfeit to the State. The person causing damage through insider trading is also liable to compensate the damage he has caused.

Self regulation on insider trading

According to the Guidelines for Insiders of the Helsinki Stock Exchange, the listed company shall define the period, when the permanent insiders and person associated with them may not trade in securities issued by the company prior to the publication of an interim report and financial statement bulletin of the company. The period shall cover at least 14 days or if the company publishes its result information at six-month intervals, the period shall cover at least 21 days. The restriction on trading shall also apply to derivatives contracts, the underlying of which is a share of the company or a security entitling to a share under the Companies Act.

When a company expressly defines an issue or arrangement under preparation as a project, the drawing up of a project-specific register on insiders is recommended by the Guidelines for Insiders of the Helsinki Stock Exchange. The FSA shall have the right to access the information relating to the management of the project-specific inside information of the company.

Furthermore, the Finnish Association of Securities Dealers' has prohibited short-term trading for members of the management or personnel of a member organization or persons associated with them. An investment shall be deemed a short-term investment when the time between the acquisition and disposal and correspondingly between the disposal and acquisition is less than three (3) months.

Cooperation of supervisory authorities

According to the Act on the Financial Supervision Authority, the duties of the FSA of Finland shall include co-operation with other authorities supervising the financial markets. The FSA shall have the right to disclose information on the financial position, business or trade secret of an individual or an organization or on a private circumstance of an individual to another supervisory authority of the financial markets or to an institution which in its home country, by virtue of law, performs a duty similar to that of the FSA as well as to a pre-trial and prosecuting authority for the investigation of a crime.

The FSA of Finland is able to render assistance to the competent authorities of other states. The FSA shall exchange information and co-operate in investigations with other regulators. All regulatory powers that are available to FSA also can be used to assist foreign regulators. The FSA is a member of CESR and CESR-Pol and has signed a FESCO-MOU.

Planned legislative changes on insider trading

In connection with the implementation of Market Abuse Directive and the amendment of the Act on the Financial Supervision Authority, the FSA is proposing to receive a power to impose administrative sanctions. The new proposed administrative sanctions will include powers to order administrative fines and to issue admonitions and public warnings. These new administrative sanctions are proposed to be used also in the context of an abuse of inside

information and violations of other provisions imposed on insiders. Adoption of the Market Abuse Directive will also mean some new investigative powers for the FSA.

12. Germany

The German insider law is laid down in the Securities Trading Act (*Wertpapierhandelsgesetz*, hereinafter WpHG). The WpHG implements EC Directive No. 89/592 on the coordination of the rules concerning insider trading.⁴ Taking action against insider trading constitutes one of the central tasks of the BAFin (Bundesanstalt für Finanzdienstleistungsaufsicht).

Inside information

Inside information is any information which is not publicly known and which pertains either to issuers of insider instruments or to insider instruments and which, were it to become publicly known, would likely to have a significant effect on the price of the insider security (Section 13 paragraph 1 of the WpHG).

Insiders

Section 13 of the WpHG defines persons who are subject to insider rules. An insider is any person who:

1. by virtue of his membership of the management or supervisory body of the issuer, or as a personally liable partner in the issuer or in an undertaking associated with the issuer,
2. by virtue of his holding in the capital of the issuer or of an undertaking associated with the issuer, or
3. by virtue of his profession, employment or duties in accordance with the regulations,

possesses information which has not been made public relating to one or more issuers of insider securities, or to insider securities, which, if it were made public, would be likely to have a significant effect on the price of the insider security (inside information).

An analysis based entirely on publicly-known information shall not be regarded as inside information, even if it may have a significant effect on the price of insider securities.

Insider securities

Section 12 of the WpHG provides a definition of securities, which are subject to insider rules. Insider securities are securities, which are:

1. admitted to official trading, or are traded on the regulated market or the regulated unofficial market on a German stock exchange, or
2. admitted to trading on an organized market in another Member State of the European Union or in another of the Contracting States to the Agreement on the European Economic Area.

⁴ Official Journal L 334, 18/11/1989 P. 0030 – 0032 – now superseded by the Market Abuse Directive.

Securities shall be deemed to be admitted to trading on an organized market, or to be traded on the regulated market or the regulated unofficial market, if the application for such admission or such trading has been made or publicly announced.

The following shall also be regarded as insider securities:

1. rights to subscribe for, acquire or dispose of securities;
2. rights to the payment of a differential amount calculated on changes in the value of securities;
3. forward contracts on a share or fixed-interest security index or forward interest-rate contracts (financial futures) and rights to subscribe for, acquire or dispose of financial futures in so far as such financial futures are concerned with securities or relate to an index which includes securities;
4. other forward contracts entailing a commitment to acquire or dispose of securities;

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

Prohibition of insider dealing

Section 14 of the WpHG defines the prohibition of insider dealing. The insider dealing prohibition distinguishes between primary insiders (Section 14 paragraph 1 of the WpHG) and secondary insiders (Section 14 paragraph 2 of the WpHG). The terms “insider trading” and “misuse of internal information” match the definitions provided in Section 14 of the WpHG. Insiders shall be prohibited from:

1. taking advantage of their knowledge of inside information to acquire or dispose of insider securities for their own account or for the account or on behalf of a third party;
2. disclosing or making available inside information to a third party without authority to do so;
3. recommending that a third party, on the basis of their knowledge of inside information, acquire or dispose of insider securities.

A third party, who has knowledge of inside information shall be prohibited from taking advantage of that knowledge to acquire or dispose of insider securities for his own account or for the account or on behalf of others.

Publication and disclosure of price-sensitive information

Among the most important measures to prevent insider trading are the statutory publication requirements for listed companies. This comprises the ad hoc disclosure requirement (Section 15 of the WpHG) and the requirement to publish changes in major holdings of voting rights (Sections 21 – 30 of the WpHG). The requirements are as follows:

(1) An issuer of securities admitted to trading on a German stock exchange must immediately publish any information which comes within his sphere of activity and which is not publicly known if such information is likely because of the effect on the assets or financial position or the general trading position of the issuer to exert significant influence on the stock exchange price of the admitted securities or, in the case of listed bonds, might impair the issuer's ability to meet his liabilities. The Federal Supervisory Office may on application by the issuer exempt the issuer from the publication requirement if publication of the information is likely to damage the legitimate interests of the issuer.

(2) Before publishing the information referred to in paragraph (1) above, the issuer shall notify:

1. the management of the stock exchanges on which the securities are admitted to trading,
2. the management of the stock exchanges on which only derivatives within the meaning of Section 2 paragraph (2) are traded, in so far as the securities are the subject of such derivatives, and
3. the Federal Supervisory Office.

The stock exchange management may use the information of which it has been notified before publication only for the purpose of deciding whether to suspend or to cancel the determination of stock exchange prices. The Federal Supervisory Office may permit issuers domiciled abroad to effect the notification pursuant to the first sentence of this paragraph together with the publication, provided this does not adversely affect the decision of the management on whether to suspend or cancel the determination of stock exchange prices.

(3) Publication pursuant to the first sentence of paragraph (1) above shall be effected in the German language:

1. in at least one supra-regional official stock exchange gazette, or
2. by way of an electronic system for the dissemination of information which is broadly accessible to credit institutions, enterprises operating under Section 53 paragraph (1) sentence 1 of the German Banking Act, other enterprises domiciled in Germany which are admitted to trading on a German stock exchange and insurance undertakings.

The Federal Supervisory Office may permit issuers domiciled abroad to effect the publication in another language provided that sufficient information to the public does not seem to be endangered thereby. Publication in any other form may not be effected before publication pursuant to the first sentence of this paragraph. In the case of extensive information the Federal Supervisory Office may permit the publication of a summary in accordance with the first sentence of this paragraph if the complete information is available free of charge from the issuer's paying agents and if this is indicated in the announcement.

(4) The issuer shall immediately forward the publication pursuant to the first sentence of paragraph (3) above to the management of the stock exchanges covered by paragraph (2) sentence 1 numbers 1. and 2. above and to the Federal Supervisory Office, provided the Federal Supervisory Office has not permitted pursuant to paragraph (2) sentence 3 above to make the notification under paragraph (2) sentence 1 above together with the publication.

(5) The Federal Supervisory Office may require the issuer to submit information and documents in so far as this is necessary to monitor compliance with the requirements set out in paragraphs (1) to (4) above. During normal business hours, employees of the Federal Supervisory Office and persons commissioned by it shall be permitted to enter the property and business premises of the issuer in so far as this is necessary for the fulfillment of the functions of the Federal Supervisory Office. Section 16 paragraphs (6) and (7) shall apply accordingly.

(6) If the issuer fails to comply with the requirements pursuant to paragraphs (1), (2) or (3) above it shall not be liable to compensate any third party for damage resulting from such non-compliance. Claims for compensation having other legal bases shall not be affected.

Criminal sanctions

Imprisonment of up to five years or a monetary fine is the punishment for any person who purchases or sells an insider security, communicates or makes available inside information or recommends the acquisition or disposition of an insider security.

Investigations

Between 1995 and 2000 the German Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, short BAFin) established facts giving reasons to suspect insider trading in 97 cases which, in accordance with Section 18 of the WpHG, it passed on to the competent public prosecutor's office. During the above-mentioned period, 15 proceedings were terminated by orders imposing punishment, which cannot be appealed. According to the Code of Criminal Procedure orders imposing punishment are judicial decisions which are essentially equivalent to judgments but are passed without a public trial. Proceedings to obtain orders imposing punishment are instituted on request from the public prosecutor's office. In 34 cases, the proceedings were discontinued after certain obligations had been complied with (e.g. indemnification payments or payments to non-profit making organizations). Up until now, there has been one court proceeding resulting in a final conviction, or acquittal, in connection with insider trading. One hundred twenty-four cases were discontinued by the public prosecutor's office. The difference in the figures is due to the fact that contrary to the BAFin, the public prosecutor's office establishes a case for each person involved in an insider case.

New amendments to law

On 1 July 2002 the WpHG was amended and a new provision concerning the disclosure of dealing by corporate insiders was introduced (directors' dealings). Section 15a of the WpHG stipulates that dealings by members of managing and supervisory boards of listed companies and their close relatives in securities of their own companies are to be disclosed without delay. Awareness of such dealings is frequently of major importance to the market, as it can provide pointers to the assessment of business prospects by the company management. Disclosure of such dealings is a significant aid the prevention of insider trading.

13. Hong Kong

The law in Hong Kong relating to insider dealing concerning listed corporations is set out in the Securities (Insider Dealing) Ordinance ("SIDO"). Under the SIDO, there is a concept of

“relevant information.” “Relevant information” in relation to a corporation means specific information about that corporation which is not generally known to those persons who are accustomed or would be likely to deal in the listed securities of that corporation but which would if it were generally known to them be likely to materially affect the price of those securities.

Insider dealing and inside information

Insider dealing concerning a listed corporation takes place:

- (a) when a person connected with that corporation who is in possession of information which he knows is relevant information in relation to that corporation deals in any listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives) or counsels or procures another person to deal in such listed securities knowing or having reasonable cause to believe that such person would deal in them;
- (b) when a person who is contemplating or has contemplated making (whether with or without another person) a take-over offer for that corporation and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to that corporation, deals in the listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives) or counsels or procures another person to deal in those listed securities or their derivatives, otherwise than for the purpose of such take-over;
- (c) when relevant information in relation to that corporation is disclosed directly or indirectly, by a person connected with that corporation, to another person and the first-mentioned person knows that the information is relevant information in relation to the corporation and knows or has reasonable cause for believing that the other person will make use of the information for the purpose of dealing, or counseling or procuring another to deal, in the listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives);
- (d) when a person who is contemplating or has contemplated making (whether with or without another person) a take-over offer for that corporation and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to that corporation, discloses that information, directly or indirectly, to another person and the first-mentioned person knows or has reasonable cause for believing that the other person will make use of the information for the purpose in dealing, or in counseling or procuring another to deal, in the listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives);
- (e) when a person who has information which he knows is relevant information in relation to that corporation which he received (directly or indirectly) from a person:
 - (i) whom he knows is connected with that corporation, and
 - (ii) whom he knows or has reasonable cause to believe held that information by virtue of being so connected,deals in the listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives) or counsels or procures another person to deal in those listed securities or their derivatives;
- (f) when a person who has received (directly or indirectly) from a person whom he knows or has reasonable cause to believe is contemplating or is no longer contemplating a take-over offer for that corporation, information to that effect and knows that such information

is relevant information in relation to that corporation, deals in the listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives) or counsels or procures another person to deal in those listed securities or their derivatives.

An insider dealing in relation to a listed corporation also takes place when a person who is knowingly in possession of relevant information in relation to that corporation in any of the circumstances described above:

- (a) counsels or procures any other person to deal in the listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives) in the knowledge or with reasonable cause to believe that that person would deal in those listed securities or their derivatives outside Hong Kong on any stock exchange other than the Unified Exchange; or
- (b) discloses that relevant information to any other person in the knowledge or with reasonable cause to believe that that person or some other person will make use of that information for the purpose of dealing, or of counseling or procuring any other person to deal, in the listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives) outside Hong Kong on any stock exchange other than the Unified Exchange.

So apart from possession of relevant information, the person would be involved in an insider dealing if and only if he is a person connected with the co-operation or receives information from a person whom he knows is connected with the corporation.

Insiders

A person is connected with a corporation being an individual, if:

- (a) he is a director or employee of that corporation or a related corporation; or
- (b) he is a substantial shareholder in the corporation or a related corporation; or
- (c) he occupies a position which may reasonably be expected to give him access to relevant information concerning the corporation by virtue of: any professional or business relationship existing between himself (or his employer or a corporation of which he is a director or a firm of which he is a partner) and that corporation, a related corporation or an officer or substantial shareholder in either of such corporations, or his being a director, employee or partner of a substantial shareholder in the corporation or a related corporation; or
- (d) he has access to relevant information in relation to the corporation by virtue of his being connected with another corporation, being information which relates to any transaction (actual or contemplated) involving both those corporations or involving one of them and the listed securities of the other or their derivatives or to the fact that such transaction is no longer contemplated; or
- (e) he was at any time within the 6 months preceding any insider dealing in relation to the corporation a person connected with the corporation.

“Substantial shareholder” in relation to a corporation means a person who has an interest in the relevant share capital of that corporation which has a nominal value equal to or more than 10% of the nominal value of the relevant share capital of that corporation.

Insider dealing is a civil matter, but it can also be an offence. The Insider Dealing Tribunal can punish a person found to be an insider dealer in several ways, but mainly by disqualifying them from being involved in the management of a company for up to five years, ordering them to pay the government the amount of any profit or loss they make by insider dealing and fining them up to three times that amount.

Materials, directions or methodology that deals with the issue of “insider trading”

The SFC monitors the securities market through a computer system known as SMARTS (Securities Markets Automated Research, Training & Surveillance) which is linked to the Automated Trading System of the Hong Kong Stock Exchange.

Based on historical trading patterns of securities, pre-set alert benchmarks/parameters for different groups of securities under various conditions have been written and installed in SMARTS. It will send out an alert when the benchmarks/parameters are hit.

During trading hours, a duty officer will monitor movements in price/volume of securities. When SMARTS sends out an alert, the officer will do an assessment to see if insider dealing may have happened. Preliminary inquiry may then be conducted to collect information on the background of all major traders, which may result in a full investigation.

The SFC has a wide range of investigation powers, which include:

- requiring relevant persons to give attend an interview or produce documents,
- obtaining records from banks/telephone companies,
- obtaining records from immigration department/land registry/company registry,
- applying to a magistrate for a search warrant to enter and search premises.

When a person attends an interview, he must answer all the questions put to him. However, he has the right to claim privilege against self-incriminating statements. If he so claims, such statements cannot be used in a criminal prosecution against him, but can be used before an Insider Dealing Tribunal, which is a civil tribunal.

14. Hungary

A new law – the Capital Market Act, came into force in Hungary on January 1, 2002. With the enactment of this Act, the former separate, sector-specific pieces of law governing the securities industry, the investment fund management area and the commodity exchange were repealed. The basic principles of regulation remained the same, through the amendments. Taking into account the changing needs and demands of the domestic and international financial environment a fine-tuning of the regulatory system was implemented. Inside information is defined in Article 199 (2) of Act CXX of 2001 on the Capital Market.

Inside information

- (a) the information associated with the financial, economic or legal position of an issuer, investment service provider, guarantor, or surety as well as the likely changes therein, for example, the information concerning the issue of securities, conclusion of substantial transactions, organizational transformation, bankruptcy, and initiation of liquidation,

- (b) information concerning persons or enterprises with interests in or voting rights of the issuer reaching or exceeding twenty-five per cent,
- (c) information relating to an enterprise in which the issuer has interests or voting rights reaching or exceeding twenty-five per cent,
- (d) information on the securities market, particularly regarding any intention to buy out an enterprise, concluded commission contracts, preliminary selling and purchasing decisions, changes in forint-foreign exchange rates, syndicate agreements between owners, and voting agreements,
- (e) information associated with the preparatory activity performed for the purpose of a public offer of securities previously offered privately,
- (f) information concerning the production, stockpiling of commodity exchange goods, regulated prices, production and expert price subsidies and price changes, that has not yet been published but is likely to exert a material influence on the value and price of securities, exchange products in the event of its publication.

Inside information is also defined in the Criminal Code (Article 299/A of Act IV of 1978). The definition of inside information under Hungarian criminal law is as follows: information - not yet published - related to the financial, economic or legal situation of the issuer of the securities affected by a public offering, as well as of the person who has undertaken suretyship or guarantee for the liability embodied in the security publicly distributed, and furthermore information on the distributor of securities, which is suitable for an essential influencing of the value or price of the securities, if it became public. Under Article 199 (1) of the Capital Market Act, it shall be forbidden to use inside information to conclude a transaction or order the conclusion of a transaction for securities and exchange products affected by inside information. Insider trading is a criminal offence under the Criminal Code.

Insiders

Any person who has been provided with or given access to any inside information in any way and is aware of the inside nature of information so acquired shall be an insider. The following shall be considered insiders:

- a) senior managers, executive officers and supervisory board members of an issuer and a legal entity or unincorporated economic association in which the issuer has an interest or a voting right reaching or exceeding twenty-five per cent,
- b) executive officers and supervisory board members, senior managers and employees of a legal entity or unincorporated economic organization that has an interest or a voting right in the issuer reaching or exceeding twenty-five per cent,
- c) the persons having been in a legal relationship aimed at performance of work with the issuer within six months preceding the date of utilization of the information if they were able to access inside information in association with the performance of their work,
- d) senior managers and executive officers of any organization participating in the organization of the offering, as well as other employees of such organizations and the issuer, participating in the issue and offering who might have had access to insider information in relation to work, for one year from the offering,
- e) natural persons with an interest reaching or exceeding ten per cent of the registered capital (equity capital) of the issuer,
- f) executive officers, supervisory board members and senior managers of account holding credit institutions,
- g) close relatives of the persons listed in subsections a)-b) and d)-f).

With the exception of public offers, executives of an issuer shall not conclude any transaction for the securities issued by the issuer in the period from the statement date of the balance-sheet of the relevant year up to the date of approval of the annual report. This rule shall be applied to persons from among the employees employed by the issuer and the persons defined in the law who participate in preparing the balance sheet. Receivers, liquidators, and fiduciaries and the person in charge of winding up shall not conclude transactions for their own benefit regarding the issuer's self-issued securities affected by their activities.

Insider trading

It shall be regarded as insider trading if, in order to gain some advantage for himself or a third party, an insider - acting on his own behalf or as a representative:

- a) trades in securities or exchange products to which the inside information relates,
- b) commissions another person to trade in such securities or exchange products,
- c) makes a proposal to another person to purchase or sell such securities or exchange products,

Forwarding inside information to other persons who can be presumed to use such information in trading shall be considered the same as insider trading.

For the purposes of this Article, trading shall be construed as offering and dealing.

It shall not be qualified as insider trading if an insider:

- a) has concluded a securities transaction without the collaboration of an investment service, or
- b) has, as a receiver, liquidator, fiduciary or person in charge of winding up, sold the self-issued securities of an issuer in bankruptcy or liquidation proceedings in order to satisfy creditors.

An insider mentioned above shall notify the Supervision within two days of concluding a transaction, and publish, in accordance with the rule of publication, if he has concluded a transaction either personally or through a proxy for securities issued by an organization in respect of which the legal relationship mentioned above exists. The notification must indicate the nominal value, quantity, and price of the securities involved in the transaction, the date of conclusion of the transaction and the designation of the investment service provider arranging the transaction.

Penalties

In the case of the establishment of a violation of legal regulations, supervisory resolutions, articles of association and internal regulations of the exchange, business regulations and internal regulations of an organization performing clearing house activities, provisions of the internal regulations of the fund, or cases of negligence, and in the case of conduct representing a risk for the interests of investors, the balance of the capital and the position of further participants in the capital market, the HFSA may take actions and impose sanctions. (Article 399 of the Capital Market Act) These actions and sanctions may be imposed on those institutions that are supervised by the HFSA. In case the person who is involved in insider

trading is not supervised by the HFSA, Article 405 (1) of the Capital Market Act (see below) may apply, under which the HFSA is entitled to impose fines. For procedures related to these persons, the general provisions of the Act on Administrative Procedures are applicable.

Under Article 405 (1) of the Capital Market Act, on the basis of the provisions of this Act, and legal regulations issued on the basis of an authorization included in this Act, the provisions of the Act on money laundering, in the case of the violation, deception, negligence or default of any obligation included in the HFSA's resolution, and if the NBH proposes it, the HFSA may oblige an issuer, a person violating the rules of acquisition in publicly operating joint stock companies, investment service providers, commodity exchange service providers, parties performing investment fund management activities, an exchange, an organization performing clearing house activities, their executive officers and employees, and persons involved in insider trading and unfair price manipulation to pay a fine.

Penal sanctions are not imposed by the HFSA, but by judicial courts. Under Article 299/A of the Criminal Code, the person who concludes a securities transaction for the acquisition of an advantage by utilizing inside information, commits a felony, and shall be punishable with imprisonment of up to three years.

The HFSA is not entitled to conduct criminal procedures, although it is obliged to report insider trading to the police. The HFSA is free to start administrative procedures and the police decides whether there is enough evidence to initiate a criminal procedure or not.

Under Article 205 of the Capital Market Act, an insider shall notify the HFSA within two days of concluding a transaction, and publish, in accordance with the rule of publication, if he has concluded a transaction either personally or through a proxy for securities issued by an organization in respect of which the legal relationship mentioned in Article 203 exists. This legal relationship is insider trading if, in order to gain some advantage for himself or a third party, an insider - acting on his own behalf or as a representative: a) trades in securities or exchange products to which the inside information relates, b) commissions another person to trade in such securities or exchange products, or c) makes a proposal to another person to purchase or sell such securities or exchange products. Forwarding inside information to other persons who can be presumed to use such information in trading shall be considered the same as insider trading. The notification must indicate the nominal value, quantity, and price of the securities involved in the transaction, the date of conclusion of the transaction and the nominal value of the investment service arranging the transaction.

Procedures to inform the public on inside information

All information that may affect the value or returns of the securities and are known by the issuer, have to be reported to the HFSA and a publication must be placed:

- a) in a national daily paper,
- b) in a public electronic data transmission and storage system publishing official information originating from the participants in the capital market, operated by the HFSA or recognized by the HFSA, and
- c) in one printed daily paper publishing official information originating from the participants of the capital market, issued by the HFSA or recognized by the HFSA as such.

Cooperation of supervisory authorities

The HFSA may perform co-operation agreements and may exchange information with foreign financial supervision agencies in order to perform its tasks and to promote the implementation of consolidated supervision as well as integration processes.

The Supervision may join international organizations promoting the international co-operation between financial supervision agencies as a member.

The Supervision may use individual data and information received from foreign financial supervision agencies in the course of international co-operation only for the following purposes and may release data to foreign financial supervision agencies only for the following purposes:

- a) for evaluating applications for the licensing of establishment or operation of financial organizations and for verifying the contents of licenses, for evaluating the prudent operation of organizations,
- b) for use as grounds for the Supervision's resolutions, particularly actions or sanctions.

Individual data and information provided or obtained in the framework of co-operation between supervision agencies may be disclosed to third parties only with the prior written consent of the supervision that provided the data.

Supervision information and data may be released to foreign supervision agencies only if the foreign partner is able to guarantee appropriate legal protection that is at least equivalent to Hungarian regulations for handling the information provided to it.

The MOUs signed with the regulatory and securities supervisory authorities of Quebec (Canada), Luxembourg, Germany, France, Italy, Austria, Poland, Portugal and Czech Republic provide a framework for mutual assistance and the exchange of information to the extent permitted by the laws and practices of each jurisdiction and place on a more formal basis the former ad hoc cooperation and information-sharing.

15. Indonesia

In the Indonesian Capital Market Law, insider trading is defined as any trading in public securities that is done by an insider when in possession of non-public information that could have an impact on the price of securities or the decision of investors. Insiders are directors, commissioners, principal shareholders, and persons who by reason of their position have access to inside information about a public company.

Administrative powers

Insider trading is subject to an administrative sanction. The sanction could be as follows: written admonition, fine, restrictions on business activity, suspensions of business activity, revocations of business activity, cancellation of approvals, and cancellation of registrations.

The Commission institutes and conducts an administrative proceeding concerning insider trading independently, irrespective of an offender. The proceeding could be instituted in

relation to any natural person, company, partnership, association or any organized group. The Regulation and Legal Counsel Bureau and Chairman of the Indonesian Capital Market Supervisory Agency (CMSA) is responsible for the proceedings. The final decision is made by the Chairman based on a recommendation of the Regulation and Legal Counsel Bureau with input from the Enforcement Bureau.

Within the framework of an administrative proceeding concerning insider trading, the Commission is entitled to:

- call and examine a witness,
- demand a compulsory appearance of a witness,
- demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case,
- search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case,
- appeal to a judicial authority or the police with the request to carry out a search,
- appeal to a judicial authority or the police with the request to issue an order of a provisional detention (it cannot do it by itself),
- issue an order freezing assets,
- appeal to a judicial authority or the police with a request to apply the above measure,
- appeal to a judicial authority or the police to issue an order to tap the phone and bug the house of a suspect (it cannot do it by itself).

If, for the same crime, there is a possibility to impose both the penal and administrative sanction, imposing the administrative sanction does not eliminate the possibility of imposing the penal sanction. The reverse is also true.

Penal powers

A violation of insider trading regulations is subject to a penal sanction of up to ten years in prison and a fine of up to Rp 15 billion.

The prosecutor:

- acts as a public prosecutor in judicial proceeding in issues concerning insider trading,
- draws up a statement of charges,
- files a statement of charges to the Court in such issues.

CMSA institutes and conducts an inquiry/investigation concerning insider trading. It works independently and takes the following activities:

- a. receives reports, information or complaints from persons with respect to capital market crimes;
- b. investigates the authenticity of reports or information relating to capital market crimes;
- c. investigates persons suspected of capital market crimes;
- d. summons, inspects, and requests information and evidence from persons suspected of capital market crimes;
- e. inspects books, records, and other documents with reference to capital market crimes;

- f. inspects certain locations where evidence may be found in books, records, and other documents and seizes materials that may be evidence in criminal cases related to the capital market;
- g. blocks bank accounts or other financial assets of persons suspected of capital market crimes;
- h. requests professional assistance in criminal investigations related to the capital market;
- i. determines the initiation and termination of an investigation;
- j. may make a request to the Minister to obtain information from banks on the financial situation of suspects, under applicable banking laws and regulations;
- k. shall announce the initiation of an investigation and deliver their results to the Attorney General in accordance with provisions in the Indonesian Criminal Code; and
- l. may request assistance from other law enforcement agencies.

16. Italy

Inside information

According to the Consolidated Law on Financial Intermediation, inside information means specific information having a precise content concerning a financial instrument or issuers of financial instruments that has not been made public and that, if made public, would be likely to have a significant effect on the price of such instruments.

Insider trading

The definition of insider trading covers any person, who possesses inside information by virtue of holding an interest in company capital or other duties, a profession or an office, or any person who has obtained, directly or indirectly, inside information from persons referred before:

- makes purchases or sales or carries out transactions, directly or through a nominee, involving financial instruments on the basis of such information,
- divulges such information to others without good cause or advises others, on the basis thereof, to carry out any of such transactions.

Duties of the companies managed of the market in insider trading area

When the public prosecutor has information concerning any of the offences referred to in Articles 180 and 181, he shall immediately report it to the Chairman of CONSOB. CONSOB shall investigate the violations using the powers attributed to it with respect to the persons subject to its supervision.

To the same end, CONSOB may also:

- a. request information, data or documents of anyone who appears to be acquainted with the facts, establishing the time limits for the related communication,
- b. hear anyone who appears to be acquainted with the facts and shall prepare minutes of such hearings,

- c. avail itself of the cooperation of governmental bodies and access the information system of the taxpayer register in the manner provided for in Articles 2 and 3(1) of Legislative Decree 212 of 12 July 1991.

At the conclusion of the investigation, the Chairman of CONSOB shall transmit the documentation gathered in the course of the activity referred to in Article 185 to the public prosecutor, together with an accompanying report.

Penalties

The unauthorized use of inside information (insider trading) is a criminal offence in Italy. A penalty of imprisonment for a term of up to two years and fine of between 12 million and 600 million lire shall be inflicted. The judge may increase the fine by up to three times where, in view of the particular seriousness of the offence, the personal situation of the guilty party or the size of the resulting gain, the maximum appears inadequate.

Exemptions

The provisions listed above shall not apply to transactions carried out on behalf of the Italian State, the Bank of the Italy or the Italian Foreign Exchange Office for reason relating to the economic policy.

17. Jordan

Inside Information

Jordan Securities Law No. (23) for the year 1997 defines insider information in articles No. (26) and (68) as follows:

Article (67):

A - For the purposes of this law, the term “Inside Information” shall mean information, which is not proclaimed and which may affect the price of any security in the event of being proclaimed. Insider information shall not include conclusions based upon financial and economic studies, research and analyses.

B- For the purpose of this law, an insider shall mean a person who has access to insider information by virtue of his position or job.

Article (68):

A- Insiders, including members of the board of directors of each the Amman Stock Exchange (ASE) and the Securities Depository Centre (SDC), as well as their executive managers and employees, shall not use any insider or confidential information to attain material or moral gains whether for their own or for others, and may not divulge any such information to any person other than their respective competent authority or the courts.

B- Any person who is not an insider but who hears or learns about insider information, and is aware that its source is an insider, shall not exploit such information to attain material or moral gains for his own or for others. Such a person shall also not divulge such information to any other person, except in accordance with the provisions of this Law or any other legislation.

C- No person shall in any way spread or circulate rumors or give misleading or false information, statements or data that may affect the price or any securities or the reputation of any issuer.

D- No person shall deal in securities, either solely or in collusion with other persons, with the aim of:

- 1) Giving the public false impression of real dealings in such securities and prompting the public to deal therein.
- 2) Affecting the prices of any securities directly or by affecting the prices of other related securities.
- 3) Adversely affecting the capital in any manner.

Sanctions to be Imposed on Insider Trading Activity

Articles No. (69) and (70) of the Securities Law state sanctions to be imposed on person who use inside information.

Article (69):

A) A person found to be violating or taking steps to violate the provisions of this Law or any of the regulations and instructions issued pursuant thereto- and after being notified by the Board of Commissioners, and given opportunity to be heard- may be requested by the Board to rectify the violation and the circumstances resulting there from, or to desist from committing the violations, or from taking the steps leading thereto, within a specified period of time. In the case of non-compliance the Board may have recourse to one or more of the following measures:

1. Suspend any prospectus submitted to the Commission or cease issuance of the securities concerned or dealings therein.
2. Suspend all activities related to securities, or to a particular security for the period of time the board deems appropriate.
3. Revoke or suspend the license to the period of time the Board deems appropriate.

B) In case of non compliance with any of the matters set out in paragraph (A) of this article, the person concerned shall be referred to the competent court.

C) The court shall look into the cases referred thereto expeditiously, and may issue temporary injunction for taking any of the measures cited in paragraph (A) of this article until the trial is concluded.

Article (70):

A) Any person who violates the provisions of this Law or any of the regulations and instructions issued pursuant thereto, shall be subject to a fine of not more than twenty thousand (20000) Jordanian Dinars, in addition to a fine of not less than twice the amount, and not more than five times the amount of profit made or loss avoided by the person who commits the violation.

B) In addition to the fines specified in paragraph (A) of this article, and without prejudice to stricter penalties imposed by any other Legislation, any person committing a violation shall be subject to the following penalty:

- Imprisonment of up to three years for violations of the provisions of article (68) of this law (the article which deals with insider information).

Powers of Supervisory Authorities

The powers of supervisory authorities is summarized in the following articles of the Securities Law No.(23) for the year 1997:

Articles (20):

A- For the purposes of this Law and regulations and instructions issued pursuant thereto, the following entities shall be subject to the Commission's monitoring and supervision:

1. The Amman Stock Exchange (ASE).
2. The Securities Depository Centre (SDC).
3. Financial services companies
4. Public shareholding companies
5. Investment funds
6. Certified financial professionals

B- The Chairman, any Board member, or any of the Commission's employees who is duly delegated by the Chairman, shall have for the purposes of monitoring and supervision, the authority to do any of the following:

- 1- Review the papers, documents, records or correspondences of any of the entities mentioned in section (A) of this article or request copies of the said documents for review and filing.
- 2- Request the rectification of errors or violations if any, within a set period or request that legal proceedings be taken against such errors or violations.
- 3- Request the cease of any procedure if this is found to be in violation of legislation in force or for any other relevant reason.
- 4- The Boards of Directors, executive officers and employees of the entities cited in paragraph (A) of this article, as well as certified financial professionals shall assist the Commission's employees in performing their monitoring duties, and shall respond to their requests and furnish them with any information required.

Article (21):

A. All persons, ministries and government departments and institutions shall respond to the Commission's requests and furnish the Commission with any documents and information it requires for the purposes of carrying out its duties and activities according to the provisions of this Law and the Regulations and Instructions issued pursuant thereto.

B. Failing to respond to the Commission's request during the set period, or deliberately delaying the response, or providing a response that indicates an intention to stay, or waste time constitutes a violation subject to criminal or disciplinary prosecution.

Planned Legislative Changes

The JSC is in the process of reviewing the Securities Law and related regulations including that governing insider trading.

18. Korea

Insider and insider trading

In accordance with the Korean Securities and Exchange Act (KSEA), insiders, who are prohibited from using non-public information, is any person who is informed of non-public

information relating to the affairs of a concerned corporation, or who is informed of non-public information from such a person. The insider is classified into three basic categories: corporation insider, quasi-insider and tippee:

- corporation insider: includes all members of the corporation concerned including officers, employees, agents and major stockholders of the corporation;
- quasi-insider: a person who has the authority, pursuant to relevant statutes, of permission, approval, direction, supervision or other authority with respect to the corporation concerned and a person who entered into a contract with the corporation concerned. Also, an agent and other employees of that person are considered quasi-insiders; and
- tippee: a person who is informed of material non-public information from a corporation insider or quasi-insider.

In addition, any person for whom one year has not passed since he/she was considered a corporation insider, quasi-insider or tippee, is prohibited from the use of non-public information.

Insider trading is the practice of buying and selling a corporation shares by the insider as defined above, using their knowledge of material corporate information that have not been announced publicly.

Non-public information

In accordance with the KSEA, material non-public information refers to any information that may have a significant impact on investors' investment decisions, including the following:

- where any issued bill or check is dishonored, or when any transaction with a bank is suspended or prohibited,
- where the corporation's business is suspended in part or as a whole,
- where the corporation files a petition for the reorganization or where the reorganization procedure has actually commenced pursuant to the provisions of relevant laws,
- where the objective of the business changes,
- where the corporation suffers damages caused by a major financial incident,
- where there is a lawsuit that may have great influence,
- where causes for dissolution pursuant to the provisions of relevant status occur,
- where there is a resolution of the board of directors for an increase or decrease of capital,
- where the operation is suspended or is unable to be continued due to special causes,
- where a correspondent bank assumes control of the corporation concerned,
- where there is a resolution of the board of directors, or a decision of the representative director or other person with respect to the acquisition and disposal of treasury stocks,
- where an event that has serious effects on the management and properties, etc. of the concerned corporation takes place.

Thus, non-public information means information that has not yet been made available to the general public by the corporation concerned.

Disclosure of information

In accordance with the Enforcement Regulation of the Securities and Exchange Act, the moment in which information becomes public involves cases falling under one of the following items:

- information that is declared to, or contained in the reports submitted to the Financial Supervisory Commission (FSC) and either the Korea Stock Exchange (KSE) or the Korea Securities Dealers Association (KSDA) in accordance with the relevant statutes, and information following a lapse of one day from the compiling date of the documents in which such information is contained in such a manner as determined by the FSC, and either the KSE or the KSDA (the FSC publicizes that information through Internet);
- information following a lapse of one day from the date on which such information is published in at least two nationwide newspapers among general daily newspapers or business daily newspapers under the provisions of the Act on Registration of Periodicals;
- information following the lapse of twelve hours after such information is announced through a nationwide broadcast among the broadcasts (excluding specialized broadcasts),
- information following a lapse of twenty four hours after such information is announced through the broadcasting network installed and operated by the KSE or the KSDA.

Administrative and legal proceedings

Where there is a violation of provisions such as disgorgement of short swing profits by insiders and prohibition of using non-public information or where it is deemed necessary to protect the public interest or investors, the Financial Supervisory Service (FSS) may order the person or persons concerned submit all necessary reports or materials for reference or launch an investigation into the financial books, documents or other matters of the offending party.

The FSS may demand the following items to facilitate its investigation:

- submission of a statement on the facts and situation concerning matters to be investigated,
- appearance for testimony concerning the matters to be investigated,
- submission of all financial books, documents or other matters necessary for the investigation.

Where it is deemed necessary to conduct an in-depth investigation, the FSS may request a securities-related institution to submit all documents necessary to complete the investigation. Also, where a violation of provisions such as disgorgement of short swing profits by insider, prohibition of using non-public information, and prohibition of unfair transaction such as manipulation has been confirmed as a result of the investigation, the FSS may take the following measures:

- order closure of a branch or other business office, or suspension of all or part of its business,
- issue warning to an institution or attention to an institution,
- demand suspension of management officers, issue warning or attention to officers,
- demand employee dismissals, suspensions from office, salary reductions, and issue reprimands, warnings, or notices of attention to employees,
- demand for or recommend improvements in management or business methods,
- demand reimbursement or correction,

- demand disclosure of contents of violation of laws,
- demand submission of memorandum,
- issue indictment or notification to the investigation agencies in case of violations of the Securities and Exchange Act,
- issue notification to the relevant agencies or the investigation agencies in case of violating other laws.

On the other hand, where the Korea Stock Exchange or the Korea Securities Dealers Association suspects a violation of the Securities and Exchange Act or a violation of a regulation, it should notify the FSS.

19. Latvia

The law “On Securities” states as follows: The issuer’s officials and employees, as well as persons, who have entered into legal relations with the issuer on any other legal basis, shall not:

- 1) disclose, use or pass on to any third persons inside information with the exception of those cases when such information is disclosed or passed on part of persons official or professional duties,
- 2) based on inside information, recommend or instruct a third person to acquire or alienate securities.

This prohibition to disclose inside information equally applies to any third person not specified above if that person is aware of the fact that this is inside information and if the person could have obtained this information, directly or indirectly, only from specified persons.

This prohibition to disclose inside information equally applies to any third person not specified above if that person is aware of the fact that this is inside information and if the person could have obtained this information, directly or indirectly, only from specified persons, such as: Council and Board members of the Financial and Capital Market Commission (FCMC), as well as employees and persons, having relations with the Commission on any other legal basis, as well as the Council and Board members of the Stock Exchange, as well as employees and persons, having legal relations with the Stock Exchange on any other legal basis, investment advisers and other professional specialists of the securities market. The same responsibilities according to the law “On Securities” apply to the Council and Board members of the Latvian Central Depository (LCD), as well as employees and other persons, having legal relations with LCD on any other legal basis.

Monitoring of insider trading is supervised by keeping track of the flow of information in the market and transactions on the Riga Stock Exchange (trading volume, market trends, block transactions). The FCMC is connected to the Riga Stock exchange trading system (on-line), monitoring all the transactions on the Riga Stock exchange, all the orders entered into to the trading system and all the transactions reported by the Riga Stock Exchange in the over-the-counter market. The FCMC has created and developed efficient, special software giving alerts, when unusual trading activities appears.

Insider trading supervision goes on by tracking the changes of price and unusual trading activity in the stock exchange and by following the information on material events (the Riga Stock exchange and the FCMC shall be informed by the issuer company on any material events (disclosing an information that could influence the price of security in a market)) and information in mass media (newspapers, news wires etc.).

If the FCMC establishes anything suspicious, it starts to investigate the case by requesting the official information (such as account statements, order-tickets, etc.) from all of the market participants involved. Additionally, investigates the exact time of publication of sensitive information (the time exactly when the information was published), and asks for an explanation from related persons (news agencies, journalists etc.).

20. Lithuania

Inside information

According to the Lithuanian Law of Public Trading in Securities, internal information means information concerning material events. Under a new version of this law, internal information is defined as information concerning prospective material events or material events that have occurred until its public announcement, as well as other information related to the issuer or its securities, disclosure of which may have significant influence on the price of these securities.

There are three cases when it is deemed that a case of insider trading on material events has occurred. They are, where:

- 1) a natural and legal person who is aware of internal information about material events of an issuer has entered into a transaction or transactions relating to securities of that issuer;
- 2) a person who is aware of inside information about material events has tipped that information to other persons;
- 3) a person who is aware of inside information about material events has recommended or offered a third party to acquire or dispose of securities based on such information.

The Securities Commission has the right to impose pecuniary penalties on issuers and economic entities for committing these acts.

Identification of Insider Trading Dealing with Material Events

Rules are detailed in the Law. In case of a breach of these rules, economic entities are liable to administrative proceedings. The new Criminal Code of the Republic of Lithuania establishes the liability for insider trading. However, the Code sets an additional indispensable indication (significant property damage) necessary for qualification of aforementioned deeds as criminal. Therefore, it has been practically impossible to enforce the rules against insider trading, as investors did not suffer direct losses in most cases, so it was impossible to prove damages.

Procedures to inform the public on inside information

In Lithuanian legislation, information about a material event shall be deemed publicly disclosed when the material event is reported to the Securities Commission, the Stock Exchange (if securities are included in the lists of the Stock Exchange) and to at least one

national daily paper. Where an information report about a material event is filed with different institutions at a different time, it shall be deemed that a material event is disclosed:

- 1) from the day of filing the information report about a material event with the Securities Commission when it is required to be filed with the Securities Commission and at least one national daily paper;
- 2) from the day of announcing the information report about a material event on the information system of the Stock Exchange when it is required to be filed with the Securities Commission, the National Stock Exchange and at least one daily paper.

In the event an information report about a material event is submitted to the Lithuanian Securities Commission with the mark “confidential information,” it shall be deemed that information about a material event is publicly disclosed after it is disclosed upon the expiration of the term of keeping information confidential.

Where, according to the Rules on Disclosure of Material Events, an information report about a material event is announced in a national daily paper of the Republic of Lithuania prior to its submission to the Lithuanian Securities Commission or (and) the National Stock Exchange, it shall be deemed that a material event is disclosed on the day of the announcement about the material event in that paper.

21. Luxembourg

Insider trading/information

According to article 1 of the law of May 3, 1991, 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.”

Penalties

Criminal sanctions are provided for insider trading in Luxembourg legislation. “A penalty of imprisonment from one to five years and a fine of 5 000 to 50 000 000 francs (€123,94 to €1239 476,80) or either such penalty shall be imposed upon any person referred to in article 2 paragraphs 1, 2 and article 5 who infringes the prohibitions provided for in the same. The court shall order seizures of the movable and immovable property, whether it is separately or jointly owned, of the sentenced person and which has been acquired with the proceeds of the sentence (article 9). Article 2 § 1 provides that “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 shall be prohibited 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.”

Article 2 §2 provides that “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.” According to article 5, “the prohibition provided for in article 2 shall be also imposed 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.”

Furthermore, “a penalty of imprisonment of three months to three years and a fine of 5 000 to 1 000 000 francs (€ 123,94 to € 24 789,53) or either such penalty shall be imposed upon any person referred to in articles 2-1 and 2-2 who infringes the prohibitions of article 4” (article 10 of the law of May 3, 1991). Article 4 states that: “Any person subject to the prohibition laid down in article 2 who possesses inside information shall be prohibited 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.”

Cooperation of supervisory authorities

According to article 7 of the said law, the Commission de Surveillance du Secteur Financier (CSSF), who has taken over the functions and competencies of the Exchange Supervisory Commission, when so requested by an administrative authority of an EC member state competent for insider dealing matters, shall carry out an investigation on the financial institution(s) concerned and communicate the requested information to the requesting authority.

The CSSF 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 Luxembourg,
- b) where judicial proceedings have already been initiated in respect of the same actions and against the same persons or where final judgment has already been passed on such persons for the same actions in Luxembourg.

Where the CSSF receives such information pursuant to this article, it may use it only for exercising the functions, which it assumes as authority competent for insider dealing and in the context of administrative or judicial proceedings specifically relating to the exercise of those functions. The CSSF may communicate information in respect to this article to foreign authorities which shall not use such information for purposes other than those for which the information has been requested in connection with insider dealing matters.”

“Where a request emanates from a competent administrative authority of a non-EC member state, the CSSF shall determine case by case whether it will provide the requested administrative assistance. Assistance to a competent administrative authority is granted only in case of a double charge” (article 8 of the law of May 3, 1991).

Planned legislative changes on insider trading

The Luxembourg legislation will be amended in order to implement the new Market Abuse Directive.

22. Malaysia

Inside information

In Malaysia, the Securities Industry Act 1983 (the “Act”) contains provisions specific to insider trading. The Act defines “information” to include:

- a) Matters of supposition and other matters that are insufficiently definite to warrant their being made known to the public;
- b) Matters relating to the intentions, or likely intentions of a person;
- c) Matters relating to negotiations or proposals with respect to –
 - Commercial dealings or
 - Dealings in securities
- d) Information relating to the financial performance of a corporation;
- e) Information that a person proposes to enter into, or has previously entered into one or more transactions or agreement in relation to securities or has prepared or proposes to issue a statement relating to such securities; and
- f) Matters relating to the future.

Insiders

An “insider” is the person, who:

- a) Possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and
- b) Knows or ought reasonably to know that the information is not generally available.

An insider shall not, whether as principal or agent, in respect of any securities to which information in the Act relates:

- a) Acquire or dispose of, enter into an agreement for or with a view to the acquisition or disposal of such securities; or
- b) Procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

Penalties

A contravention of the above is an offence and the offender is liable on conviction to a fine of not less than one million Ringgit and to imprisonment for a term not exceeding ten years.

In addition, the Securities Commission may institute civil proceedings in the court against the offender.

Persons, who suffer loss or damages by reason of, or by relying on, the conduct of a person who has contravened the Act may recover the amount of loss or damages by instituting civil proceedings against that person.

Cooperation of supervisory authorities

The stock and futures exchanges under the purview of the Securities Commission are obliged to provide to the Securities Commission such information and records as requested by the Securities Commission. The Securities Commission Act 1993 provides for assistance that may be rendered by the Securities Commission to the police or other public officer, as well as to foreign supervisory authorities, within the confines of relevant confidentiality provisions. In addition, with respect to extending assistance to foreign supervisory authorities, the Securities Commission is also guided by the 15 Memoranda of Understanding it has signed with its foreign regulatory counterparts. In upholding the objective of cooperation and mutual assistance prescribed by IOSCO, the Securities Commission consistently strives to maintain good cooperative and working relationships with its foreign regulatory counterparts.

There are no planned legislative changes at this time.

23. Malta

Definition of Insider Trading / Information:

There is no definition of insider trading under Maltese law. However, upon an examination of the appropriate provisions of the Insider Dealing Act, it emerges that insider dealing is a criminal offence that can be committed by different categories of persons in a number of different ways. The three constitutive elements are the following:

- 1) **The act**, which can manifest itself in any of the following three ways:
 - dealing in listed securities of a company on the basis of unpublished price sensitive information by persons occupying such posts as directors and officers of listed companies;
 - counseling or procuring any other person to deal in those securities with the knowledge or with reasonable cause to believe that that person would deal in those securities;
 - communicating to any other person the information held or, as the case may be, obtained or received by him if he knows / has reasonable cause to believe that that or some other person will make use of the information for the purpose of dealing, or of counseling or procuring any other person to deal in any such securities.

- 2) **The knowledge** that the information is unpublished price sensitive information, or in the case of information obtained by an individual directly or indirectly through another person, the reasonable cause to believe that the latter held the information by virtue of his office.

Unpublished price sensitive information is defined under our law as information of a precise nature, which has not been made public, relating to companies that have issued securities or to the securities themselves, and which, if it were made public, would be likely to have a significant effect on the price of the securities in question.

- 3) **The motive** – making a profit or avoiding a loss (whether for himself or another person) by the use of that information.

Penalties

An individual who contravenes the provisions of the Insider Dealing Act shall be guilty of an offence and shall be liable on conviction to a fine (multa) not exceeding Lm250,000 or to imprisonment for a term not exceeding 7 years to both such fine and imprisonment.

Cooperation of supervisory authority

The Insider Dealing Act gives the Minister of Finance the authority to issue regulations prescribing the procedures, requirements and conditions for the establishment of co-operation by the competent authorities in Malta with foreign competent authorities for the purpose of carrying out their supervisory and investigatory duties in relation to insider dealing, and may, for this purpose provide for exchanges of information between such authorities. Any information so exchanged remains covered by the obligation of professional secrecy to which the person employed or formerly employed by the competent authorities receiving the information is subject.

Planned legislative changes on insider dealing

The following amendments have been proposed and approved by the Maltese Parliament:

- 1) Title of the law to read: Insider Dealing and Market Abuse Offences Act;
- 2) Insertion of definition of the terms “counsel or procure” as “entice, encourage, advise, induce or recommend;”
- 3) Amendment to the definition of unpublished price sensitive information as follows:
 - “information of a precise nature” to read “information of a precise or specific nature;”
 - “significant effect on the price” to read “significant or material effect on the price or value;”
- 4) Inclusion of a new provision dealing with market abuse offences consisting in the:
 - dissemination of false, exaggerated or misleading information, spreading of false rumors or putting into effect simulated or artificial operations or transactions which are intended or which may or are likely to:
 - influence the supply, demand or price of security,
 - create a false or misleading impression or appearance of an active market or of active dealing in a security, for the purpose of artificially stimulating or inducing the purchase or sale of such security by others, or

- manipulation of the securities market by the employment of artificial devices, fictitious transaction or other deceptive or manipulative conduct.
- 5) **Re: Co-Operation:** A new provision of the law allows the Malta Financial Services Authority to coordinate its efforts and exchange information or otherwise collaborate with the Listing Authority, the Registrar of Companies and with other local or other authorities whose functions include the detection, prevention or prosecution of insider dealing or market abuse offences.

This cooperation is allowed for the purpose of securing compliance with the insider dealing law, and for preventing, investigating or detecting activities which amount or are likely to amount to insider dealing or market abuse under Maltese or foreign law. Furthermore, any information thus exchanged may only be used for the purpose for which it is disclosed and is subject to the rules governing professional secrecy.

24. Norway

Insider trading

A subscription for the purchase, sale or exchange of financial instruments which are quoted, or for which quotation has been applied for, on a Norwegian stock exchange or a Norwegian authorized market, or incitement to such dispositions, must not be undertaken by anyone who has information about the financial instruments, the issuers thereof or about other factors, which is likely to influence the price and which is not publicly available or commonly known in the market. The same applies to entry into, purchase, sale or exchange of option or futures/forward contracts or equivalent rights connected with such financial instruments or incitement to such dispositions.

The above paragraph applies only to the misuse of information as mentioned in the paragraph. The paragraph does not prevent the normal performance of option or futures/forward contracts previously entered into upon the expiry of such contracts.

The above paragraph does not apply to dispositions made on behalf of a State when such disposition is part of the monetary and foreign exchange policy of the State concerned.

Penalties

Administrative sanctions:

- Surrender of gain; if gain has resulted from negligent or willful violation of conduct of business rules, the party to whom such gain has accrued may be ordered to surrender all or part of it. This also applies where the person to whom the gain accrues is a person other than the violator. If the size of the gain cannot be established, the amount shall be fixed on a discretionary basis. Kredittilsynet may issue a decision ordering the surrender of gain under this section.

Civil sanctions:

- Pursuant to the Stock Exchange Regulations, issuers of listed financial instruments, stock exchange members and authorized stock exchange dealers shall observe good stock exchange practices. If this regulation is being violated the Stock exchange may suspend, delist, impose daily fines, or impose a violation charge.

Criminal sanctions:

Pursuant to the Norwegian Securities Trading Act, the criminal sanctions are as follows:

- Anyone who willfully or negligently violates the prohibition against misuse of information or the prohibition against price manipulation is punishable by fines or imprisonment up to six years.
- Fines or imprisonment of up to 1 year shall be handed down to anyone who willfully or negligently violates the other conduct rules in the Norwegian Securities Trading Act.

Cooperation of supervisory authorities

The legal sanctions against market abuse and other illegal securities or futures activities are in Norway mainly based on criminal prosecution. The Oslo Exchanges, by virtue of their proximity to the market, is responsible for reporting suspicious circumstances to the Kredittilsynet. The Kredittilsynet is an administrative authority that investigates on a preparatory stage for The National Authority for Investigation and Prosecution of Economic and Environmental crime in Norway (ØKOKRIM). If Kredittilsynet suspects a contravention of the prohibition against insider trading or price manipulation, any party may be ordered to provide the information requested by Kredittilsynet. After the preliminary investigations, Kredittilsynet decides whether to report the offence to ØKOKRIM. ØKOKRIM investigates the offence further, and then decides whether to prefer an indictment.

Legislative changes on insider trading

On July 2001 amendments to the Securities Trading Act went into force. The aim of the changes is to clarify and tighten regulations against insider dealing/trading and improve effectiveness of preventing such activities. The amendment lowers the threshold for information coming under the provision on the misuse of inside information. Moreover, a requirement to show due care in dealing with inside information in general is added. The provisions on primary insiders' duty to investigate were assigned to a separate provision. Concurrently, the earlier prohibition against trading by primary insiders in certain periods was lifted. Changes were also made in the provisions on notifiable securities trading by primary insiders. Moreover, Kredittilsynet was assigned authority to order relinquishment of gain.

25. Paraguay

Inside information

The Comision Nacional de Valores uses the following definition of inside information: inside information is understood to include information regarding the issuer or referring to it, to its business or to one or several securities issued or guaranteed by it that is not disclosed to the

market, of which the public knowledge may be able to influence the quotation of the issued securities (Law of Securities Market).

Inside information is also understood as information relating to securities operations to be realized, of acquisitions or sales, by an institutional investor in the securities market.

Administrative powers

Insider trading is subject to an administrative sanction. The Commission imposes the following sanctions:

- a) admonition;
- b) a fine up to an amount equivalent to two hundred minimum per month wages, established for workers of non-specified diverse activities;
- c) the suspension or inability of up to ten years to perform administrative and controlling functions in institutions controlled by the Commission;
- d) a suspension of up to two years of the authorization to conduct a public offering of securities;
- e) a prohibition to conduct a public offering of securities; and,
- f) the cancellation of the registration in the Registry that allows the realization of any of the qualities allowed by this law.

The Commission institutes and conducts an administrative proceeding concerning the insider trading irrespective of an offender. Except on contrary evidence, it is presumed that inside information is in the possession of persons related to institutional investors in the securities and to securities brokerage firms that operate with securities of the issuer, as well as the persons related to them.

In addition, except on contrary evidence, it is presumed that insider information is in the possession, to the extent that they may have access to the factual object of the information, of the following persons:

- a) directors, functionaries, proxy holders, consultants and advisors of the stock exchanges;
- b) partners and managers of the external auditors of the issuer;
- c) partners, managers and members of the rating board of the rating agencies that rate securities of the issuer or the latter;
- d) dependants that work under the management or direct supervision of the directors or managers of the issuer or of the institutional investor;
- e) persons who render permanent or temporary advising services to the issuer;
- f) public functionaries that depend on the institutions that supervise issuers of securities of public offering or patrimonial funds authorized by law; and
- g) spouses or relatives up to the second degree of consanguinity or affinity, of the persons marked in the previous clauses.

The Commission conducts the instituted administrative proceeding independently. The Commission, within the framework of an administrative proceeding concerning the insider trading, is entitled to call and examine a witness (any person) and demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case, but it is not entitled to demand a compulsory appearance of a witness.

The Commission cannot search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case. In such circumstances, it should appeal to a judicial authority or the police with the request to carry out a search. Similar rules in relation to a suspected person works in:

- issuing an order of provisional detention,
- issuing an order freezing assets,
- issuing an order to tap the phone and bug the house of a suspect.

Penalties

Imposing an administrative sanction does not eliminate the possibility of imposing the penal sanction. The reverse situation is also true. The Securities Law establishes that the persons that deliberately violate the Law's dispositions on reserved information will be sanctioned with imprisonment from 6 months to one year.

The prosecutor is authorized to act in a judicial proceeding in cases of insider trading. The prosecutor draws up a statement of charges and institutes and conducts an inquiry/investigation. The Supreme Court intervenes in these trials but only for the part that appeals a juridical resolution. The Securities Commission is in charge of denouncing the offences to the corresponding Courts in the cases when there are facts that could be considered offences. The Commission can only act or require information if the person is under its legal surveillance.

26. Peru

Insider trading

The authority with competence over insider trading in Peru is the Comisión Nacional Supervisora de Empresas y Valores (CONASEV). It uses the following definition of insider trading: for the purpose of the Securities Market Law, privileged information is any information about an issuer, its business, or any or several securities it issues or underwrites, not disclosed to the market, the source of which is the issuer, and which by its nature may influence the liquidity, price or quote of securities issued. It also includes the confidential information and information concerning acquisition or spin off transactions to be executed by an institutional investor in the securities market, as well as information concerning tender offers.

Insiders

The following persons are presumed to have access to inside information:

- a) directors and managers of the issuer, institutional investors, as well as members of any institutional investor investment committee;
- b) directors and managers of companies affiliated to the issuer and to institutional investors;
- c) shareholders that individually or jointly with their spouses and blood relatives up to the first degree of consanguinity hold ten percent or more of the capital stock of the issuer or of institutional investors; and

- d) the spouse and blood relatives up to the first degree of consanguinity of the persons mentioned in the foregoing sections.

Other persons presumed to have access to inside information include:

- a) shareholders and manager of auditing firms hired by the issuer;
- b) shareholders, partners, directors, managers and members of the rating committees of rating companies;
- c) managers, advisor, traders and others representatives of intermediation agents;
- d) members of the board of directors, managers and other officials of the exchanges and institutions responsible for the management of the centralized systems;
- e) directors and officials of the institutions responsible for the control or surveillance of issuers of publicly offered securities or institutional investors, including CONASEV, the Superintendency, and the Superintendency of Private Pension Fund Administrators;
- f) directors, managers and other officials of securities clearing and settlement institutions;
- g) persons working under the direction or direct surveillance of the directors managers administrators or liquidators of the issuer and institutional investors;
- h) persons providing temporary or continual advisory services to the issuer if they are involved in management decision making;
- i) officers of financial institutions responsible for loans to the issuer;
- j) officers of the issuers and institutional investors, as well as affiliated companies; and
- k) relatives of the persons indicated in items a), b) and c) and those mentioned in the foregoing sections.

Administrative powers

Insider trading is subject to an administrative sanction. The Rule of Sanctions sets a fine of not less than twenty-five UITs and not more than fifty UITs. A UIT is equal to 2,900 Soles. Additionally, the Securities Market Law compels persons who violate the prohibitions about privileged information to forfeit any earning obtained to the issuer or fund, when the information involves a mutual fund, investment fund or pension fund transactions.

The Commission conducts the instituted administrative proceedings independently. Within the framework of an administrative proceeding concerning the insider trading, the Commission is entitled to call and examine a witness and to demand a compulsory appearance of a witness (any person).

Further powers, available to the Commission in administrative proceedings concerning the insider trading, are as follows:

- power to demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case,
- power to search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case,
- it can appeal to a judicial authority or the police with a request to carry out a search.

The Commission, in relation to a suspected person, is neither entitled to issue an order of provisional detention, nor appeal to a judicial authority or the police with a request to apply the above measures. It also, in relation to a suspected person of committing an offence, is not entitled to:

- issue an order freezing assets,
- appeal to a judicial authority or the police with a request to apply the above measures,
- issue an order to tap the phone and bug the house of a suspect,
- appeal to a judicial authority or the police to apply the above measure.

If for the same crime there is possibility to impose both the penal and administrative sanction, imposing of the administrative sanction does not eliminate the possibility of imposing a penal sanction.

Penalties

Insider trading is subject to a penal sanction. The Criminal Code states: Anyone who by using privileged information obtains an economic benefit or avoids an economic loss, whether directly or through third parties, shall be punished by imprisonment for no less than one or more than five years.

If a director, officer or employee of a Stock Exchange, intermediation agent, issuer surveillance agency, risk rating company, mutual fund management companies, investment fund management company, pension fund administrator, or banking, financial or insurance institution commits an offence referred to in the foregoing paragraph, imprisonment shall be for not less than five (5) nor more than seven (7) years.

The Prosecutor acts in a judicial proceeding, draws up a statement of charges in cases and institutes and conducts an inquiry/investigation concerning insider trading. The Commission files a statement of charges to the Court in these cases.

27. Poland

The Polish Securities and Exchange Commission (PSEC) supervises public trading and the commodities market. The PSEC supervises the observance of fair trading and competition rules in public securities trading and ensures that universal access to accurate information on the securities market is available. The PSEC supervises the use of inside information and the keeping of professional secrecy and checks the fulfillment of disclosure obligations by public issuers.

Insider trading

The Law on Public Trading of Securities defines insider trading as the criminal liability relating to any person who in securities trading discloses and uses inside information. The Law defines inside information as a piece of information not given to the public and which, after its disclosure, could influence the price or value of a security. The information does not necessarily have to concern the issuer itself or the security itself.

Penalties

There is a criminal penalty for misuse of inside information. The criminal penalty and financial fine for insider trading are as follows:

- whosoever in securities trading discloses inside information shall be subject to fine of up to 1,000,000 PLN and imprisonment for up to 3 years, and
- whosoever in securities trading uses inside information shall be subject to fine of up to 5,000,000 PLN and imprisonment from 6 months to 5 years.

Administrative powers

In case of suspicion of misconduct, the PSEC initiates explanatory proceedings. If suspicions are validated, the PSEC notifies the Public Prosecutor about the alleged law violation. The PSEC undertakes the following activities in the period between detection of the offence and the transfer of the case to the Public Prosecutor:

- the collection of information concerning suspicious transactions,
- the identification of parties to the suspicious transaction,
- an analysis of the previous activity of identified investors,
- the identification of persons who had access or could have had access to the inside information,
- the investigation of relations between persons who had or could have had access to the inside information and the parties to the suspicious transactions.

Additionally, the Chairman of the Commission is vested with the powers of a prosecuting attorney as derived from the provisions of the Civil Procedure Code in civil cases pertaining to public trading. The Chairman of the Commission is also vested with the powers of an injured person defined in the provisions of the Penal Procedure Code to the extent to which the interests of public trading participants have been infringed or threatened.

Information disclosure

Public issuers are obliged to furnish to the PSEC and to the exchange information about any events that may substantially affect the price or the value of the securities and to disclose it to the public. The Commission created a special electronic system designated for transmission of data related to issuers and to securities in public trading (Eminent system). Brokerage houses must have internal rules and regulations concerning the protection of the flow of inside information.

Electronic Market Surveillance System

Electronic Market Surveillance System (ESNAR) is being created in the PSEC. The system will cover supervision over issuers, intermediaries, investment funds and transactions concluded on the regulated market. The system will generate alerts according to specified parameters concerning price, volume of trading, etc.

28. Portugal

The Portuguese Law has considered Insider Trading to be a crime in the Portuguese Companies Code, and in the Portuguese Securities Code (SC).

Inside information

According to the SC, privileged information is considered to be all non-public information that, being precise and regarding any issuing company, security or any other financial instrument, is able, if given public range, to influence, in a sensible way, the corresponding market prices. Insider trading corresponds to all situations concerning the use, in the financial markets, of relevant economic information obtained by privileged means, before its knowledge by the general public.

Insider trading

Four types of actions, based on privileged information, determine, according to the mentioned provision, the existence of this crime: (1) transfer, exterior to the agent's regular professional activity, of that information; (2) trading based on that information; (3) trading advice based on that information; and (4) buying, selling, and exchanging orders, directly or indirectly, on behalf of the agent or on behalf of third parties, based on that information. Neither the simple knowledge of privileged information nor a situation in which trading has not occurred corresponds, therefore, to insider trading.

The insider trading agents determined by the SC include: (1) managers or supervisors of an issuing company, (2) shareholders, (3) agents professionally related, in a permanent or occasional basis, to the issuing company, obtaining the information in consequence of that relation; (4) agents with a State profession, with inherent access to that information, (5) and agents not included in the previous categories, but obtaining the information from the previously mentioned agents.

Penalties

This crime is punishable with imprisonment with a three-year limit or by a fine, but if the agent is the one referred to in category (5) referred hereinabove, the prison penalty has a two-year limit and the criminal penalty a 240-day limit. Furthermore, the SC determines two accessory sanctions for this crime: (1) interdiction, during a period of time not exceeding five years, of the agent's professional activity, or the activity related to the crime committed; (2) publication of the court sentence with the correspondent conviction, at the agent's expense. The Portuguese Companies Code also establishes the sanction of indemnity towards the aggrieved.

Information disclosure

The issuing entities are obliged to inform the public of facts relating to their business activities that, in consequence of their influence in the company's economic, financial and business situation, may relevantly influence the share prices. The issuers of bonds and other debt securities are also obliged to inform the public of the facts that may relevantly affect their compliance ability. These facts must be communicated to the SMC in order to be disclosed to the general public through its information disclosure mechanism. Furthermore, it is compulsory to make these facts public immediately after their occurrence. If the facts that have occurred are not included in this category, they are made public, depending on the type of facts that have taken place, via publication in a newspaper with vast circulation in Portugal/in the company's territorial area and/or in the Stock Market Bulletin.

Administrative powers

The methodology adopted in the detection and investigation of this crime is structured as follows: (1) detection, through the SMC's supervision devices, of abnormal behavior relating to a determined security; (2) determination of the buyers/sellers; (3) identification, through the financial intermediaries, of the final buyers/sellers (through consultation of account files, determination of the person/s capable of moving the accounts, determination of the type of investor – regular/occasional, etc.), (3) establishment of a connection between these entities and the agents defined here above, (4) transfer of the collated data to the Public Prosecutor, who gathers additional proof and initiates the court procedure.

In spite of the existence of some cases of insider trading indictment, the Portuguese courts have never issued a conviction based on this crime. The principle reason for this lies in the difficulty of determining, on a case-by-case basis, the limits of the concept of insider trading, and also the complexity of the proof concerning the agent's motivation.

29. Singapore

The relevant authority is the Monetary Authority of Singapore. The laws prohibiting insider trading are found in the Securities and Futures Act (“SFA”).

Insider trading

The SFA redefines Singapore's laws on insider trading. The previous provisions were based on the defendant's connection with the company and make only the insider and the tippee (a person acting in concert with the insider) liable for insider trading.

To prove a case against tippees, the Prosecution has first to show that the tippee has received information from an insider. Secondly, it has to show that the tippee had an arrangement or association with the insider. Thirdly, the tippee must be aware that the insider himself is precluded from dealing. The balance is tilted too much in favor of tippees, to the detriment of other market participants.

Furthermore, there is difficulty in extending liability to others who are further down the information chain. Where the tippee himself does not trade but communicates price-sensitive information to another person (the secondary tippee), who then trades in securities, it may be difficult to prove any “arrangement” or “association” with the insider. This is unsatisfactory, as the secondary tippee (or other persons further down the information chain) would have traded with an unfair information advantage.

A person who receives inside information from sources other than a connected person is also not caught under the present approach, which requires the tracing of information back to the connected person.

At the core, the mischief of insider trading lies in tilting the playing field unfairly against other market participants. Those who knowingly have inside information should be prohibited from trading, whether or not they are connected with the company. The intent is to address the core evil of trading while in possession of undisclosed market sensitive information, instead of having liability depend on a person's connection with the company.

The new insider trading provisions no longer depend on the proof of a person's connection with the company. The test will instead shift to the core of the offence, i.e. trading while in possession of undisclosed price-sensitive information by the defendant. The new provisions will also tighten the *mens rea* (mental intent) test for directors and connected persons.

A person is guilty of insider trading if he, while in possession of information that is not generally available, but if it were, a reasonable person would expect it to have a material effect on the price of securities –

- subscribes for, purchases or sells, or enters into an agreement to subscribe for, purchase or sell, any securities; or
- procures another person to subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any securities.

The laws also tighten the prohibition on persons connected to a company. A person is “connected” if he is an officer or substantial shareholder of the company / related company, or if he is in a position that may reasonably be expected to give him access to price-sensitive information by virtue of a professional or business relationship between himself and the company / related company. For such connected persons, prosecution will have to prove that they have either **actual**⁵ or **constructive** knowledge⁶ of inside information. Thereafter, they would be **deemed** to know that the information in their possession is undisclosed and price-sensitive, without the prosecution having to prove such knowledge. This presumption may be rebutted by the defendants, who have to prove that they did not know that the information was undisclosed and price-sensitive. This will introduce greater discipline for those in fiduciary positions.

Prohibited activities

A person also is prohibited under the laws from communicating inside information to another person if he knows or ought reasonably to know that the other person would be likely to use the information to deal in securities or procure another person to deal in securities.

The SFA provides for the following statutory defenses for insider trading:

- the parity of information (i.e., where the counterparty to the trade is also in possession of the same inside information);
- trading whilst under a legal obligation;
- an exemption for trustees / managers of collective investment schemes in relation to redemption of units;
- a Chinese Wall defense;
- an exemption for communication made pursuant to legal obligations; and
- an exemption for underwriters in relation to trades made pursuant to an underwriting or sub-underwriting agreement.

⁵ Actual knowledge means a direct and clear awareness or understanding of an act, a fact or the truth.

⁶ Constructive knowledge is deemed knowledge – that one using ordinary care and diligence would possess.

Penalties

Insider trading attracts both criminal and civil liabilities. A defendant who is subject to criminal prosecution is liable upon conviction to a fine not exceeding S\$250,000 or to imprisonment for a term not exceeding 7 years or to both. A body corporate is liable to a fine not exceeding S\$500,000. Other than being a criminal offence, a defendant may alternatively be subject to civil penalty actions by MAS and/or civil claims for compensation by investors who suffered losses as a result of the offending trades. MAS is empowered to bring an action in court to seek a civil penalty award of up to treble the amount of profit gained or loss avoided by an insider trader while investors can sue for compensation.

The SFA limits proceedings to one of the three actions (criminal action, civil penalty action or civil claim for compensation) at any time to avoid parallel judicial deliberations. Thus, if a criminal proceeding is commenced against a defendant, both civil penalty and civil compensation actions in Court will be stayed. Similarly, with commencement of a civil penalty action, civil claim action by investors shall be stayed. In addition, the civil penalty route cannot be taken if criminal proceedings have been instituted. In other words, an insider may **either** be criminally prosecuted **or** liable for a civil penalty, but not liable to both.

Criminal investigations are conducted by the Commercial Affairs Department from the Singapore Police Force and criminal prosecutions handled by Deputy Public Prosecutors from the Attorney-General's Chambers. Civil investigations and civil penalty proceedings in Court are conducted by the MAS. The MAS has the following investigative powers and access to information:

- the power to require production and retain possession of books and, with a magistrate's order, to search and seize books;
- the power to require attendance of a witness for the purpose of recording a written statement; and
- the power to compel disclosure of the identities of beneficiaries of securities and futures transactions.

Where an investigation into a suspected insider trading is being carried out, MAS may apply to the court for an order to prohibit any transfer of money or securities.

30.Slovakia

In the Slovak Republic, matters of insider trading are regulated both in the Securities and Investment Services Act and the Criminal Code.

Inside Information

Basic provisions for the abuse of insider information under Slovak law are defined in the Securities and Investment Services Act.

For the purposes of the Securities and Investment Services Act, inside information is considered as information that:

- (a) was not disclosed,

- (b) refers to one or several issuers or one or several investment instruments admitted for trading on the stock exchange or that refers to another significant fact important for a market price development or to the price of one or several investment instruments,
- (c) after its disclosure, should significantly affect a market price or the price of investment instruments admitted for trading on the stock exchange, by which it could bring advantages to their owner or to the other legal or natural person.

The Criminal Code includes a general provision on the misuse of information in commercial relations, which is also applicable to insider dealing.

Insiders and Prohibition of Insider Dealing

A person who, due to his or her share in the registered capital of the issuer, or due to his or her job, employment, profession, position, or in relation to the performance of his or her duties, has access to confidential information and acquires such information is prohibited from:

- (a) using such information for his or her own benefit or for the benefit of other persons, in particular to acquire or dispose of the investment instruments to which such information relates, unless such information is generally known,
- (b) disclosing or accessing confidential information to another person, unless disclosure of such information is made in normal course of the exercise of their duties or employment,
- (c) recommending to any other person to acquire or dispose of the securities, which such information concerns.

This prohibition also applies to persons who have acquired confidential information from the informed person defined in the previous paragraph.

Administrative powers

The Financial Market Authority that is the Slovak capital market supervisory body is competent to impose administrative sanctions if the Securities and Investment Services Act is breached by a supervised entity.

Publication and disclosure of price-sensitive information

The price-sensitive information is published:

- (a) in nationwide press that releases exchange news,
- (b) by means of an unpaid posting at the seat of an issuer, at the seat of the stock exchange and at the seat of a securities dealer that offered services for an issuer connected with the issuance of the securities, and a notice of the place of such a disclosure in a nationwide press that releases exchange news.

All such information is reported to the Financial Market Authority.

31.Slovenia

Inside information

Misuse of inside information is prohibited by the Penal Code of the Republic of Slovenia. A person who, contrary to his duties of safeguarding inside information that is accessible to him in connection with his work in the pursuit of an economic activity or in connection with his status, in circumstances where such information could significantly affect the price of securities and is not yet known to the public, communicates such information to an unauthorized person or in any other way uses such information in relation to trading on an organized securities market, can be sentenced to imprisonment for up to three years (primary insider).

As regards insider dealing, Slovenian law defines the prohibition of trading on the basis of inside information as follows: inside information shall be deemed any information of a precise nature relating to one or several securities, which has not been made public and which, if it were to be made public, would be likely to have a significant effect on the price of the security or securities in question. Persons with direct access to inside information shall be:

1. holders of a qualifying holding in a legal entity,
2. management and/or supervisory board members of a legal entity.

Prohibited activities

No one shall be allowed to acquire securities or dispose of them on the basis of inside information. Persons with direct access to inside information shall not be allowed to disclose this information to third parties or recommend, on the basis of such information, to third persons to acquire or dispose of certain securities.

Information disclosure

Persons with direct access to inside information are obliged to report to the Slovenia Securities Market Agency (Agency) any securities transactions, which are the subject of reporting. The subject of reporting shall be any transaction of securities traded on the organized market in the Republic of Slovenia and/or on the organized market in a Member State, regardless of whether the person concerned made such a deal for his/her own or someone else's account and regardless of whether the transaction was made on or outside the organized market. Such person will be, upon full Slovenian membership in the EU, obliged to report on the transactions referred to above which were made on the organized market of an individual Member State and of which reports are made to the responsible supervisory authority of the Member State in question.

The Agency issued a decree on obligatory reporting for all persons that have direct access to inside information. The above mentioned by-law defines the contents and the method of reporting to the Agency and it is compulsory for all persons that have direct access to inside information. It defines persons who are obliged to report and the kinds of transactions that must be reported.

Administrative powers

To prevent violations of the prohibition of the use of inside information and/or to uncover such violations, the Agency may request relevant explanations and data from the following persons:

- 1) persons with direct access to inside information,
- 2) issuers of securities, which are traded on the organized markets,
- 3) individuals and legal entities accepting orders and/or performing individual tasks relating to the transactions,
- 4) individuals and legal entities which might be familiar with individual violations of the prohibition of the use of inside information,
- 5) employees and management board members of the legal entities referred to in the preceding items.

The persons referred to above are obliged to: respond to the Agency's request and provide it with relevant oral explanations, disclose the identity of a person for whose account the transaction in question was made and present the documents relating to the transaction in question.

If, during the exercise of the supervision, the Agency establishes that there is reason to suspect that a crime was committed, the Agency shall be obliged to report it to the responsible public prosecutor.

Penalties

The SMA defines fines in cases of violations of insider trading. A fine for an economic offence is imposed on the legal entity and on the competent person of the legal entity or on the individual:

1. if it/he acquires securities or disposes of them on the basis of inside information, or
2. if it/he discloses inside information to third parties or recommends, on the basis of such information, to third persons to acquire or dispose of certain securities.

A fine for an economic offence also can be imposed on secondary insiders (legal entity, competent person or individual) if he acquires securities or disposes of them on the basis of inside information. The same punishment is imposed on an unauthorized person who acquires inside information and uses it on an organized market (secondary insider).

Since the law on commercial companies prescribes that a person who was convicted of a criminal offence committed against the economy will not be eligible for management of a joint stock company within five years from the final court verdict and not before a period of two years has elapsed after he has served a prison term, the person convicted on the basis of the above mentioned provision cannot – for a defined period of time – become a member of the management. The same applies for the members of the supervisory board.

Even stricter rules are prescribed for management of financial companies (in case of stock brokering companies, a criminal record with no final sentence of imprisonment of over three months which has not yet been expunged, is required).

Brokerage houses: prohibited activities

A stock brokering company is obliged to maintain as classified that information, facts and circumstances with which it has become familiar by virtue of providing services with regard to securities and is not allowed to disclose it to third parties, to make use of them itself, or to enable third parties to make use of them.

The obligation to maintain classified data also applies to members of bodies of the stock brokering company, those employed with the stock brokering company and other persons providing individual services for the stock brokering company on a contractual basis, and is applicable after the cessation of the function or contractual relationship. A stock brokering company is obliged, with regard to each person referred to above to keep a record of all securities transactions made by the said persons and has to ensure that they regularly report on all their securities transactions and/or securities transactions made by persons related to them. It must organize its operations so as to ensure the efficient maintenance of classified information and to protect against possible misuse of that information.

A stock brokering company is obliged to regularly compile a list of securities and/or issuers with regard to which the classified information was obtained. All stockbrokers and those employed with the stock brokering company must be familiar with the contents of the said list and are not allowed to recommend the securities included in the list to clients or buy and/or sell them for the account of the stock brokering company, for their own accounts or for the accounts of persons related to the stock brokering company or stockbrokers.

Brokerage houses: exemptions

A stock brokering company is only allowed to communicate the classified information in the following events:

- 1) on the basis of a written approval given by the client;
- 2) at the written request of a court and/or responsible administrative body if the information is needed by the court and/or responsible administrative body with regard to individual proceedings pursued by it within the scope of its competency;
- 3) at the written request of the Agency and/or the Bank of Slovenia if the information is needed by the Agency and/or Bank of Slovenia with regard to individual proceedings pursued by it within the scope of its competency.

Information obtained by the court, responsible administrative body, the Agency or the Bank of Slovenia on the basis of the mentioned provisions may only be applied pursuant to the purpose for which they were obtained.

Brokerage houses: administrative powers

The Agency withdraws from the stock brokering company the authorization to provide services with regard to securities if the stock brokering company violates the prohibition on the use of inside information. The Agency withdraws the authorization to assume the function of management board member of a stock brokering company if the management board member violates the obligation to maintain classified data.

The prohibition of insider trading also is included in rules of the Ljubljana Stock Exchange, the sanction can be imposed on a member of the Stock Exchange (e.g., authorized participants on the securities market) being among other suspension from Stock Exchange trading for a definite or an indefinite period of time.

32. South Africa

The Insider Trading Directorate (ITD) is a committee of the Financial Services Board (FSB), which is responsible for dealing with insider trading. This matter is regulated in terms of the Insider Trading Act (the Act). The Act does not empower the FSB or the ITD to impose administrative sanctions. However, in terms of the Act the FSB may issue civil summons against alleged offenders for up to four times the profit made or the loss avoided as a result of offending transactions.

Insider trading

Insider trading is the dealing in securities or financial instruments by an individual knowingly in possession of inside information, relating to the instrument being dealt in.

Securities and financial instruments are defined as stocks, shares, debentures, notes, units of stock issued in place of shares, and options and rights to such instruments. The terms include options on indices, loan stock and instruments issued in other countries. It also includes instruments with similar characteristics, dealt with on a regulated market.

Inside information is specific or precise information that is price sensitive and has not been made public. If information is likely to have a material effect on the price or value of an instrument if it is made public, it is price sensitive.

Inside information is information obtained from an insider. Someone who has inside information through being a director, employee or shareholder of the issuer of the instrument, or who has gained access to such information by virtue of his employment, office or profession, is an insider. Anyone, who is tipped by an insider, becomes an insider as well.

Everybody in possession of inside information is precluded from trading in the affected security or financial instrument.

Penalties

Anyone who knows that he or she has inside information and who deals directly or indirectly, for his own account or for another, in the securities or financial instruments to which such information relates or which are affected by such information, is guilty of the offence of insider trading.

A person with inside information who encourages or discourages another person from dealing, or discloses any inside information, may also be guilty of an offence. The above offences can result in a fine of up to 2 million Rands and imprisonment of up to ten years.

Exemptions

An individual shall not be guilty of insider trading if such individual proves on a balance of probabilities that he or she:

- was acting on specific instructions from a client, where the inside information was disclosed to him or her by that client;
- would have acted in the same manner even without the inside information;
- was acting on behalf of a public sector body in pursuit of monetary policy, policies in respect of exchange rates, the management of public debt or foreign exchange reserves; or
- was acting in pursuit of the completion or implementation of an affected transaction.

An individual shall not be guilty of the offence if such individual proves on a balance of probabilities that he or she:

- believed, on reasonable grounds, that no person would deal in the securities or financial instruments as a result of such disclosure; or
- disclosed the inside information in the proper performance of the function of his or her employment, office or profession and at the same time disclosed that the information was inside information.

Civil remedy

The FSB may institute civil claims against persons who knowingly used inside information to trade in securities or financial instruments. If the FSB can prove that a person profited or avoided a loss through unlawful dealing, the profit or loss avoided may be recovered. In addition, such a person will be liable to pay a penalty of up to three times the amount of his ill-gotten gains, plus interest and legal costs.

As a result of a successful civil action, the FSB will be in possession of the total amount recovered from the offender. In terms of the Act, the FSB may recoup its legal and investigation costs from this amount. The balance of the funds is then distributed to investors who have been affected by the illegal transactions.

For this purpose the Act provides for a statutory claims officer to deal with the distribution of the funds recovered from the offender. The claims officer has the discretion to grant a claimant a lesser amount than he is entitled to, if good cause is shown for such action. However, any person aggrieved by a decision of the claims officer, may appeal against such decision to the FSB Appeal Board.

The Insider Trading Act does not prescribe how profits made or losses avoided on insider trading are calculated. The Act only stipulates that the FSB can sue for four times such an amount. If an individual purchases securities whilst in the possession of inside information before the information is published, and sells those securities after the announcement, FSB uses the difference between the purchase price and the selling price to calculate the profit. If the individual does not sell the securities, the unrealized profit is calculated by subtracting the purchase price from the market price of the securities after announcement of the inside information. If an individual sells securities to avoid a loss, the loss avoided is calculated by subtracting the price of the security after the announcement of the inside information from the actual selling price at which the offender sold.

If the offending transactions and the publication of the inside information took place within a week from each other, every person that dealt in the same security during the same week are compensated. If the offending transactions and the publication of the inside information took place more than a week apart, every person that dealt in the same security on the same day as the offender are compensated. In both these instances the claims officer only compensates persons that traded in the opposite direction as the offender.

For every claimant the difference between the prices at which he or she traded and the price of the security after the announcement of inside information is calculated. The total amount recovered from the offender is distributed pro rata to all claimants.

Cooperation of supervisory authorities

The primary surveillance with regard to insider trading in South Africa is done by the JSE Securities Exchange. The Financial Services Board meets with them at least once every week to discuss possible new cases and cases under investigation. As a result of the Financial Services Board's right to subpoena information, the FSB is able to obtain information from the other supervisory authorities nationally. Internationally, the FSB rely on memoranda of understanding to obtain information. The level of cooperation differs from jurisdiction to jurisdiction.

Planned legislative changes on insider trading

The Insider Trading Act is being taken up in the Securities Services Bill, to be promulgated soon. When that happens, a structure will be created that will enable the Financial Services Board to impose administrative fines on offenders in general. It will be possible to use this structure to combat insider trading. However, it is foreseen that the administrative fines would rather be utilized in less serious cases of non-compliance.

33. Spain

Inside information (“privileged information”) and insider trading is defined and regulated by the Spanish Securities Market Act.

Insider trading

Any person or entity acting on the securities markets, conducting business relating thereto and, in general, anyone who, due to his work, profession, office or duties, possesses particulars or information relating thereto shall safeguard the secrecy of such particulars and information without prejudice to his obligation to notify and cooperate with the court or governmental authorities. In particular, he/she/it will prevent such particulars or information from being used abusively or unfairly, he will report cases where this may have taken place, and shall adopt forthwith the necessary measures to prevent, obviate and, as appropriate, remedy the consequences arising therefrom.

Privileged information is understood to be all specific information referring to one or more securities and to one or more securities issuers, which has not been made public and which, should it be made or have been made public, could have or could have had an appreciable effect on the quotation of such securities.

Insiders

All those in possession of any privileged information shall refrain from carrying out, on their own account or on behalf of another, directly or indirectly, the following:

- 1) preparing or performing transactions of any kind on the market relating to the securities to which the information refers,
- 2) communicating said information to third parties, except in the normal course of their work, profession, office or duties,
- 3) recommending that a third party acquire or assign securities or to procure that another party acquires or assigns them on the basis of such information.

From an administrative point of view, the use of confidential (“privileged”) information in breach of the requirements stated above is considered as an extremely serious infringement, unless the benefits derived from the misconduct be of scant importance. In this latter case, it shall be considered just as a serious infringement.

On the other hand, if the profits derived from the misconduct exceed 450 000 Euro, it shall be considered as a crime and punished by the judicial authorities according to the Criminal Code. It has to be noted that the description of the conduct and the scope of potential insiders are more restrictive in the Criminal Code.

Penalties

The Criminal Code states that, those who directly or through an intermediary use price sensitive information regarding securities or instruments traded in an organized market, whether official or acknowledged, in relation to which they have had reserved access because of their professional or business activities, or supply such information, with the result of obtaining profits for themselves or a third person exceeding the amount of 450 000 Euro or causing a harm of identical quantification, will be punished to 1-4 years’ imprisonment and a fine ranging from the equivalent amount to three times the profits obtained or facilitated.

When one of the following circumstances is present regarding the behavior described above, a punishment of 4-6 years’ imprisonment and a fine ranging from 12 to 24 months will be applied:

- 1) development of such abusive practices on a regular basis,
- 2) notorious importance of the profits obtained,
- 3) grave damage to the general good.

The fine is a monetary sanction. The fine is imposed on a daily basis, for a minimum of 5 days and a maximum of 2 years. The daily fine is a minimum of 200 pesetas (1,2 Euro) and a maximum of 50.000 pesetas (300,5 Euro). When the period of the punishment is established by months or years, it will be understood that months are of 30 days and years are of 360 days. The Judge determines the period and the amount of the fine within the limits above.

In addition, there is a legal requirement to disclose without delay any fact, event or decision that may have a significant influence on the prices of listed securities.

Under the Spanish Securities Market Act, the issuers of securities must inform the public, within the shortest period of time, of any fact or decision that may have a significant influence on the securities quotation. Where the issuer deems that the information should not be made public, on grounds of it affecting its legitimate interest, it shall immediately notify the Spanish Securities Commission (CNMV), which is empowered to exempt the issuer from the disclosure requirements, if it is deemed necessary.

Under the Spanish Securities Market Act, the Commission may require the issuers of securities and any other entities somehow connected with the securities markets to immediately disclose to the public those facts or significant information that might have an effect on the trading of these securities. The CNMV is empowered to disclose subsidiarily such information on its own.

34. Sri Lanka

Insider trading

The market is supervised by the Securities and Exchange Commission. It uses the following definitions for the purposes of insider trading: a connected person trading in a listed company's securities based on unpublished, price sensitive, material information is said to be committing the offence of insider trading.

For the purpose of the offence, an individual is connected with a company if, and only if:

- (a) he is a director of that company or a related company; or
- (b) he occupies a position as an officer (other than director) or employee of that company or a related company or a position involving a professional or business relationship between himself (or his employer or a company of which he is a director) and the first company or a related company which in either case may reasonably be expected to give him access to information which, in relation to listed securities of either company, is unpublished price sensitive information and which it would be reasonable to expect for the proper performance of his function.

Any reference to "unpublished price sensitive information" in relation to any listed securities of any company is reference to information which:

- (a) relates to specific matters relating, or of concern, (directly or indirectly) to that company that is to say, is not of a general nature relating or of concern to that company; and
- (b) is not generally known to those persons who are accustomed or would be likely to deal in those listed securities but which would if it were generally known to them be likely to affect materially the price of those securities.

"Related Company" in relation to any company means any body corporate that is a company's subsidiary, associate or holding company, or a subsidiary of that company's holding company.

Penalties

The issues related to the insider trading are not subject to an administrative sanction, but they are subject to penal powers. Any person found guilty of insider trading shall be liable on conviction after summary trial by a Magistrate, to a sentence of imprisonment of either description for a period not exceeding five years or to a fine not exceeding ten million rupees or to both such imprisonment and a fine.

The Commission may, having regard to the circumstances in which the offence was committed, compound such offence for a sum of money not exceeding one-third of the maximum fine imposable for such offence and all such sums of money received by the Commission in the compounding of an offence shall be credited to the Compensation Fund established under SEC Act.

The prosecutor:

- acts as a public prosecutor in judicial proceeding in issues concerning insider trading,
- files a statement of charges to the Court,
- draws up a statement of charges.

Administrative powers

The role of the Commission is to institute and conduct an inquiry/investigation concerning insider trading. It does it independently. The Commission, within the framework of an inquiry/investigation concerning insider trading:

- is entitled to call and examine a witness (any person); this information is presently obtained under the general provisions contained in the SEC Act and the Commission has no authority to administer an oath from witnesses,
- is not entitled to demand a compulsory appearance of a witness,
- is not entitled to demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case,
- is not entitled to search inhabited premises and other places in the situation of a justified assumption that there may be objects constituting evidence in the case, and cannot appeal to a judicial authority or the police with the request to carry out a search,
- cannot issue an order of provisional detention,
- cannot appeal to a judicial authority or the police with the request to apply the above measure,
- neither issue an order freezing assets nor appeal to a judicial authority or the police with the request to apply this measure,
- neither issue an order to tap the phone and bug the house of a suspect, nor appeal to a judicial authority or the police to apply these measures.

35. Chinese Taipei

Inside information

The relevant institutions in the Chinese Taipei capital market are Securities and Futures Commission and Ministry of Finance. For the purposes of insider trading, the inside

information is information that will have a material impact on the price of securities of the issuing company.

Penalties

The issues related to insider trading are not subject to an administrative sanction. The insider trading is subject to criminal penal sanction and reparation. Any person who violates insider trading law shall be punished with imprisonment for a period not more than seven years, and in addition thereto, a fine of not more than NT 3,000,000 dollars may be imposed.

The prosecutor acts in issues concerning insider trading and files a statement of charges to the Court. The Commission and the exchanges draw up a statement of charges in issues concerning insider trading. The inquiry/investigation concerning insider trading is instituted and conducted by the prosecutor and the Bureau of Investigation.

Administrative powers

If there is information that has an impact on the price of the securities of the issuing companies, the Commission will check the so-called “insider,” focusing on the insider’s trading activity prior to the public disclosure of such information.

Within the framework of an inquiry/investigation concerning insider trading, the Commission is neither entitled to call and examine a witness nor to demand a compulsory appearance of a witness. The Commission is not entitled to do the following activities either:

- to demand a delivery and retaining of things (documents or other objects) which may constitute evidence in the case,
- to search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case,
- to issue an order of provisional detention, to freeze assets, or to tap the phone and bug the house of a suspect.

However, the Commission may appeal to a judicial authority or the police to apply the above measures.

36. Thailand

Insider trading

The Securities and Exchange Commission in Thailand (SEC) uses the following definition of insider trading: the use of non-public price-sensitive information, either by means of trading in securities or tipping for a consideration by corporate insiders, including other persons entrusted by the corporation, staff of securities exchanges and officers of the Commission.

Penalties

Insider trading is criminal in nature, which is punishable by a fine not exceeding 2 times the illegal profit earned but not less than Baht 500,000, or by imprisonment for up to 2 years, or both. Also, the law allows a civil disgorgement of the illegal profit earned within 6 months. In order to pursue a criminal action, the SEC may choose to send the case before the

Settlement Committee to impose criminal fines, and the matter is deemed final. In cases where the offenders fail to appear before the Settlement Committee, the SEC is left no choice but to pursue the normal criminal procedure route, filing a criminal complaint with the Royal Thai Police, who then will refer the matter further to the public prosecutor. In this regard, the prosecutor acts in judicial proceedings in issues concerning insider trading, draws up a statement of charges and files a statement of charges to the Court.

Administrative powers

The Commission conducts inquiry/investigation independently. It is entitled to:

- demand a compulsory appearance of a witness,
- demand a delivery and retaining of things (documents or other objects), which may constitute evidence in the case,
- search inhabited premises and other places, upon a justified assumption that evidence involving violations of law are kept in that place.

The Commission has neither power to issue an order of provisional detention nor is entitled to file a petition to a judicial authority to issue such an order. In cases where a person is suspected of committing an offence that may harm the public interest, if the Commission has a reasonable ground to believe that such person would remove or dispose of his properties, the Commission may issue an order freezing assets for a period not more than 180 days. However, when an action has been filed before the court, then the freezing order will continue in effect until the court orders otherwise. If it is unable to bring the case before the court within 180 days, the Commission may file a petition to a judicial authority to lengthen the period. The court, upon its discretion, may issue an order.

The Commission has no power to issue an order to tap the phone or bug the house of a suspected person or to file a petition to a judicial authority to apply this measure.

Two amendments to legislation on insider trading are planned to ensure greater clarity and interpretation:

1. *Meaning of Insider Trading*: A proposed amendment to the SEC Act aims to clearly define the meaning of offenses on insider trading and to enforce insider trading laws more practically. Offenses relating to insider trading are classified into 1) insider trading by a corporate insider and 2) insider trading by an insider in connection with a tender offer.
2. *Prevention of Insider Trading*: The SEC has proposed to include a short-swing profit provision into the Act. Such provision would prohibit any person, who by virtue of his office or position normally has access to corporate inside information that has not yet been disclosed to the public, from purchasing and then selling, or selling and then purchasing, securities of the company within a certain period of time. This provision will help prevent the offender, especially the management, from committing the offenses.

37. Turkey

The Capital Markets Board (CMB) of Turkey uses the following definitions:

Insider Trading: to benefit to his/her self-owned property or to eliminate a loss so as to damage equal opportunity among the participants operating in capital markets with the aim of gaining benefit for himself/herself or for third parties by making use of non-public information which could materially affect the value of capital market instruments.

Insiders: the chairman and members of the board of directors, directors, internal auditors and other staff of the issuers, capital market institutions (intermediaries, auditing firms, mutual funds, investment companies etc) or of their subsidiary or dominant establishments, and apart from these, the persons who are in a position to have information while carrying out their professions or duties, and the persons who are in a position to have information because of their direct or indirect relations with these.

The companies are required to disclose facts, such as changes in capital structure and control of the company, purchase, sales and lease of fixed assets, changes in operations, investments, financial structure or participations of the company, and changes regarding administrative issues to the public. In case of unusual movements in price/volume of securities, companies should inform the public on whether there is any fact or event that may have an influence on the securities, and if any, disclose those to the public immediately. Disclosing such information shall be by notifying the CMB and the relevant stock exchange. It is announced during the trading session and published in the stock exchange bulletin. The CMB also publishes those material events and may also require the companies to publish that information in the press, if deems it necessary.

Administrative powers

The CMB is entitled to take necessary measures in order to prevent anyone involved in any insider trading activity to trade in any organized and regulated securities market. The issues related to insider trading are subject to an administrative sanction.

The CMB institutes and conducts an administrative proceeding concerning the insider trading independently, irrespective of an offender. It is not entitled either to call and examine a witness or to demand a compulsory appearance of a witness. However, the CMB's experts are authorized to request relevant information (written or oral) from the issuers, securities market institutions, their subsidiaries, and other natural or legal persons within the context of Capital Market Law and other legislation related with securities markets, and it is compulsory for them to provide the CMB with this information.

Within the framework of administrative proceedings concerning insider trading, the CMB may demand from anyone a delivery of and retain things (documents or other objects) which may constitute evidence in the case. The CMB may not, within the framework of an administrative proceeding concerning insider trading, search inhabited premises and other places where there is a justified assumption that there may be objects constituting evidence in the case, but it can appeal to a judicial authority or the police with the request to carry out a search.

The CMB also is empowered to disclose to the public any information which otherwise should have been disclosed. The Istanbul Stock Exchange (ISE) also requires companies traded on the ISE to confirm whether there is any undisclosed information when it determines any unusual movements in stock prices/ volume during the course of market surveillance.

In relation to a suspected person, the CMB is neither entitled to issue an order of provisional detention nor to appeal to a judicial authority or the police with a request to apply this measure. In relation to a person suspected of committing an offence, the CMB is not entitled to issue an order freezing assets, but it may appeal to a judicial authority or the police with the request to apply this measure. The CMB also is not entitled to issue an order to tap the phone and bug the house of a suspect or to appeal to a judicial authority or the police to apply those measures. Imposing an administrative sanction does not eliminate the possibility of imposing a penal sanction.

Penalties

Insider trading has a criminal nature and is subject to penalties specified in the CML, including from 2 to 5 years of imprisonment and a heavy fine of TL 10 billion to TL 25 billion. Fines may not be less than three times the benefit realized, being independent of any upper limit. In case of the repetition of the violation, the penalties given shall be increased by one half. Also, under the authority given by the CML, the CMB can take and implement measures to prevent natural or legal persons involved directly or indirectly in insider trading or manipulation from making transactions on the exchanges and on any other organized markets temporarily or permanently. Imposing the penal sanctions does not eliminate the possibility of imposing administrative sanctions.

The prosecutor:

- acts in judicial proceeding in cases concerning insider trading,
- files a statement of charges to the Court,
- draws up a statement of charges (in cooperation with the CMB).

The CMB institutes and conducts an inquiry/investigation concerning insider trading independently. It cannot call and examine a witness, but the CMB's experts are authorized to request relevant information (written or oral) from the issuers, securities market institutions, their subsidiaries, and other natural or legal persons within the context of Capital Market Law and other legislation related with securities markets, and it is compulsory for them to provide the CMB with this information. The CMB is not entitled to demand a compulsory appearance of a witness.

The delivery and retaining of things (documents or other objects) which may constitute evidence in the case may be demanded by the CMB from anyone. The CMB also may appeal to a judicial authority or a police with the request to carry out a search of inhabited premises and other places in the situation of a justified assumption that there may be objects constituting an evidence in the case, but may not do it by itself.

38. United Kingdom

In the United Kingdom, matters of insiders dealing are regulated by the Criminal Justice Act. It is the practice of the stock exchange to bring such dealings under further examination to the attention of the Secretary of State for Trade and Industry.

Insider trading

According to the act, an individual having information as an insider is guilty of insider dealing if he/she:

- deals in securities that are price-affected securities in relation to the information,
- encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information,
- discloses information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

Inside information

For the purposes of the Criminal Act “inside information” is the information which:

- relates to particular securities or to a particular issuers of securities and not to securities generally or to issuers generally,
- is specific or precise,
- has not been made public,
- if it were made public, would be likely to have a significant effect on the price of any securities.

Exemptions

An individual is not guilty of insider dealing by virtue of dealing in securities or encouraging another person to deal in securities, if he shows that he did not expect that the dealing would result in a profit attributable to the fact that the information was price sensitive. He can also prove that he believed on reasonable grounds that the information had been disclosed widely enough or that he would have done what he did even if he had not the information.

A person is not guilty of insider trading by virtue of a disclosure of information if he/she shows that he did not at the time expect that any person, because of disclosure, would deal in securities or that the dealing would result in a profit attributable to the fact that the information was price-sensitive information in relation to the securities, although he had such an expectation at the time.

Penalties

An individual guilty of insider dealing is liable:

- on summary conviction, to a fine not exceeding the statutory maximum or imprisonment for a term not exceeding six months or both,
- on conviction on indictment, to a fine or imprisonment for a term not exceeding seven years or to both.

The offender can also be forced to repay all profits made or losses avoided as a result of insider dealing.

39. United States of America

Insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, non-public information about the security. Accordingly, there are two elements to the concept of inside information: confidentiality and materiality.

Information is material, under the securities law of the US, if a reasonable investor is likely to consider it significant in making an investment decision or if the information is reasonably certain to have a substantial impact on the market price of a company's securities.

Non-public information is defined as information that has not been disseminated in a manner making it available to investors generally. Dissemination can be achieved by disclosing information in reports filed with the SEC or the Exchanges, and publishing it in the press. Dissemination is completed when the public has assimilated the information in the disclosure.

Insider trading

No statutory definition of insider trading exists in the United States and the prohibition of such activity has been developed through the implementation of statutes and regulatory rules, as well as common law interpretation.

The Securities Exchange Act addresses insider trading directly through Section 16(b) and indirectly through Section 10(b).

- Section 16(b) prohibits short-swing profits (profits realized in any period less than six months) by corporate insiders in their own corporation's stock, except in very limited circumstances. It applies to directors or officers of the corporation and 10% shareholders. Profits earned in that way belong to the corporation.
- Section 10(b) makes it unlawful for any person to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any securities not so registered, any manipulative or deceptive device or contrivance in contravention of such rules that the SEC may prescribe to implement Section 10(b).

These broad anti-fraud provisions make it unlawful to engage in fraud or misrepresentation in connection with the purchase or sale of a security. Although these sections do not expressly mention "insider trading," under this provision the courts and the SEC have developed theories of insider trading liability.

Theories of insider trading

Traditional Theory

Prior to 1980 nearly everyone who was in possession of inside information was prohibited from trading on it or communicating it to others. After a 1980 U.S. Supreme Court decision, a securities trader could not be held guilty of fraud for failing to disclose material non-public

information in his or her possession prior to consummation of a transaction unless the trader had a duty to disclose that information. The mere possession of material non-public information does not give rise to a duty to disclose that information. The duty to disclose information or abstain from trading on the basis on that information arises only when a fiduciary relationship or a similar relationship of trust and confidence is involved between parties to a transaction. The classic example of a relationship resulting in the duty to “disclose or abstain” is that between corporate officers and directors, on one side, and the shareholders of the corporation, on the other.

Under the traditional theory, liability may extend to parties who are not typical insiders of a corporation when those parties obtain access to corporate information by virtue of their special confidential relationships with the corporation. Such parties are sometimes called “temporary insiders.” Typical temporary insiders are lawyers, accountants, investment bankers, financial consultants, and financial analysts working for rating agencies.

In response to the court decision, the SEC promulgated Rule 14e-3 under section 14(e) of the Exchange Act, and made it illegal for anyone to trade on the basis of material non-public information regarding tender offers if they knew that information emanated from an insider. The purpose of the rule was to remove the duty requirement in the tender offer context, where inside information was most attractive and especially disruptive.

The Supreme Court's decision extended liability under the traditional theory to “tippees.” A tippee can be any person, who learns material nonpublic information from a corporate insider. Tippee liability derives from the liability of the insider. The tippee is sometimes said to “inherit” the insider's fiduciary duty. Liability can be imposed on a tippee only when an insider breaches a fiduciary duty to shareholders by disclosing information to the tippee and when the tippee knows, or should know, that the insider is acting improperly by disclosing information.

Misappropriation Theory

Under the misappropriation theory, a person commits securities fraud when he or she misappropriates material nonpublic information in breach of a duty owed to an employer or any other person who is not the securities issuer and uses that information in a securities transaction or communicates it to others. Unlike the traditional theory, securities fraud can be found even if the violator does not owe any duty to the shareholders of the issuing corporation or have any relationship at all to those shareholders. Under the misappropriation theory, any person who trades on the basis of material nonpublic information misappropriated from another person can be guilty of insider trading.

Penalties

Violations of insider trading laws in the US trigger a broad range of penalties. An insider who willfully violates securities laws is subject to criminal penalties, including a maximum of ten years imprisonment and a fine of 1 million dollars for individuals and 2.5 million dollars for corporations.

It should be pointed out that the SEC cannot bring a criminal action for an insider trading violation. It can only recommend criminal prosecution to the Justice Department. On the other hand, the SEC can bring a civil action against an insider and obtain an injunction

preventing future securities trading, or an order requiring disgorgement of profits gained through insider trading, and a fine as high as 1 million dollars or three times the profit gained or loss avoided as a result of the insider trading.

An investor may also bring a private lawsuit for damages against an insider. The maximum amount of civil recovery by an investor is equal to the difference between the price at which the investor sold or purchased the shares and the market price of the stock at reasonable time after the information was announced to the public, limited by the amount gained by the wrongdoer.

Insider trading investigation techniques

The following provisions of federal law have been uncovered as most commonly violated by insider trading: 1. Tender offer provisions; 2. Failure to supervise; 3. Aiding and abetting; 4. Policies and procedures; 5. Perjury/false statements to government; 6. Obstruction of justice; 7. Issuer's books and records; 8. Broker dealer's books and records; 9. Reporting of beneficial ownership; 10. Manipulation; and 11. Antifraud.

Insider trading investigations are often started after a public announcement which materially affects the price of the issuer's securities (e.g. announcements of proposed tender offers and announcements of significant earnings declines frequently warrant investigations of possible insider trading). Defendants come from a wide variety of backgrounds and include corporate employees, attorneys, investment bankers, physicians, students, account executives, housewives and others.

Insider trading cases typically involve the use of circumstantial evidence to prove that the defendant possessed material non-public information. Telephone records frequently provide this circumstantial evidence in "tipping" cases. Whether this type of circumstantial evidence is sufficient often depends upon the credibility of the defendant who denies, under oath, that a tip took place. For this reason, evidence bearing on the credibility of potential defendants is critical. A false exculpatory statement by a defendant in the course of the investigation is frequently the linchpin of a successful investigation strategy.

The main sources of information on breaching the law concerning insider trading are as follows:

1. Informants, namely: anonymous calls, market professionals, disgruntled employees, and competitors;
2. Market surveillance, namely:
 - Self Regulatory Organizations (SROs) – SROs provide the SEC with reports of suspicious trading, frequently there are detailed reports of their investigations including backup materials,
 - SEC review of market trading – the staff monitors market trading through online data services and through review of major periodicals. Depending on the evidence, the staff may immediately either open a Matter Under Inquiry (MUI) to take a further preliminary look at the situation, or an investigation.

In the course of insider trading investigations, the following steps are especially important:

1. Establishing materiality of the case (generally a price movement of 10% or more) with obtaining price/volume trade data, contacting issuer, and reviewing news releases.
2. Identification of suspicious trades – it is an ongoing process (e.g. trades which may not appear suspicious at the outset can later become suspicious as more evidence is developed, and vice versa). Large trades are routinely classified as suspicious, however small trades can be suspicious if they can be linked to other suspicious trades or to insiders. To identify suspicious trades the Commission and SRO staff routinely analyze trading records among others in computerized format via the automated Blue Sheet system (namely: monthly account statements, account opening documents, order tickets, price volume runs, etc.).
3. Identification of insiders and traders – the Commission staff routinely requests chronologies from issuers, law firms, investment bankers and tender offerors in order to determine what the material non-public information was, when it was created and when various persons had access to it. These chronologies show the locations, dates, times, participants and subject matter of relevant meetings and documents from the inception of the discussion of the material event through its public disclosure. In many investigations the staff creates a master chronology using information from trading records, travel records, day timers, calendars, telephone and other records.
4. Establishing connection between insiders and traders – such documents as day timers, address books, calendars, telephone records, bank records and other personnel files are extremely useful in establishing connections between insiders and traders. These files are available from a number of sources, including employers, witnesses, and institutional data bases.
5. Establishing “duty” – employees of law firms, brokerage firms, investment banking firms and issuers routinely execute blanket confidentiality agreements with respect to information they receive in the course of their employment. The agreements are obviously most helpful in establishing a duty of trust and confidence with respect to information which may have been used or conveyed in connection with the suspect trading.
6. Setting stage for disgorgement – last but not least, it is the part of investigation which includes statements on profit summaries and location of assets as well as profit sharing, payoffs concerning usage of nominee accounts.

Cases involving significant foreign trading are more complicated. In order to prevent a dissipation of illegal profits when the suspicious trading occurs in a foreign based account, the SEC frequently seeks emergency relief. The SEC action covers usually several additional steps:

1. Connecting an U.S broker dealer:
 - SEC requests identity of account holder. If it is not disclosed, the Commission asks that the account holder be contacted and told to contact the SEC, requests information on knowledge of deal and insiders, reasons for trade, voluntary freeze, etc.
 - SEC asks to be informed if the account holder seeks to withdraw/transfer funds or securities.
 - SEC requests monthly account statements, Blue Sheet data, etc.
2. Connecting a foreign broker dealer (co-ordination with the Office of International Affairs):
 - As above and additionally the SEC warns that a foreign broker dealer could be named as a defendant in immediate legal action if it fails to identify customer or freeze funds.

Insider trading experience in the United States

The legal system in the United States is based on the common law tradition of England, which relies on courts to develop the law. Therefore, it is worthwhile to examine the case law and the history of interpretation of the scope of insider trading in the case law.

Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, which became the principal laws applicable to stock markets after the crash of 1929, aimed at controlling abuses and protecting investors. To implement the 1934 Act, the SEC addressed the statutory provision regarding insider trading (Section 10b) by adopting associated anti-fraud regulations (Rule 10b-5). In the United States, the development of insider trading law has not progressed evenly as the reach of the anti-fraud provisions to cover insider trading has expanded and contracted over time.

The anti-fraud provisions are relatively easy to apply to a corporate insider who secretly trades in his own company's stock while in possession on inside information because such behavior fits within traditional notion of fraud. Far less clear was whether Section 10(b) of the 1934 Act and Rule 10b-5 prohibited insider trading by a corporate "outsider." In 1961, in the case of *Cady Roberts & Co.*, the SEC, applying a broad construction of the provisions, held that they do. The Commission held that the duty or obligation of the corporate insider could attach to those outside the insiders' realm in certain circumstances. The Commission reasoned: "Analytically, the obligation (not to engage in insider trading) rests on two principal elements: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. In considering these elements under the broad language of the anti-fraud provisions we are not to be circumscribed by fine distinctions and rigid classifications. Thus, it is our task here to identify those persons who are in a special relationship with a company and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities. Intimacy demands restraint lest the uninformed be exploited."

Based on this reasoning, the SEC held that a broker who traded while in possession of nonpublic information he received from a company director violated Rule 10b-5. The Commission adopted the "disclose or abstain rule," that is, that insiders, and those who would come to be known as "temporary" or "constructive" insiders, who possess material nonpublic information, must disclose it before trading or abstain from trading until the information is publicly disseminated.

Several years later in the case of *SEC v. Texas Gulf Sulphur Co.*, a federal circuit court supported the Commission's ruling in *Cady*, stating that anyone in possession of inside information is required either to disclose the information publicly or to refrain from trading. The court expressed the view that no one should be allowed to trade with the benefit of inside information because it operates as a fraud to all other buyers and sellers in the market. This was the broadest formulation of prohibited insider trading.

In the 1980s, US courts narrowed the scope of Section 10(b) of the 1934 Act and Rule 10b-5 in the insider trading context. In the 1980 case of *Chiarella v. United States*, the United State Supreme Court reversed the criminal conviction of a financial printer who gleaned nonpublic

information regarding tender offers and a merger from documents he was hired to print and bought stock in the target of the companies that hired him. The case was tried on the theory that the printer defrauded the persons who sold stock to him. In reversing the conviction, the Supreme Court held that trading on material nonpublic information in itself was not enough to trigger liability under the anti-fraud provisions, and because the printer owed target shareholders no duty, he did not defraud them.

In response to the *Chiarella* decision, the SEC promulgated Rule 14e-3 under Section 14(e) of the Exchange Act, and made it illegal for anyone to trade on the basis of material nonpublic information regarding tender offers if they knew the information emanated from an insider. The purpose of the rule was to remove the *Chiarella* duty requirement in the tender offer context, where insider trading is most attractive and especially disruptive.

In 1981, the Second Circuit Court adopted the “misappropriation” theory, holding in the case of *United States v. Newman* that a person with no fiduciary relationship to an issuer nonetheless may be liable under Rule 10b-5 for trading in the securities of an issuer while in possession of information obtained in violation of a relationship of trust and confidence. Newman, a securities trader, traded on material nonpublic information about corporate takeovers that he obtained from two investment bankers, who had misappropriated the information from their employers.

Three years later in *Dirks v. SEC*, the Supreme Court reversed the SEC’s censure of a securities analyst who told his clients about the alleged fraud of an issuer he had learned from the inside before he made the facts public. *Dirks* was significant because it addressed the issue of trading liability of “tippees,” i.e., those who receive information from the insider tipper. *Dirks* held that tippees are liable if they knew or had reason to believe that the tipper had breached a fiduciary duty in disclosing the confidential information and the tipper received a direct or indirect personal benefit from the disclosure. Because the original tipper in *Dirks* disclosed the information for the purpose of exposing a fraud and not for personal gain, his tippee escaped liability.

A significant aspect of the decision was contained in a footnote to the opinion, which has come to be known as “*Dirks* footnote 14.” There, Justice formulated the concept of the “constructive insiders” – outside lawyers, consultants, investment bankers or others – who legitimately receive confidential information from a corporation in the course of providing services to the corporation. These constructive insiders acquire the fiduciary duties of the true insider, provided the corporation expected the constructive insider to keep the information confidential.

The Second Circuit again addressed the misappropriation theory in the 1986 case of *United States v. Carpenter*. The case centered on a columnist from the Wall Street Journal, whose influential columns often affected the stock prices of companies about which he wrote. The columnist tipped information about his upcoming columns to a broker (among others) and shared in the profits the broker made by trading in advance of publication. In upholding the convictions of the columnist and the broker for securities fraud under Rule 10b-5 and mail and wire fraud, the Second Circuit rejected the defendants’ argument that the misappropriation theory only applies when the information is misappropriated by corporate or constructive insiders.

The case was appealed to the Supreme Court. The Supreme Court unanimously agreed that the columnist engaged in fraud, but divided evenly on whether he engaged in securities fraud. But in unanimously affirming the mail and wire fraud convictions, the Court quoted an earlier New York Court decision that ruled: “It is well established, as a general proposition, that a person who acquired special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principle for any profits derived there from.”

Recently, the Supreme Court adopted the misappropriation theory of insider trading in the case of *United States v. O’Hagan*. O’Hagan was a partner in a law firm retained to represent a corporation, Grant Met, in potential tender offer for the common stock of the Pillsbury Company. When O’Hagan learned of the potential deal, he began acquiring options in Pillsbury stock, which he sold after the tender offer for profit of over \$4 million. O’Hagan argued, essentially, that because neither he nor his firm owed any fiduciary duty to Pillsbury, he did not commit fraud by purchasing Pillsbury stock on the basis of material, nonpublic information. The Court rejected O’Hagan arguments and upheld his conviction. The Court held, significantly, that O’Hagan committed fraud in connection with his purchase of Pillsbury options, thus violating Rule 10b-5, based on the misappropriation theory. In the Court’s words:

“The misappropriation theory holds that a person commits fraud in connection with a securities transaction, and thereby violates the law, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. Under this theory, a fiduciary’s undisclosed, self-serving use of a principal’s information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of the information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company’s stock, the misappropriation theory premises liability on a fiduciary-turned-trader’s deception of those who entrusted him with access to confidential information.”

40. Vietnam

Insider trading/information

In Decree No. 48 on securities and securities market (the highest legislation on securities market in Vietnam at the present time), Article 70 addresses insider trading. In this Article, insider trading is understood as direct or indirect dealing of securities at any time when the issuers of these securities have not yet publicly disclosed information that may materially affect prices of these securities.

Penalties

A fine ranging from VND 20,000,000 to VND 50,000,000 shall be imposed on using or revealing the inside information to others in order to buy or sell or subscribe to buy or sell securities. Any return gained from the violation shall be confiscated.

Cooperation of supervisory authorities

In the Decree on the organization and operation of the securities inspection, there is a Chapter on the cooperation between the securities inspection and other related agencies. The Chapter regulates the cooperation between the securities inspection and the inspection bodies of Ministries, ministerial-level agencies, agencies under the Government, the local State Inspectorate offices to detect and deal with the violations of laws and regulations on securities and securities markets.

Planned legislative changes on insider trading

Decree No. 22 on the sanctions on the administrative violations in the field of securities and securities market shall be amended in line with the Decree No. 48. The regulations on insider trading shall be developed in more detail.

41. European Union Directives

On November 13, 1989, the Council of Ministers of the European Communities adopted the Directive that coordinates regulations on insider trading (89/592/EEC).

Prior to the adoption of the Directive, Member States were free to regulate insider trading by means they considered adequate. Some Countries treated insider trading as a criminal offence, while others had voluntary codes of conduct, or no specific regulations at all.

Once the Directive on insider trading was adopted, the member states were obligated to modify or to introduce elements into their national securities laws so as to make them consistent with the Directive.

Inside information

Whether information may be considered as inside information, is determined by the following factors:

- the information must not have been made public,
- the information has to be of the precise nature (this element excludes from the definition rumors and speculations),
- the information has to be related to one or several transferable securities or issuers of transferable securities,
- the information is likely to have a significant effect on the price of the securities concerned.

Insider securities

The provisions of the Directive are applicable to any purchase or sale of transferable securities admitted to trading on the market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public. The Directive's definition of "transferable securities" is relatively broad and encompasses shares and debt securities, as well as securities equivalent to shares and debt securities, contracts or rights to subscribe for them, futures contracts, options and financial

futures, and index contracts. The Directive does not apply to unlisted or privately held securities.

Insiders

The Directive distinguishes between two categories of insiders:

- 1) persons who by status or profession are near to the origin of inside information - *Primary Insiders*
- 2) those who receive information from persons belonging to the first category - *Secondary Insiders*

Primary Insider

There are three categories of primary insiders which the Directive's prohibitions apply to:

- 1) persons who possess inside information by virtue of his membership in the administrative, management or supervisory bodies of the issuer,
- 2) persons who possess inside information by virtue of his holding in the capital of the issuer,
- 3) persons who possess inside information because they have access to such information by virtue of the exercise of their employment, profession or duties.

The Directive specifies that a primary insider may be a legal person such as a corporation. In that case the prohibition against buying or selling transferable securities applies to the natural person who takes part in the decision to carry out a transaction for the account of the legal person concerned. Thus, the actual offenders are the natural persons who take part in the decision to carry out the transaction on behalf of the legal person.

Secondary Insiders

Secondary insider, pursuant to the Directive's definition, is any person 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.

Prohibited Activities

The Directive prohibits a primary insider who 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. The Directive includes secondary insiders in this prohibition.

The Directive makes no distinction between buying and selling, since insiders, depending on the nature of the information obtained, benefit in either transaction based on the ability to predict price increases or decreases. To be liable under the terms set forth in the Directive, an insider must enter into a transaction and must use the inside information with full knowledge of the facts. The Directive provides that the EU Member may, at its decision, adopt more stringent measures to penalize the disclosure of inside information by secondary insiders.

Exemptions

The Directive's basic prohibition triggers when primary insiders disclose inside information to any third party. However, the prohibition does not apply in cases when such disclosure is made in the normal course of the exercise of their employment, profession or duties.

Moreover, the Directive's provisions do not apply to transactions involving the State in an effort to protect State economic sovereignty. The Directive creates immunity for the State, central banks or anybody acting on their behalf in pursuit of monetary, exchange rate or public debt-management policies when they buy or sell transferable securities.

Penalties

As the Directive does not provide a formal regulatory mechanism by which insider trading laws are to be enforced, it also leaves the determination of the penalties to the EU Members. In that, it provides only a little guidance as to the scope of such penalties. The Directive states that each Member States 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.

The new Market Abuse Directive

The Insider Dealing Directive described above was adopted more than a decade ago. Since then financial markets have considerably changed. New technologies and new products (in that a wide range of derivative products) have developed, cross-border trading and the number of participants have significantly increased. Taking under consideration these changes in financial markets and also changes made in EU law, the Commission of the European Communities prepared and, on 30 May 2001 in Brussels presented the Proposal for the new Directive on Insider Trading and Market Manipulation (Market Abuse Directive). This Directive was finally adopted on 3 December 2003, but has not yet been published in the Official Journal of the European Union.

Definition of inside information

The definition of "inside information" is based on the definition given in the prior Directive. However, it is extended to cover primary markets as well.

Insider securities

In order to take into account the development of new products the term "transferable securities" is replaced by "financial instruments." The definition of "financial instruments" covers the instruments listed in Investment Services Directive (ISD) (in its Annex B) plus commodity derivatives. To create consistency between the Directives the definition of "regulated market" refers in the proposal to the one given in the ISD.

Definition of an insider

Generally, it is based on the prior Insider Dealing Directive. Only the element of knowledge by acting as an insider is suppressed, and the distinction between transactions effected through a "professional intermediary" and those that are not, has been deleted.

Prohibited Activities

In the new Directive, apart from the prohibition of insider trading, prohibition of market manipulation was covered. Two types of behavior are mentioned that are considered as manipulative: transaction and orders to trade in the orders book and dissemination of information, which mislead or try to mislead market participants.

Exceptions

As an exception the Directive treats trading by entities in their own shares, in “buy back” programs, or stabilizing a financial instrument during an Initial or Secondary Public Offer. Such trading will be permitted only, if it will be carried out under agreed conditions. Member States may decide to introduce specific provisions for persons acting as journalists. By this the Directive separates clearly professional-journalistic-behavior from personal behavior for market abuse purposes.

Supervision and sanctions

The Market Abuse Directive stipulates that every Member State shall designate a single administrative authority competent to ensure that the provisions of the Directive are applied. The competent authority shall be given all supervisory and investigatory powers either directly or, where appropriate, in collaboration with other authorities, which shall include at least the right to:

- 1) have access to any document and to receive a copy of it,
- 2) demand information from any person, and if needed, to require the testimony of a person,
- 3) carry out on-site inspections,
- 4) require telephone and data traffic records,
- 5) request the freezing and/or the sequestration of assets,
- 6) request temporary prohibition of professional activity.

Member States shall ensure that the appropriate measures be taken, including administrative and criminal sanctions in conformity with their national law, against the natural or legal persons responsible, where the provisions of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

Competent authorities of Member States shall co-operate with each other whenever necessary for the purpose of carrying out their duties. Competent authorities shall render assistance to competent authorities of other Member States. In particular, they shall exchange information and co-operate in investigation activities. Where necessary, the competent authorities shall immediately take the necessary measures in order to gather the required information. A competent authority of one Member State may also request that an investigation be carried out by the competent authority of another Member State, on the latter’s territory. It may further request that some of its own personnel be allowed to accompany the personnel of the competent authority of that other Member State during the course of the investigation.