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# THE REGULATION OF INSIDER TRADING IN ITALY

*Eugenio Ruggiero\**

## I. INTRODUCTION

The purpose of this article is to review the Italian law of insider trading, the Insider Trading Act of 1991 (Act or Insider Trading Act),<sup>1</sup> using as a benchmark of comparison the American experience and the body of insider trading law developed by American courts on the basis of the Securities and Exchange Commission (SEC) Rules.<sup>2</sup> Since American law is probably the most developed example of insider trading law, such comparison is apt in order to elucidate the different approach adopted by Italy.

Fundamentally, there are three differences between the Italian and the American law. First, Italian law attempts to codify by defining and circumscribing the regulated phenomenon, thus granting, supposedly, greater certainty to the legality of the investors' conduct,<sup>3</sup> whereas in the American experience the approach is a case-by-case development without any attempt at precise legislative definition. Second, Italian law focuses on possession of material nonpublic information. Hence, it seems to be primarily concerned with the protection of investors' equal access to information. Instead, American

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1. Law of May 17, 1991, No. 157, *Gazzetta Ufficiale della Repubblica Italiana* [Gazz. Uff.] (May 20, 1991, No. 116), 77 Lex Part I, at 1241 [hereinafter *Insider Trading Act*]. See Appendix for the full annotated text of the Insider Trading Act, in an unofficial translation. This Act implemented the corresponding European Council Directive 89/592, 1989 O.J. (L334) 30 [hereinafter *Insider Trading Directive*].

2. 17 C.F.R. § 240 (1995).

3. Thomas L. Hazen, *Defining Illegal Insider Trading—Lessons from the European Community Directive on Insider Trading*, 55 LAW & CONTEMP. PROBS. 231, 236-38 (1992).

law, under Rule 10b-5,<sup>4</sup> promulgated pursuant to section 10(b) of the Securities Exchange Act of 1934<sup>5</sup> by the SEC, rejects the equal access approach and focuses on fraudulent and deceitful behavior whereby some individuals gain informational advantages over other investors. Third, Italian law punishes the behavior of insiders even when no trading takes place.<sup>6</sup> In contrast, under American law, for SEC Rule 10b-5 to apply, the fraudulent behavior becomes relevant only "in connection with the purchase or sale of any security."<sup>7</sup> Hence, no violation of Rule 10b-5 can be found unless there is trading by someone. Finally, because the language of the statute is unclear in its own terms and because five years after Italy's promulgation of the Act the law has yet to be interpreted or applied by Italian courts,<sup>8</sup> caution is recommended in accepting any proposed interpretative conclusion and solution.

Part II of this article will first broadly describe the context in which the Italian statute was issued and how it fits within the legal system. A detailed description of the Italian law will follow in Part III. In Parts IV-VIII, the main aspects of the Italian insider trading legislation will be reviewed, including the definition of the "insider," the notion of inside information, the scienter requirement, and comparisons with current U.S. law. It will also be suggested that the definition of material information under U.S. law be referenced in order to help define inside information under Italian law. In conclusion, it will be argued that the different regulatory solutions adopted by the Italian and the American legislatures are the results of qualitatively different approaches and philosophies respecting the insider trading phenomenon.

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4. 17 C.F.R. § 240.10b-5 (1995).

5. Securities Exchange Act of 1934 §§ 1-211, 15 U.S.C. §§ 78a-78kk (1994).

6. In fact, punishment is triggered for violations of the "tipping" and "recommendation" prohibitions. See *infra* notes 26-31 and accompanying text.

7. 15 U.S.C. § 78j(b) (1994).

8. So far, only one Italian court decision has been based upon the Insider Trading Act. Judgment of Nov. 16, 1994, Tribunale Milano, 1995 Foro Italiano [Foro It.] II 469. However, that decision only concerned article 5 of the Act, which does not regard insider trading situations, but the manipulation of the securities market.

## II. THE REGULATION OF INSIDER TRADING IN THE ITALIAN LEGAL SYSTEM: THE STATUTE IN ITS CONTEXT

The Act, entitled "Rules Concerning the Use of Nonpublic Information in Securities Transactions, and the National Commission for Companies and the Securities Exchanges (CONSOB)," for the first time in Italian history directly addresses insider trading, regulating it as a criminal offense. The Act implements the European Insider Trading Directive (Directive or Insider Trading Directive), the aim of which is to "coordinat[e] regulations on insider dealing."<sup>10</sup> The Directive

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9. Insider Trading Act, *supra* note 1, at 1241. Before this law was passed, a few existing provisions dealt indirectly with insider trading situations. Among them, it is worth mentioning the following: article 2622 of the Civil Code prohibits company directors, officers, internal auditors, and liquidators from using, for their own or another's profit, any information obtained by reason of their office, unless there is a justifying motive, if the fact may cause harm to the company. Codice civile [C.C.] art. 2622. Along the same lines, article 15 of the Presidential Decree of Mar. 31, 1975, No. 136, art. 15, Gazz. Uff. (May 7, 1975, No. 119), 61 Lex Part I, at 736, 743, regulating listed companies' external auditing, prohibits the directors and employees of the auditing company to take advantage of information acquired in the course of their activity and concerning the audited company. Both provisions were deemed insufficient to ensure protection against insider trading phenomena both from a substantive point of view (they are designed to protect the interest of the company whose securities are traded, and not the market as a whole), and from a procedural point of view (prosecution is only possible if the allegedly damaged company files a complaint). As a supposed measure of prevention, article 17 of the Law of June 7, 1974, No. 216, art. 17, Gazz. Uff. (June 8, 1974, No. 149), 60 Lex Part I, at 1481, 1491, requires directors, internal auditors, and officers of listed companies to file with CONSOB a quarterly statement of their shareholdings in the company and any subsequent variation. Article 326 of the Italian Criminal Code prohibits civil servants from using, for their own or another's profit, information acquired in the course of their office which is supposed to remain secret. Codice penale [C.P.] art. 326, ¶ 3. The scope of the provision is quite limited since it only covers offenses committed by civil servants or public functionaries. See Francesco Mucciarelli, *L'art. 326, 3° co. c.p. e l'insider trading: un'anticipazione consapevole?*, in 18 GIURISPRUDENZA COMMERCIALE 310 (1991). Lastly, article 622 of the Italian Criminal Code prohibits the use of information protected by professional secrecy, when such use may cause damage. C.P. art. 622. However, the prosecution of the offense is subject to the filing of a complaint by the allegedly damaged person. *Id.*

10. Insider Trading Directive, *supra* note 1, at 30. Several comments were issued on the European Insider Trading Directive. See BERNHARD BERGMANS, INSIDE INFORMATION AND SECURITIES TRADING 66-95 (1991); Giuseppe Carcano, *La direttiva CEE sull'« insider trading »*, 34 RIVISTA DELLE SOCIETÀ 1026 (1989); Giuseppe Carriero, *L'insider trading nella disciplina comunitaria*, LE SOCIETÀ 581 (1990); Hazen, *supra* note 4; EUROPEAN INSIDER DEALING (Klaus J. Hopt & Eddy Wymeersch eds., 1991); Luigi Solimena, *La direttiva sull'insider trading*, 16 GIURISPRUDENZA COMMERCIALE 1054 (1989).

requires Member States to take the appropriate regulatory measures<sup>11</sup> to deter persons holding inside information from trading in securities. The Directive does not require the use of "criminal" enforcement, rather, it was intended to foster investors' confidence in the operations of the securities market, in keeping with the establishment and functioning of the internal European Union (EU) market.<sup>12</sup> The issuance of the Directive was designed to force countries that had no specific regulation of insider trading, mainly Germany and Italy, to adopt one.<sup>13</sup>

However, even before any Directive was issued, the need for an insider trading law in Italy had been greatly publicized, both among practitioners and academics,<sup>14</sup> as one means of

11. The regulatory measures must be "sufficient to promote compliance . . . ." Insider Trading Directive, *supra* note 1, art. 13.

12. *Id.* pmbl. paras. 5-10. The purpose of the Directive, as in its nature (in light of articles 100A and 189 of the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]), is to give the European Union Member States a common and harmonized background in terms of the facts to regulate, by setting a minimum standard. The Member States are then required to set up the actual regulatory and enforcement system as it best fits within their own general legislative framework, although they are free to adopt more restrictive measures as long as such greater severity is of general application, without any resultant discrimination. See Insider Trading Directive, *supra* note 1, art. 6.

13. See *id.* pmbl. para. 13. Within the European Community, France has had specific insider trading legislation ever since 1970. Law of Dec. 23, 1970, No. 70-1208, Journal Officiel de la Republique Francaise [J.O.] (Dec. 24, 1970, at 11,891), Recueil Dalloz-Sirey, *Législation* [D.S.L.] 1971, at 17. In the United Kingdom insider trading was initially made a criminal offense in the Companies Act of 1980. Companies Act, 1980, ch. 22, §§ 68-73 (Eng.). After the issuance of the Insider Trading Directive, the relevant legislation, scattered among many statutes, was reassembled in Part V of the Criminal Justice Act of 1993. Criminal Justice Act, 1993, ch. 36, §§ 52-64. For a general overview of insider trading regulation in Europe, see INSIDER TRADING IN WESTERN EUROPE (Gerhard Wegen & Heinz-Dietter Assmann eds., 1994).

14. Clearly evidencing such interest, the Italian literature concerning insider trading was quite voluminous, and it especially focused on the experience of those countries that had already developed a body of law on the matter (hence, mainly, the United States). See Riccardo Alessi, *«Market egalitarianism» e «insider trading»* 25 RIVISTA DELLE SOCIETÀ 942 (1980); Giorgio Baldini, *L'illecito dell'insider nell'ordinamento italiano*, in LE SOCIETÀ 729 (1990); Stefano Ballarini, *La regolamentazione dell'insider trading nel Regno Unito*, 89 RIVISTA DEL DIRITTO COMMERCIALE 163 (1991); Stefano Ballarini, *Insider trading: problemi attuali e profili di comparazione*, in CONTRATTO E IMPRESA 1160 (1990); ANDREA BARTALENA, *L'ABUSO DI INFORMAZIONI PRIVILEGIATE* (1989); Armando Bartulli, *Profili penali dell'« insider trading »*, 34 RIVISTA DELLE SOCIETÀ 988 (1989); Marco Campanelli, *L'insider trading*, in BANCA, BORSA E TITOLI DI CREDITO 768 (1988); Giuseppe Carcano, *« Insider trading » e analisti finanziari in una sentenza statunitense*, 30

encouraging the growth of the Italian securities market. Two factors ultimately led to a thorough revision of the Italian financial regulatory framework: 1) the greater diffusion of securities ownership among the general investing public;<sup>15</sup> and 2) the liberalization of capital movements within the European Community (EC).<sup>16</sup> As a result, several statutes were passed creating a modern legal framework for the Italian financial market: 1) the Investment Business Act came to regulate the securities business and broker-dealer activities;<sup>17</sup> 2) the Takeover Act regulated takeovers and public offers of securities;<sup>18</sup> and 3) the Banking Acts of 1992<sup>19</sup> and 1993<sup>20</sup> gave full implementation to the Second EC Banking Directive<sup>21</sup> and allowed credit institutions to enter the securities business, thus breaking down the commercial bank/investment bank legal distinction. Some of these laws are currently under re-

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RIVISTA DELLE SOCIETÀ 722 (1985); Giuseppe Carriero, *Il problema dell'insider trading*, Foro It. IV 146 (1988); Paolo Casella, *Alcune osservazioni in tema di insider trading*, 16 GIURISPRUDENZA COMMERCIALE 796 (1989); Diego Corapi, *Inside Information e Insider Trading: prospettive di intervento legislativo*, in L'INFORMAZIONE SOCIETARIA (1982); Stefano Galli, *Il caso Tomé e la repressione dell'insider trading negli Stati Uniti*, 14 GIURISPRUDENZA COMMERCIALE 716 (1987); Stefano Galli, *Novità sull'insider trading: due recenti sentenze americane, un progetto legislativo della SEC, la modifica al codice penale svizzero e la direttiva CEE*, 15 GIURISPRUDENZA COMMERCIALE 282 (1988); Leonardo Mazza, *La repressione dell'insider trading nel quadro della tutela del mercato azionario*, in BANCA, BORSA E TITOLI DI CREDITO 673 (1988); SERGIO SEMINARA, *INSIDER TRADING E DIRITTO PENALE* (1989).

15. Between 1980 and 1990, the percentage of Italian households' financial portfolios invested in stocks doubled from 10% to 19.9% (21.3% if mutual funds holdings are taken into account). CONFINDUSTRIA, PREVISIONI DELL'ECONOMIA ITALIANA: RISPARMIO, CAPITALE DI RISCHIO E MERCATO AZIONARIO 91 (1993). The policy currently pursued by government authorities to privatize most of the very large state-owned industries is also intended to widen the presence of public investors on the securities market.

16. Council Directive 88/361, 1988 O.J. (L178) 5 prohibits any restriction to capital movements between Member States. More recently, the Treaty on European Union codified this prohibition as an article of the treaty. TREATY ON EUROPEAN UNION, art. 73(b).

17. Law of Jan. 2, 1991, No. 1, Gazz. Uff. (Jan. 4, 1991, No. 3), 77 Lex Part I, at 27 [hereinafter Investment Business Act].

18. Law of Feb. 18, 1992, No. 149, Gazz. Uff. (Feb. 21, 1992, No. 43), 78 Lex Part I, at 866 [hereinafter Takeover Act].

19. Decree-Law of Dec. 14, 1992, No. 481, Gazz. Uff. (Dec. 17, 1992, No. 296), 78 Lex Part I, at 4180.

20. Decree-Law of Sept. 1, 1993, No. 385, Gazz. Uff. (Sept. 30, 1993, No. 230), 79 Lex Part I, at 2557.

21. Second Council Directive 89/646, 1989 O.J. (L386) 1.

view, either to be harmonized with current EU legislation,<sup>22</sup> or to correct any flaws that arose in their day-to-day application.

The insider trading statute came within this general revision, and it suffered, as did most of the other statutes, from the great deal of rhetoric and demagoguery that accompanied its issuance. Most of the securities reform laws were passed by a large majority in Parliament as the result of a general and diffuse feeling, that soon crystallized into the political slogan: Any successful development of Italy's financial market would only be possible if Italy was provided with laws and regulations comparable to the ones in place in countries where the economy and financial activities seemed to be faring better than in Italy. Acceptance of this "slogan" affected the regular course of the legislative process so as to prevent a sufficiently careful reflection on the necessity, coverage, and implications of the legislation. Subsequently, the process of remodernizing the regulatory framework of the financial system was carried out in a hurried and disorderly manner, often with legislators having no precise long-term project in mind, thus failing to set out explicitly the rationale underlying each law or the objectives that were being pursued. Indeed, in a few instances, the securities statutes were issued in order to implement interests and powers well beyond and different from their widely publicized purposes.<sup>23</sup>

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22. The Italian legislature is in the process of implementing the Investment Services Directive, Council Directive 93/22, 1993 O.J. (L141) 27. Article 21 of the recent Law of Feb. 6, 1996, No. 52, establishes the principles and criteria the Italian government must abide by in implementing the directive. Law of Feb. 6, 1996, No. 52, Gazz. Uff. (Feb. 10, 1996, No. 34), art. 21.

23. A blatant example can be seen in the Takeover Act, *supra* note 18. When issued, it was widely publicized as an instrument of economic democracy, since it was intended to pursue the objective of equal treatment among shareholders and the protection of minority shareholders, whereas the actual effect, if any clear one can be construed, has been to hinder the market for corporate control, making it more costly to transfer control of companies in the public markets. If the law was intended to enhance investors' confidence in public markets, this was quite an ambiguous way of doing it. See generally Rosanna Ricci & Eugenio Ruggiero, *Riflessione per una revisione della disciplina italiana delle offerte pubbliche d'acquisto*, in WORKING PAPERS: DIRITTO DELL'IMPRESA 331 (1996). Moreover, the Investment Business Act, *supra* note 17, regulating financial services and the securities business, is under close review by the EU Commission. Case 101/94, Commission v. Italy, No. 0835/91 (E.C.J. filed Mar. 22, 1994). In bringing this case under Article 169 of the EC Treaty, the Commission is accusing Italy of violating the EU provisions on the right of establishment and on the freedom to provide

The uncertainty and fragmentation of the overall framework resulted in requests for adaptations.<sup>24</sup> Also, within such an uncertain and fragmented framework, the government agencies entrusted with the enforcement of these laws risk being either too discretionary or undereffective, or both. The statutes themselves were written in a confused manner—many of the terms were adopted without providing legal definition, thereby rendering interpretative answers difficult even to suggest.<sup>25</sup>

Moreover, the confusion and uncertainty caused by the flaws in the legislative process gave rise to doubts about the effectiveness of the securities laws in view of the legislative decision to criminalize the insider trading phenomenon. On the one hand, there is the extreme gravity of the criminal sanction to be pursued and imposed for a violation of the statute—imprisonment or fine, and interdiction from public or corporate offices.<sup>26</sup> On the other hand, the rigidity brought about by criminal enforcement, in view of its obviously greater attention to a strict application of the rule of law, greatly reduces the opportunity for administrative enforcement action.<sup>27</sup> Furthermore, CONSOB, the Italian government's enforcement agency

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services. EC TREATY, arts. 52, 59. See Maria C. Malaguti, *La legge 2 gennaio 1991, n. 1 (SIM) è veramente incompatibile con il diritto comunitario sulla libera prestazione di servizi?*, in *CONTRATTO E IMPRESA* 650 (1993).

24. The clearest example of the short-sightedness of the legislature is the current situation in the Italian securities market: despite the legislative effort, the market underwent hardly any of the development that was supposed to follow the enactment of the reform laws. The securities market basically remains a very speculative and risky environment which best fits the needs of sophisticated and professional investors, and scares away the public at large. See generally GUSTAVO VISENTINI, *L'EVOLUZIONE DEL SISTEMA FINANZIARIO ITALIANO. I PROBLEMI ATTUALI. LA LEGALITÀ NELL'ORGANIZZAZIONE DELL'ECONOMIA. ETICA E AFFARI* (1995). It is evident, however, that a very important factor in determining the situation in the securities market, regardless of the quality of the laws in place, is the large amount of high-yield public debt, crowding out most possibilities of investment in private finance. *Id.* at 31.

25. One commentator, while praising the legislature's efforts in trying to regulate and repress insider trading behaviors, points out that the technical design of the Insider Trading Act may end up "frustrating any underlying noble intentions." Giovanni M. Flick, *L'insider trading. Profili giuridici*, 3 *ECONOMIA E DIRITTO DEL TERZIARIO* 699, 711 (1991).

26. The insider will be subject to fine or imprisonment, and will be disqualified from holding public or corporate offices. Insider Trading Act, *supra* note 1, art. 2, ¶ 5.

27. For a broad overview of the Italian criminal system, see generally ETTORE GIANNANTONIO, *ITALIAN LEGAL INFORMATION RETRIEVAL* 17-22 (1984).



responsible for the supervision of the securities markets, maintains some relevant powers of investigation and collection of evidence. However, should a *prima facie* allegation of insider trading arise, the results must then be immediately passed on to the competent judicial prosecuting authority.<sup>28</sup>

In the United States, insider trading is also a criminal offense.<sup>29</sup> However, the U.S. system allows greater flexibility with enforcement policies, mainly because criminal prosecution is discretionary, whereas in Italy it is mandatory. The U.S. enforcement agency, the SEC, can consequently utilize a wider scope of tools for the repression of the phenomenon, since it can choose to seek equitable<sup>30</sup> or administrative<sup>31</sup> relief, thus profiting from the lower burden of proof standards and the tempering of the sanction.

### III. THE CONTENT OF THE INSIDER TRADING ACT

The structure of the Insider Trading Act centers upon the definition of the typical insider trading situation. Article 2, paragraph 1 prohibits a person from trading securities if he or she possesses material nonpublic information acquired as an "insider," that is, by virtue of holding shares in a company or by reason of the exercise of a function, even a public one, or of a profession or office (the insider trading prohibition).<sup>32</sup>

Related crimes are then set out in order to grant greater

28. Insider Trading Act, *supra* note 1, art. 8, ¶ 3.

29. Securities Exchange Act of 1934, § 32, 15 U.S.C. § 78ff (1994).

30. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 863 (1968) (en banc), *cert. denied*, 404 U.S. 1005 (1972), *reh'g denied* 404 U.S. 1064 (1972); Securities Exchange Act of 1934 §21(e), 15 U.S.C. § 78u(d) (1994).

31. See *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 917-18 (1961). In the exercise of its administrative powers, however, the SEC's jurisdiction is limited to registered broker-dealers and members of national securities exchanges. See Securities Exchange Act of 1934, 15 U.S.C. § 78u (1994).

32. Insider Trading Act, *supra* note 1, art. 2, ¶ 1. Two further provisions of the Act attempt to prevent insider trading by posing a general prohibition to trade securities in special instances when the material nonpublic information is still at its formative stage. The Act stipulates that company directors, internal and external auditors, officers, managers, company liquidators, and controlling shareholders are not allowed to trade when a meeting of the board of directors has been called to resolve upon material issues until the moment the resolution is made public. *Id.* art. 2, ¶ 3. Similarly, government Ministers and Undersecretaries of State cannot trade any of the securities that may be affected by the adoption of resolutions in the agenda of government meetings that have already been convoked, until the resolution is publicly disclosed. *Id.* art. 2, ¶ 7.

effectiveness to the insider trading prohibition. Article 2, paragraph 2 prohibits the communication to third parties of any material nonpublic information by one who obtained the information through his or her position, unless there is a justification (the tipping prohibition).<sup>33</sup> Moreover, insiders are prohibited from recommending that third parties effect any securities transaction, when such recommendation is based upon material nonpublic information possessed by the insider (the recommendation prohibition).<sup>34</sup> The tipping and recommendation prohibitions were deemed essential to avoid easy circumventions or loopholes in the operation of the central insider trading provision.<sup>35</sup>

Furthermore, all of the above prohibitions (trading, tipping, recommending) apply to "tippees," that is, to those persons that acquired, directly or indirectly, the relevant nonpublic information from insiders (tippers) who possess the information because of their function, profession or office (the tippee prohibition).<sup>36</sup>

According to the Act, the insider's conduct, when he is in possession of material nonpublic information, will be illegal in the following instances: a) should he purchase or sell or effect any other transaction, also through the interposition of a person, on securities; b) should he communicate the material nonpublic information to third parties, without any justification; c) should he recommend to third parties, based upon the material nonpublic information, that they effect securities transactions (without disclosing the information to them, however).

In the latter two instances, it is not essential that there be trading for the offense to be completed.<sup>37</sup> The insider will be

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33. Insider Trading Act, *supra* note 1, art. 2, ¶ 2.

34. *Id.*

35. Moreover, a further provision in the Act, article 5, defines and punishes the manipulation of the securities market. *Id.* art. 5.

36. *Id.* art. 2, ¶ 4. An express exemption from the law is provided for in article 4 of the Act. No insider trading violation can be claimed against the Italian State, the Bank of Italy, the Italian Foreign Exchange Office or any person acting on their behalf for reasons connected with monetary or foreign exchange policy, or the management of public debt or official reserves. *Id.* art. 4.

37. See Insider Trading Act, *supra* note 1, art. 2, ¶ 2. Conversely, under the trading prohibition of a), insider non-trading, although possibly as blameworthy as insider trading, is outside the reach of the law. Thus, the insider will not be accountable if he revokes a purchase order after learning about negative nonpublic

liable for merely tipping the information or recommending the transaction, regardless of whether any trading takes place. Therefore, whether or not the tippee or the person receiving the recommendation trades on the basis of the tip or the recommendation, the insider will still be liable.<sup>38</sup>

By comparison, under American law, any violation of Rule 10b-5 must be "in connection with the purchase or sale of securities."<sup>39</sup> If trading does not take place, a charge under Rule 10b-5 cannot be brought, the rationale being that there is no harm to the market. The irrelevance of trading in the tipping and recommending prohibitions in Italian law is probably founded on the idea that these deterrents will inhibit or at least reduce the risk that anybody will actually trade on inside information.

In the trading prohibition, the incidental phrase "also through the interposition of a person" enlarges the scope of the illegal conduct to include any securities transaction which the insider initiates, even though he may not be the ultimate beneficiary. Since in the Italian legal system criminal liability is only personal and does not apply to companies or legal entities, this extension allows the Act to reach the frequent cases where the trading is made to the advantage of companies or other legal persons, and not by insiders in their individual capacities. Therefore, the corporate veil is no excuse if insiders initiate or take part in the decision process that leads their company to trade securities about which they hold privileged information. The insider will be held liable even though it is ultimately the company that benefits from the use of the inside information.<sup>40</sup>

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information concerning the securities he was intending to buy.

38. The only exemption applies to the insider's tipping the nonpublic information when there is a justification. *Id.* art. 2, ¶ 2. The justification exemption is intended to apply to situations where it can be expected to be regular practice that information is transferred during the course of one's function, profession or office (e.g., where a director discloses the information to an auditor, or to an investment banker). Therefore, it is not limited to hypotheses where there is a duty to disclose or, conversely, a right to know.

39. 15 U.S.C. § 78j(b) (1994).

40. The Act is concerned with "behaviors" and not with "results." In order for the trading prohibition to apply, the decision to trade must be tainted by the possession of privileged information, since that is what affects the correct functioning of the price mechanism and the allocation of financial resources. More generally, for the conduct to be illegal, there is no requirement that the insider must per-

However, the actual role played by the insider in the decision making process may vary the statutory sources of liability. If the insider holds a corporate office that allows him to make decisions as to the company's transactions in securities, he will be subject to liability under the central insider trading prohibition. The same result will occur if the decision as to the purchase or sale of securities accrues to the board of directors, or other committee in which the insider actively participates.<sup>41</sup> If this is not the case, the source of the insider's liability will instead shift to the recommendation prohibition. Thus, if his position within the corporate structure does not allow the insider to make the final decision, but he participates in the process leading to that decision, by giving advice or suggestions, while relying on nonpublic information, liability will attach.<sup>42</sup>

Finally, articles 6 through 9 of the Act grant regulatory and investigatory powers to CONSOB for the enforcement of the law.<sup>43</sup> However, none of the Act's provisions expressly address the issue of the insider's civil liability. Nonetheless, a private right of action accruing to persons harmed by the illegal behavior of insiders is construed from the existing general contract law, and from the "open" tort system which entitles anyone suffering an unjust harm recovery against whomever committed the tortious action.<sup>44</sup>

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sonally gain a profit from the transactions he initiates, either by trading, tipping or recommending.

41. It is irrelevant whether the director has notified the other members of the board of the inside information when assessing the director's individual liability. However, notification will force the other directors to abstain from trading as well, since they gathered the information in the exercise of their directoral office.

42. Cesare Pedrazzi, *Riflessioni sull'insider trading in ambito corporativo*, 36 RIVISTA DELLE SOCIETÀ 1661, 1668-69 (1991).

43. Insider Trading Act, *supra* note 1, arts. 6-9. CONSOB's regulatory powers under the insider trading statute are basically addressed at ensuring that information is timely delivered to the market. The underlying philosophy is that trading on inside information is less likely to occur if the information stays inside for the least amount of time. Andrea Bartalena, *Il regolamento Consob in tema di insider trading*, in 1 BANCA BORSA E TITOLI DI CREDITO 239, 240 (1992).

44. C.C. art. 2043. The American experience prior to the enactment of § 20(a) of the Securities Exchange Act of 1934, imposing insiders' liability to contemporaneous traders, shows how difficult it may be to assert insiders' liability on common law tort or contract grounds. See Securities Exchange Act of 1934, § 20(a), 15 U.S.C. § 78t-1 (1994). Those same problems and difficulties, in terms of causation and reliance, are altogether present in Italian law. Carriero, *supra* note 14, at 160-63; Guido Santoro, *Insider Trading: profili civilistici*, in CONTRATTO E IMPRESA

## IV. THE DEFINITION OF THE "INSIDER" IN ITALY

The definition of an insider in Italian law is very broad. An insider is any person possessing material nonpublic information whenever such possession is the consequence of owning shares in a company, or of carrying out a function (including a public function), profession or office.<sup>45</sup> The insider is prohibited from trading, from tipping the nonpublic information unless there is a justification, and from recommending any transactions to third parties relying on the inside information.<sup>46</sup>

The statutory definition of insider makes no specific reference to corporate positions, such as directorships or officerships. The law is written in general terms to include any professional or employment activity,<sup>47</sup> regardless of any specific duties attached to it, whether the activity implies any duty of confidentiality,<sup>48</sup> or whether it is carried out in relationship to the issuer of the security affected by the information.<sup>49</sup> Even when the nonpublic information is acquired by being a shareholder, the trading prohibition applies with no concern for any special connection between the shareholder and the company such as, for example, the relationship between a controlling shareholder and the company. The share ownership may be of any proportion, a minority one as well. Thus, one may then be an insider if he or she only owns a single share of a company and, as a consequence of that owner-

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663, 671-ss (1992).

45. Insider Trading Act, *supra* note 1, art. 2, ¶ 1.

46. *Id.* art. 2, ¶¶ 1-2.

47. Function, profession, and office are by no means "terms of art" in this field of law specifying precise categories of persons—they should thus be given their general common meaning.

48. Indeed, it is the law under review that actually imposes a duty of confidentiality barring the insider from transferring the information to anyone, unless there is a justified reason for doing so. Insider Trading Act, *supra* note 1, art. 2, ¶ 2.

49. The lack of any required linkage between the activity exercised by the insider and the issuer of the security affected by the information seems to be confirmed by the express recognition, as possible insiders, of public functionaries. Solimena has a different view. In examining the equivalent provision in the Insider Trading Directive, he argues that the definition of "insider" should be interpreted to include only individuals acquiring the nonpublic information while working in a relationship with the issuer to whom the information refers. The acquisition of information regarding securities and issuers other than the one the alleged insider is working for should instead make him a tippee. Solimena, *supra* note 10, at 1058-59.

ship, he or she gains inside information. Indeed, for the trading prohibition to apply, it is not even necessary that the securities the nonpublic information affects, and the shareholder trades upon, be those issued by the company in which the shareholder owns shares.<sup>50</sup> This seems to confirm that, for the purposes of applying the Act's prohibitions, the position of the insider (shareholding, exercise of a function, profession or office) is only relevant because it permits the acquisition of the material nonpublic information, and not because any duties (confidentiality, loyalty, etc.) arise from that position.

The Act seems to reach even further when combining the definition of the insider, to whom the prohibitions are addressed, with the definition of the tippee, to whom those same prohibitions apply.<sup>51</sup> A tippee's acquisition of material nonpublic information, directly or indirectly obtained from an insider, imposes a duty upon the tippee to abstain from trading the securities affected by that information, when the tippee is aware of the materiality and non-publicity of the information.<sup>52</sup> By combining the two provisions—the central insider

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50. When defining the insider for this purpose, in fact, the statute says "shareholder of a company", it does not say "shareholder of *the* company." Insider Trading Act, *supra* note 1, art. 2, ¶ 1. Although some commentators have looked to parliamentary reports to argue that this is an error by the legislature, which really wanted to include only the shareholders of the company to which the nonpublic information refers, that is not how the statute was written. See Stefano Galli, *Insider trading: un primo commento*, 18 GIURISPRUDENZA COMMERCIALE 928, 932 (1991); Alessandra Rossi Vannini, *La legge 17 maggio 1991, n. 157: i destinatari dei divieti di insider trading, tipping e tuyautage. L'estensione dei divieti*, 35 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 276, 278 (1992) (asserting that the language in the statute was a last minute oversight and that the legislative intent was to refer to "*the* company"). However, the Act's wording would encompass as an insider the shareholder of a company who, knowing that his company is going to take over another company, trades the stock of the target company before the tender offer is officially publicized.

51. Insider Trading Act, *supra* note 1, art. 2, ¶ 4.

52. *Id.* The tippee inherits the same duties as the insider that originally tipped the information. Besides being prohibited from trading, the tippee cannot further tip the information or recommend the making of transactions relying on the information. *Id.* art. 2, ¶ 4. This provision is even broader than the requirement of the Insider Trading Directive, which only extends the trading prohibition, and not the tipping or the recommendation prohibitions, to tippees. Insider Trading Directive, *supra* note 1, art. 4. Moreover, as a clear example of the very poor drafting of the Italian statute, it should be noted that, for no apparent reason, the prohibitions do not apply to all tippees but only to those that receive the inside information from tippers possessing the information "by reason of the exercise of their function, profession or office." Insider Trading Act, *supra* note 1, art. 2, ¶ 4.

trading prohibition and the tippee trading prohibition—the result seems to be that anyone holding material, nonpublic, inside information respecting a security must abstain from trading in that security,<sup>53</sup> because material nonpublic information can always be traced back to an inside source and can “indirectly” reach anyone.<sup>54</sup>

Commentators have attempted to restrict such a broad interpretation of the insider definition by implying a causal link between the inside position and the acquisition of the information. According to this interpretation,<sup>55</sup> the alleged insider would be prohibited from trading only if he acquired the nonpublic information as a direct consequence of his inside position, not as an incident to it. For example, the external auditor that overhears the conversation concerning a planned takeover between two officers of the company while eating at the company's cafeteria would not fall under the insider trading prohibition because he receives the information apart from

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Thus defined, the source of the information for the tippee (the tipper) is different from the definition of insider in ¶ 1 of article 2 of the Act, since it leaves out the shareholder and, probably, the public functionary. Therefore, under the Italian law, if one receives a tip from the shareholder of a company or from a public functionary, he will be able to legitimately trade, tip or recommend with impunity. Nevertheless, the shareholder and the public functionary will still be liable for violating the tipping prohibition unless they can claim the justification exemption. *Id.* art. 2, ¶ 2; see discussion *supra* note 38.

53. Armando Bartulli & Mario Romano, *Sulla disciplina penale dell'insider trading (legge 17 maggio 1991, n. 157)*, 19 *GIURISPRUDENZA COMMERCIALE* 660, 661 (1992).

54. The language of the Insider Trading Directive in this respect seemed even more explicit, since article 4 of the Directive requires that the prohibition to trade apply to 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 person referred to in Article 2,” i.e., an insider. Insider Trading Directive, *supra* note 1, art. 4; see also *id.* art. 2. However, the different language used by the Italian statute, “directly or indirectly obtained . . . from [an insider],” may possibly lead to restrict the literal scope of the notion of tippee that is apparently very wide. Insider Trading Act, *supra* note 1, art. 2, ¶ 4. It may, in fact, be argued that the scienter required for the offense comprises knowledge of the identity of the original insider-tipper. The “indirect” tipping through which the tippee acquires the material nonpublic information would then have to be known to the tippee through all its passages from the original inside source. One commentator notes that knowledge of the original inside source of the information is an essential requirement for evaluating the awareness of the tippee as to the materiality of the information itself. Sergio Seminara, *L'insider trading nella prospettiva penalistica*, 19 *GIURISPRUDENZA COMMERCIALE* 637, 647 (1992).

55. *Circolare Assonime n. 78/1991*, 36 *RIVISTA DELLE SOCIETÀ* 883, 884 (1991) [hereinafter *Circolare Assonime*].

the exercise of his proper functions. The fact that he is auditing that company's accounts gave him the "occasion" to hear the information, but it was not the "proximate cause" of his acquisition of the information. On the other hand, following the same argument, should he learn about the planned takeover reading a memo included in the company's accounts he is auditing, he would then be prohibited from trading because in this case there would be a causal connection between the function carried out and the acquisition of the nonpublic information.

However, this restrictive interpretation seems to be sterile. Even assuming that it may be successfully argued that the auditor learning of the information overhearing the officers' conversation does not become an insider under article 2, paragraph 1 (in the absence of any strictly causal linkage between the function carried out and the acquisition of the nonpublic information), he would not escape liability as a tippee under paragraph 4 of article 2. Hence, the prohibition against trading would altogether apply to him. Moreover, the practical irrelevance of envisaging the two different interpretations is further confirmed by the fact that either violation, as an insider or as a tippee, carries the same penalty.<sup>56</sup>

#### V. THE DEFINITION OF THE "INSIDER" IN THE UNITED STATES

The U.S. experience concerning insider trading developed through leading court decisions that centered upon the significance and operative meaning of Rule 10b-5,<sup>57</sup> issued by the SEC in implementation of section 10(b) of the Securities Exchange Act of 1934.<sup>58</sup> Section 10(b) is a general anti-fraud

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56. Article 2, ¶ 5, in fact, imposes exactly the same penalties to insiders and tippees who violate any of the provisions of the law, whether they trade the concerned securities, tip the confidential information or recommend the making of transactions in reliance on the inside information. Insider Trading Act, *supra* note 1, art. 2, ¶ 5. The use of such indiscriminate sanctioning techniques, where the penalties do not reflect the possibly different gravity of the offense in view of the danger posed to investors' protection, is surely deplorable. Seminara, *supra* note 54, at 647-48; Giovanni M. Flick, *Insider trading: una tappa significativa - anche se controversa - della lunga marcia verso la trasparenza*, 36 RIVISTA DELLE SOCIETÀ 975, 993 (1991).

57. 17 C.F.R. § 240.10b-5 (1995).

58. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1994). The only attempt to strictly define insider trading is SEC Rule 14e-3, forbidding trading in securities when in possession of material nonpublic information in the con-



clause that protects investors dealing in securities from the use of manipulative and deceptive devices.<sup>59</sup> The implementing rule, 10b-5(c), prohibits a person from engaging "in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."<sup>60</sup> This rule is the basis for insider trading liability in the United States. Thus, the central element of any offense under the rule is fraud<sup>61</sup> based upon manipulation<sup>62</sup> or deception.

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text of tender offers. 17 C.F.R. § 240.14e-3(a)-(b) (1995). However, such a definition cannot be analogized to other situations because of the context (time-wise and legislation-wise) in which it was issued. In fact, the SEC issued Rule 14e-3 in 1980, in the raging aftermath of the *Chiarella* case. *Chiarella v. United States*, 445 U.S. 222 (1980); see *infra* notes 70-71 and accompanying text. The legal justification of SEC Rule 14e-3 finds its roots in the full disclosure environment permeating tender offers pursuant to the Williams Act. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (codified as amended in scattered sections of 15 U.S.C.); see *United States v. Chestman*, 947 F.2d 551, 558-59 (2d Cir. 1991) (en banc) (noting that Rule 14e-3 was originally enacted as part of the Williams Act and thus was part of its overall disclosure provisions), *cert. denied*, 503 U.S. 1004 (1992). Section 16(b) of the Securities Exchange Act is also concerned with insider trading situations, although it only imposes a civil sanction. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p (1994). It states that short-swing profits made by 10% shareholders, directors or officers by trading, within a period of six months, the shares of their corporation are recoverable by the issuer. *Id.* Moreover, a few insider trading convictions have been upheld on the basis of legislation that does not specifically deal with securities, such as the mail and wire fraud statutes or the Racketeer Influenced and Corrupt Organization (RICO) Act. 18 U.S.C. §§ 1961-1968 (1994). However, since insider trading is somehow a "collateral accident" to such statutes, they will not be the subject of this article.

59. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1994). Section 10(b) states that:

[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

*Id.*

60. 17 C.F.R. § 240.10b-5(c) (1995).

61. The words of Justice Powell in delivering the opinion of the Court for the *Chiarella* case are quite meaningful: "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." *Chiarella*, 445 U.S. at 234-35.

62. In the context of securities dealing, "manipulation" means the creation of a false market for any traded security, which is reflected in its price becoming partially or completely detached from its underlying economic value. Take, for example, the disclosure of a company's annual accounts shows a profit in order to attract greater demand for its securities, whereas the business of the firm is actu-

In the specific case of insider trading, Rule 10b-5 implies that the offender has engaged in fraudulent, i.e., deceptive, action in connection with the purchase or sale of securities.<sup>63</sup> The deception lies in the failure to disclose the information and abstain from improperly using it in connection with trading. To be actionable, deception requires breach of a duty.<sup>64</sup> The duty may involve the "typical" insider owing a fiduciary duty to other investors<sup>65</sup> (the fiduciary duty theory), or it may involve a duty to the source of the information arising from contract<sup>66</sup> or from the particular nature of the trader's relationship with the source itself (the misappropriation or fraud-on-the-source theory).<sup>67</sup> The illegitimacy of the trader's behavior is then inferred from the deceptive process, involving the breach of a duty arising from a specific relationship, eventually leading to the informational advantage.<sup>68</sup>

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ally operating at a loss; or the creation of an apparently active market, often through the use of wash sales. Instead of manipulating the market, the trader with inside information tries to anticipate the market's movements by exploiting information not yet available to the rest of the market. GIUSEPPE ZADRA, *STRUTTURE E REGOLAMENTAZIONE DEL MERCATO MOBILIARE* 63-66 (2d ed. 1995); see also Daniel R. Fischel & David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 HARV. L. REV. 503 (1991).

63. 17 C.F.R. § 240.10b-5 (1995).

64. *Chiarella*, 445 U.S. at 228.

65. For example, directors have a fiduciary duty to the company's shareholders. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 834 (2d Cir. 1967).

66. An example is an employment manual that encompasses the firm's internal regulations and express policies. See *United States v. Carpenter*, 791 F.2d 1024, 1026 (2d Cir. 1986) (policy manual requiring employees to treat nonpublic information learned on the job as confidential), *aff'd by an equally divided Court* 484 U.S. 19 (1987).

67. An example is the psychiatrist/client relationship. *United States v. Willis*, 737 F. Supp. 269 (S.D.N.Y. 1990) (denying motion to dismiss indictment of psychiatrist who traded on the basis of information obtained from patient, in breach of duty arising from relationship of trust and confidence).

68. In describing the current state of the American law, I have put myself in the position of the attorney counselling his client about safe harbors for trading on inside information. From this perspective, the insider's breach of duty toward the source of material nonpublic information (the misappropriation theory) is to be considered the basis for fraud under SEC Rule 10b-5 since, although there is not yet any Supreme Court decision on the matter, the theory has been accepted by several circuit and district court decisions. See, e.g., *Carpenter*, 791 F.2d at 1024; *SEC v. Materia*, 745 F.2d 197, 203 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *SEC v. Clark*, 915 F.2d 439, 443 (9th Cir. 1990); *SEC v. Cherif*, 933 F.2d 403, 410 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992); *Rothberg v. Rosenbloom*, 771 F.2d 818, 822 (3d Cir. 1985), *cert. denied*, 481 U.S. 1017 (1987); *Willis*, 737 F. Supp. at 271-72. However, the issue is still under debate since the

The U.S. Supreme Court has rejected the previous position of the SEC according to which it was forbidden to trade on the basis of mere possession of nonpublic material information.<sup>69</sup> On that assumption, the SEC had extended the well known "disclose or abstain" doctrine to anyone who merely held inside information and traded on it. The SEC believed it was harmful to the market, and fraudulent, for anyone to trade while in a privileged position due to the holding of material information which other investors did not have.<sup>70</sup>

The rationale of U.S. law seems to be the protection of the market from fraudulent devices such as traders using privileged positions to gain an informational advantage. Trading on material nonpublic information, per se, is not the object of the law. Instead, the object of the law is to prohibit the setting up of fraudulent schemes designed to allow the insider to trade securities and gain a profit from the use of the inside information. The fraud lies in either the improper receipt of the information or in the misuse of properly received information by the insider through any relationship in which a duty exists. Unless some breach of duty occurs, no fraud can be found in the fact that an insider actually trades, nor in the insider's mere possession and use of the material nonpublic information.<sup>71</sup> Thus,

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Supreme Court evenly split when reviewing it in the *Carpenter* case. *Carpenter*, 484 U.S. at 24. Indeed, very recently, the misappropriation theory has been rejected as a basis for securities fraud under Rule 10b-5 by two decisions of the Court of Appeals for the Fourth Circuit. *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995); *United States v. ReBrook*, 58 F.3d 961 (4th Cir. 1995). A similarly cautious approach is being followed in examining the Italian statute.

69. *United States v. Chiarella*, 445 U.S. 222, 235 (1980).

70. This was also the position supported by the government in *Chiarella*. 445 U.S. at 235-36. In a broad sense, that position, extending the holdings of *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), and *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), reflected the attempt to apply the developing doctrine of contractual fraudulent deceit to impersonal market transactions. The Restatement (Second) of Contracts establishes that a party's nondisclosure of a material fact is equivalent to an assertion that the fact does not exist if the person "knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which the party is making the contract . . ." RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (1981). See also E. ALLAN FARNSWORTH, CONTRACTS, §§ 6.3-.4, at 401-14 (2d ed. 1990).

71. A fairly clear idea of the current state of U.S. insider trading law under Rule 10b-5 can be extrapolated from three cases: *Chiarella*, 445 U.S. at 222; *Dirks v. SEC*, 463 U.S. 646 (1983); and *Carpenter*, 791 F.2d at 1024. In *Chiarella*, the Supreme Court refused to uphold a securities fraud conviction on the grounds that a failure to disclose imposed a duty to abstain from trading directed to anyone holding material nonpublic information. 445 U.S. at 236-37. The Court held that

for example, an insider will be liable when he is given access to material non-public information for a specific purpose (typically, though not necessarily, a corporate purpose), but he disposes of it for a different purpose in breach of a duty.<sup>72</sup>

At this point, the different perspective adopted by American law compared with the Italian law seems evident. American law is aimed at ensuring a level playing field among investors in terms of honesty of behavior in the collection of information. Hence, under American law, trading will be limited only if based upon information that has been fraudulently gathered. Italian law, instead, shifts the focus to the exact

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insider trading activity is free and that the only limitation imposed by the law is the use of fraudulent devices. *Id.* at 234. In this respect, the non-disclosure of material nonpublic information constitutes fraudulent conduct only in presence of a duty to disclose arising from an existing "relationship of trust and confidence between parties to a transaction." *Id.* at 230. Chief Justice Burger's dissenting opinion argued in favor of finding fraud on grounds of misappropriation of information belonging to the source of the information. *Id.* at 239-45 (Burger, C.J., dissenting). However, the majority held that the merits of the Chief Justice's argument could not be legitimately reviewed by the Court because to do so would have exceeded the limits of the petitioning. *See id.* at 237 n.21 (citing *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931)). The principle set forth in *Chiarella* was further strengthened in the *Dirks* case and was extended to tippees. Again, the Court held that mere possession of inside information is not sufficient grounds for finding fraud in the trading taking place on that basis, even when the trader knows the information comes from an inside source. *Dirks*, 463 U.S. at 653-54. The Supreme Court recognized the great importance of a free flow of information for the preservation of a healthy market, to be limited only by fraudulent conduct forbidden under section 10(b) and Rule 10b-5. *Id.* at 658-59. Hence, the tippee who trades on the basis of nonpublic information received from an inside source will only be liable when the receipt of the information is "improper," that is, when the information has been fraudulently tipped in breach of the insider's fiduciary duty. The test to ascertain the insider's breach of duty in tipping the information is one of purpose—in other words, "whether the insider personally benefit[s], directly or indirectly [from the tipping]." *Id.* at 662. When this occurs, the tippee inherits the insider-tipper's breach, and they both collude in the fraudulent scheme. However, it is worth noting that the wider the interpretation of "personal benefit," the more far-reaching the scope of the fraud and, conversely, the narrower the leeway for the legitimate flow of information. Finally, in *Carpenter*, the Second Circuit affirmed the misappropriation theory. *Carpenter*, 791 F.2d at 1026. Consistent with prior case law, the court confirmed that a Rule 10b-5 issue can be raised only where fraud is evident. The peculiarity of the decision is that in the instant case, fraud, although still finalized to the purchase or sale of securities, is construed upon the trader breaching a duty to the source of the material nonpublic information, as opposed to the countertraders as was the case in *Chiarella* and *Dirks*.

72. *See Dirks*, 463 U.S. at 654.

moment the trading takes place. If, at that moment, the trader has information that is unavailable to the market, no matter how legitimately the information was acquired, the prohibitions will apply. The Italian legislature, then, seems to aim at ensuring an informational level playing field among investors *tout court*.<sup>73</sup>

## VI. THE REQUIREMENT OF "INTENT"

Italian law circumscribes the criminal liability of the insider by requiring the insider's scienter as to the existence of the facts and intentionality to engage in the illegal behavior.<sup>74</sup> However, the exact definition of the scienter required for the completion of the offense raises controversies. The technical question is whether the intent required by the law is a general intention to trade securities while in knowing possession of nonpublic information, i.e., general intent, or whether it is a specific intention to take advantage and exploit the possessed material, nonpublic information, i.e., specific intent.<sup>75</sup> The difference is best appreciated by viewing it from the perspec-

73. The *Dirks* case is a good example of the different operation of the law as a result of the different approaches taken by the United States and Italy. *Dirks*, a financial analyst, was relieved from liability because no fraud was found in his gathering the inside information that allowed him to trade at an advantage in the market. *Id.* at 665. In fact, the insider that tipped the information to *Dirks* was not found in breach of any duty in doing so and, hence, no duty to "disclose or abstain" was transferred to *Dirks*. *Id.* at 666-67. However, if Italian law were to apply to the facts of the case, *Dirks* would be considered an insider because he gained the information while exercising his profession as a financial analyst. Hence, any subsequent trading would be a criminal offense under article 2 of the Act. Insider Trading Act, *supra* note 1, art. 2.

74. Italian criminal law distinguishes two general categories of criminal offenses, "delitti" and "contravvenzioni," according to the type and size of the penalty that the law will impose. "Delitti" translates roughly as "crimes" and includes those violations which the law will punish either with imprisonment or fines. "Contravvenzioni," or misdemeanors, include violations punished either with arrest or a levy. C.P. arts. 17, 39. The main difference between the categories is the required proof needed to establish the essential psychological element of the crime. Behaviors constituting "delitti" can be prosecuted and punished only upon a showing of intent—unless the law expressly states so, there is no space for prosecuting reckless or negligent behavior. The insider trading law under review prescribes the penalties of imprisonment and fine, thus making the offenses fall within the category of "delitti." *Id.* art. 2, ¶ 5. Therefore, absent any contrary provision, committing any of the prohibited actions is punishable only if intent is proved.

75. In the category of criminal law, the question then becomes whether insider trading is a "general" or "specific" intent offense. FRANCESCO ANTOLISEI & LUIGI CONTI, *MANUALE DI DIRITTO PENALE - PARTE GENERALE* 328-29 (1994).

tive of the prosecution's burden of proof. Should it be concluded that the insider trading offense requires general intent, the burden of proof would then be met by showing that the insider had nonpublic, material information about certain securities and that, later in time, he traded those securities prior to the disclosure of the information. In such case, the relationship between the holding of nonpublic information and the trading of securities would be a merely chronological one. On the other hand, requiring specific intent would force the prosecutor to show that the insider possessed the inside information and that he precisely relied on it to trade in order to take advantage of the resulting informational asymmetry. In the latter instance, the relationship between the holding of nonpublic information and the trading of securities would then be a causal one.<sup>76</sup>

The difference between the operation of the general/specific intent hypotheses may appear subtle or captious, especially because the insider's criminal conduct nevertheless requires scienter. As a matter of fact, it seems a fair assumption that a knowing and conscious possession of material nonpublic information concerning specific securities, followed by trading in those securities, implies the exploitation of the nonpublic information. However, this may not always be the case. For example, an insider may sell shares following a pre-established plan, regardless of any negative information he may have about the company. Also, in friendly takeover negotiations it is common to disclose specific material information to the prospective acquiror, for a more correct estimate of the bidding price. In such cases, selective disclosure may be preferred

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76. A different issue is presented when an insider misinterprets the nonpublic information and trades in the opposite direction as he should have in order to make a profit (e.g., he buys shares thinking that the information, once publicly disclosed, will have a positive effect on prices, but in fact it turns out the information actually has a negative effect). In such a case, the insider should be liable because there is nothing in the law requiring that the insider actually make a profit (or avoid a loss) for the offense to be completed. What matters, in the restrictive interpretation requiring "specific" intent, is that the insider *intended* to make a profit. This is surely the case in the given hypothetical. Other legal systems, however, take a different approach. Article 161 of the Swiss Criminal Code, introduced in 1987 to cope with insider trading, punishes the insider only if he profits from his illegal conduct. *Codice penale svizzero* [CP] art. 161; see PESTALOZZI GMUER & HEINZ, *BUSINESS GUIDE TO SWITZERLAND* ¶ 1140, at 359-60 (1991).

because general disclosure to the public may possibly harm the corporation. If general intent were sufficient grounds for asserting insider trading liability, any such exchange of material nonpublic information would prevent the takeover from eventually taking place. In that case, it would be no excuse for the acquiror to show that his price bid was high enough to include the positive non-publicly disclosed information as well.<sup>77</sup> In both examples, the lack of any hampering of the securities market from the insiders' behavior does not seem to justify the adoption of such restrictive prohibitions, unless one concludes that what the statute really intended to protect the market from is the mere danger that any harm may accrue.<sup>78</sup>

A literal reading suggests that the Italian Insider Trading Act adopts the general intent requirement for the insider's conduct to be illegal. The Act states: "It is prohibited to purchase or sell . . . when one is in possession of nonpublic information . . .,"<sup>79</sup> resulting in a mere chronological connection between the acquisition of the informational advantage and the subsequent trading of securities.<sup>80</sup> However, notwithstanding the letter of the law, an argument in favor of the specific intent approach may be made on the basis of the European Directive.<sup>81</sup> The Directive prohibits insiders from "taking

77. Indeed, in a hostile takeover situation, the general intent requirement would provide target management with a statutory defensive tactic. Disclosure of an industrial secret to a prospective raider would force him to refrain from any action with regard to the target company. Should he try to take over the company, he might be liable as a tippee of the target company's insiders; should he try to avoid tippee liability by disclosing the information to the public, he might be liable for any damage thus possibly caused to the target company.

78. A further possible consequence of the general intent hypothesis is that it may eventually lead completely to preventing traditional insiders (directors, officers, members of the supervisory board) from engaging in any trading of securities issued by their company, since structurally they always possess inside information about the company.

79. Insider Trading Act, *supra* note 1, art. 2, ¶ 1.

80. Galli, *supra* note 50, at 940; Seminara, *supra* note 14, at 228; Bartulli, *supra* note 14, at 1002-04; Paolo Casella, *La legge sulla repressione dell'Insider Trading*, 18 GIURISPRUDENZA COMMERCIALE 858, 866 (1991). Indeed, the general intent solution may be fostered by the fact that tipping and recommending are prohibited regardless of any connected trading, apparently confirming that the law is concerned with "dangerous" behaviors, rather than with "harmful" behaviors. Paolo L. Carbone, *Nuovi illeciti attinenti alla negoziazione di 'valori mobiliari'. Profili della disciplina. Spunti critici*, Foro It. V 466, 477 (1991). According to one commentator, the apparent lack of any specific intent requirement confers an "ethical coloring" to the Italian insider trading regulation. Flick, *supra* note 56, at 986.

81. See Insider Trading Directive, *supra* note 1, art. 2, ¶ 1. The case law of

advantage of that [inside] information.”<sup>82</sup> Therefore, the illegality of the insider’s conduct would seem to turn on his attempt to profit from the privileged possession of information where his cause for trading is the awareness that the market is at a disadvantage against him.<sup>83</sup>

## VII. MATERIAL NONPUBLIC INFORMATION IN THE ITALIAN STATUTE

The informational asymmetries covered by the Act are the ones arising from the possession of material, nonpublic information, as defined in article 3.<sup>84</sup> Material, nonpublic information is any information that: 1) is specific and of a determinate content; 2) concerns one or more issuers of securities or one or more securities; 3) has not been made public; and 4) if made public, would be able to notably influence the price of the concerned securities.<sup>85</sup> The criminal nature of the provision re-

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the European Court of Justice has established that judges, in interpreting national laws, must do so in view of the letter and the purpose of any corresponding directive, in order to achieve the results pursued by the directive itself. The principle was recently reaffirmed. Case C-91/92, *Faccini Dori v. Recreb Srl*, [1995] All ER (EC) 1 (July 14, 1994) (LEXIS, Eurcom library, Cases file).

82. Insider Trading Directive, *supra* note 1, art. 2, ¶ 1.

83. Despite the very clear language of the text in this respect, the Insider Trading Directive is not completely immune from ambiguities. On the one hand, in fact, the Preamble states that “insider dealing involves taking advantage of inside information,” thus seemingly adopting a general intent solution. Insider Trading Directive, *supra* note 1, pmbl. ¶ 17. On the other hand, the Preamble recalls certain transactions, such as market makers in the normal course of their business, stockbrokers executing clients’ orders, and transactions aimed at stabilizing prices, and states that such practices should not be construed as a per se use of inside information. *See id.* These exceptions to the phenomenon seem to give even more strength to the requirement that the insider actually exploit the inside information.

84. Insider Trading Act, *supra* note 1, art. 3. The Italian and EC legislatures used different terminology concerning the relevant information. Whereas the Italian insider trading law uses the phrase “nonpublic information,” the EC Directive refers to “inside information” (the Italian official text of the Directive, valid in all effects, used the term “informazione privilegiata”). In practice, the difference does not seem to have any material consequence, since both the Directive and the Act subsequently define the item in substantially the same way. However, the different qualification may be viewed as a hint of a different approach to the phenomenon of insider trading: the EC reference to “privilege” seems to indicate a subjective negative behavior to be connoted in the abuse of a position, whereas the Italian “nonpublic” reference seems to lead towards the sanction of an objective negative behavior centered upon the secrecy of the information. Carbone, *supra* note 80, at 476.

85. Insider Trading Act, *supra* note 1, art. 3.



quires that the insider have scienter as to the actual existence of all these characterizing features.

First, the statutorily required "specificity" and "determinate content" qualify information—additional knowledge one receives—implying that it be precise as to the facts or circumstances it concerns, and substantially certain of the happening and development of the facts or circumstances. As a result of coming across such qualifying information, a person should be enriched with facts that he did not, or could not, previously have known, which favor a more accurate pricing of the concerned security.

Rumors and hearsay should be outside the reach of such qualification because they are not certain and are subject to different interpretations and beliefs.<sup>86</sup> Similarly, one would not include within the envisaged notion of nonpublic information one's own interpretation and understanding of generally available data or generally known facts. In such a case, the information a person possesses does not undergo any quantitative effect, hence, there is no addition to a person's knowledge. The effect on knowledge from the use of particular analytical and scientific techniques is a qualitative one, not quantitative, thus putting already available resources (publicly known information) to more efficient use (the accurate pricing of traded securities). For example, if a fund manager sells all the shares of a company because he forecasts its crisis after carefully reviewing the company's financial statements and its product market developments, and the company actually files for bank-

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86. For instance, generic contacts between two companies regarding a possible merger should not be deemed specific enough until the moment the merger becomes substantially and reasonably certain. The law does not expressly state that the information should be "certain," but such requirement can be inferred from the seriousness of the limitation on dealing capacity deriving from the holding of such information, and the gravity of the consequences for its misuse. Bartulli & Romano, *supra* note 53, at 670; GALLI, *supra* note 50, at 955. Galli also notes that the requirement for the relevant information to be substantially and reasonably certain can also be inferred from the existence of the special catch-all provisions in article 2, ¶¶ 3 and 7, which prohibit trading immediately prior to a meeting of the board of directors or of the Council of Ministers (or of some other ministerial committee). Galli argues, in fact, that should the requirement of "certainty" not feature the notion of material nonpublic information, the information regarding the agenda of a meeting would be sufficiently specific enough to forbid any connected trading under article 2, ¶ 1. If this were the case, the provisions of article 2, ¶¶ 3 and 7 would be a useless, and hence irrational, repetition of an already existing prohibition. *Id.* at 955.

ruptcy after a while, he may not be deemed to have traded on inside information. He did not have any new piece of information that everybody else did not have as well. Rather, his analyses led to "better" information, not to "greater" information (where "better" stands for more profitable use of informational resources, though at parity of amount).<sup>87</sup>

Moreover, the "specificity" and "determinate content" required by the statute should be met if the acquired information can move the price of the concerned security in a specific given direction. There does not seem to be a worthy purpose in forbidding trading where, although there might be the use of some nonpublic item of information, there is still a substantial risk of the stock moving in either direction. For example, the still-to-be-disclosed information that the board of directors of a

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87. This type of reasoning should help resolve the question of whether there can be insider trading in so-called "scalping" situations. For example, say a person possesses a reputation in the market for his brilliant guesses as to profitable stock choices (a so-called financial guru). Experience shows that whenever this person makes a statement concerning particular stocks, the market price of the stock will follow his advice and hence move upward if the comment was positive, or downward if the comment was negative. If, before publicizing the statement, the guru trades the stock and then makes a profit because of the price movements that follow the disclosure of his statements, could it be construed that he has traded on inside information? To be consistent with the interpretation given in the text above, it should be held that if such behavior is illegal, it would not be considered trading on inside information, but rather manipulation of the market. As noted previously, insider trading laws do not seek to punish or repress the use of greater skills and capacities in understanding and interpreting generally available information. Thus, in the example given above, the act of publishing a statement disclosing the results of one's own analysis should be considered merely incidental, since in the long run the market would have reached a similar conclusion anyway if the guru's analysis was correct. The guru's statement helps the market reach that conclusion faster. However, if it can be proven that the guru traded merely to take advantage of the statement he was planning to make, and there is evidence of negligent or reckless analysis (or no analysis at all) underlying his public statements, this would be an issue of manipulation of the market. In other words, the publication of the statement may be deemed to be a dissemination of deceptive news intended to alter the securities market, a practice sanctioned in the anti-manipulation provision of the Insider Trading Act. Insider Trading Act, *supra* note 1, art. 5; see also *supra* note 62 and accompanying text. Moreover, the EC Directive also recognizes that in any transaction there is a decisive moment and an operative moment—although these two moments may not, and most often do not, coincide in time, the decisive moment cannot be said to be the inside information on which the subsequent operative moment takes place. See Insider Trading Directive, *supra* note 1, pmbl., ¶ 16. Hence, the decision of a company to take over another company does not prevent the bidding company from purchasing shares of the target company in the market before launching the tender offer.

company will soon release their suggestion regarding the company's dividend policy, without knowing whether such suggestion will head towards greater or lesser dividend distribution,<sup>88</sup> should not be considered specific because it is of no help in estimating the price of the shares of the company, whether it be higher or lower than the current price. Hence, the trading taking place after the acquisition of such information might surely bring about a profit, depending upon the quality of the guess the insider made based on the information. Any such profit, then, will be the result of the guess, not of any nonpublic information.<sup>89</sup>

Second, the object of the inside information must concern "one or more issuers of securities" or "one or more securities."<sup>90</sup> The reference is wide enough to include both "corporate information," specifically related to the economic and financial situation of the issuer (e.g., the finding of rich oil wells by an oil company), and "market information," related to facts happening "outside" the issuer of the concerned security that may nevertheless have an effect on its price (e.g., a takeover bid on the company). The use of the wording "concerning one or more securities or issuers," rather than a more generic reference such as "concerning securities and issuers of securities," seems to imply that the information should be directly

88. Under Italian corporate law, the regular meeting of shareholders makes resolutions about the distribution of dividends. C.C. arts. 2433, 2364. The board of directors, in this respect, only has a proposal power. *Id.*

89. Some commentators have argued that the strict requirement that the information be specific and of determinate content may easily reduce any effectiveness of the law. The concept of information is in fact typically a dynamic one, and insiders usually trade and make profits on information which is still at its formation stage, not sufficiently specific or determined yet to fit within the definition of article 3. See Sergio Seminara, *Riflessioni in margine al disegno di legge in tema di Insider Trading*, in RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 545, 553 (1990); Giuliano Vassalli, *La Punizione dell'Insider Trading*, 35 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 3, 19-20 (1992). It should be noted, however, that any less stringent requirement in this respect might have been too vague and thus gone against the strict application of criminal law. Luigi Foffani argues that the rigid and narrow definition of the object of the illegal conduct (the inside information) serves as a counterbalance to the extreme breadth of the definition of "insider." Luigi Foffani, *La Nuova Disciplina Penale dell'«Insider Trading» e delle Frodi Nel Mercato Mobiliare*, 4 RIVISTA TRIMESTRALE DI DIRITTO PENALE DELL'ECONOMIA 911, 918-19 (1991).

90. Insider Trading Act, *supra* note 1, art. 3; see also Insider Trading Directive, *supra* note 1, art. 1, ¶ 1 ("[I]nformation . . . relating to one or several issuers of transferable securities or to one or several transferable securities . . .").

imputable to specific issuer(s) or specific security(ies). Any fact that generally and indiscriminately pertains to a whole category of issuers or securities (e.g., a government's decision to modify the tax status of shares or bonds), although it may have an effect on the price of each and every one of those securities, could not be considered to pertain to "one or more" issuers or securities.<sup>91</sup>

Third, the information used by the insider must have not yet been made public when the trading occurs. The defense is to show that the public might have known about the event that is the object of the information, not that it actually knew about it.<sup>92</sup> In practice, it might be difficult to establish when and how information should be considered public. Obviously, it will be deemed to be public once CONSOB disclosure obligations have been fulfilled,<sup>93</sup> although that is not the exclusive means

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91. A more specific example is the decision of the Governor of the Central Bank to modify the official discount rate. This is surely a decision that affects the prices of securities since it is an indication of the direction public authorities are moving towards in administering, within their limited power, the financial market. However, the decision to modify the official discount rate is a decision that, taken by itself, affects the whole supply and demand of financial resources, and it cannot be imputed to single issuers or securities, or even to Treasury bonds that are usually the securities being affected more quickly by such decision. Of course, the conclusion would be different if the pricing of a particular security were strictly tied to the official discount rate, let alone its general market effect (for example, the case of debentures issued at a variable rate to be calculated by adding a premium to the current official discount rate). The same reasoning is to be made with respect to information regarding the issue of data concerning the inflation rate.

92. In contrast, in commenting on the similarly worded provision of the Insider Trading Directive, *supra* note 2, art. 1, ¶ 1, Solimena draws attention to the necessity that the public actually perceives the information. See Solimena, *supra* note 10, at 1055. This conclusion is similar to the original version of the insider trading bill in the Italian Parliament. In fact in that draft, reported by Seminara, the non-publication of the information was described as "not known to the public," therefore implying, at least on a literal reading, that the insider would then be able to trade only after actual public knowledge of the material information—quite a diabolical burden of proof, indeed. See Sergio Seminara, *Riflessioni in margine al disegno di legge in tema di Insider Trading*, RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 545, 554 (1990).

93. Regulations of Nov. 14, 1991, No. 5553, Gazz. Uff. (Dec. 10, 1991, No. 157), 77 Lex Part I, at 2757 [hereinafter CONSOB Regulations]. According to these regulations, issuers of listed securities must timely disclose to the public any material fact concerning their activity. More specifically, among the facts and events that must always be disclosed to the public are the following: changes in control, filing for bankruptcy, issues of new shares or debentures, mergers or divisions, purchase or sale of relevant shareholdings or business branches, business

through which the alleged insider can prove the publicity of the information.<sup>94</sup>

In ascertaining to which persons the information should be accessible in order to be deemed public, it should be kept in mind that the securities market is characterized by the intervention of professional intermediaries that generally assist investors in their decisions to trade, having special fiduciary duties towards them.<sup>95</sup> It follows that information should be deemed public when it is generally accessible to such professional intermediaries, even though the general investing public may actually not have the information yet.<sup>96</sup> CONSOB regulations seem to confirm such interpretation when stating that the disclosure obligations are to be fulfilled by communication to the competent exchange authorities and to two press agencies.<sup>97</sup> These information outlets are usually only immediately available to professional intermediaries and investors, and seldom to the general public, during the short interim in which effective use of new information may be made in the securities market.

Note that the duty to furnish timely disclosure through CONSOB is only imposed on the issuers of listed securities.<sup>98</sup>

reorganizations, buy-back operations, dissolution of the company, annual and consolidated accounts and periodical reports. *Id.* arts. 5-14.

94. The potential for the insider to prove that the information was completely public despite non-compliance with CONSOB disclosure obligations is also confirmed by the fact that those obligations only bind issuers of listed securities, whereas material information regarding the listed security or its issuer may well find its source "outside" the listed issuer. Meaningful examples include: a non-listed company's decision to launch a takeover bid on a listed company; or a decision by the Ministry of Treasury to initiate bankruptcy proceedings against a listed banking institution.

95. Investment Business Act, *supra* note 17, art. 6, ¶ 1(e). The Investment Business Act regulates investment business transactions, requiring professional broker-dealers, investment advisors, and managers always to keep the investor adequately informed of the nature and risk of any transaction, and to inform the investor of any act, fact or circumstance that may affect the investor's conscious investment decision. *Id.*

96. *Circolare Assonime*, *supra* note 55, at 887.

97. CONSOB Regulations, *supra* note 93, art. 17.

98. Insider Trading Act, *supra* note 1, art. 6, ¶ 1. The timeliness of the disclosure should be judged from the moment the relevant information has definitely assumed all features article 3 requires for the existence of nonpublic information. It is no excuse for nondisclosure because of any possible prejudice that the company may suffer as a consequence of disclosure; in that instance disclosure is to be made to CONSOB, which may allow the issuer to keep the information secret as long as there is no danger of inducing the market to be in error or deceit. *See id.*,

The disclosure obligations may not, and usually do not, rest on traders in possession of nonpublic information. Indeed, not only do such insiders have a duty to abstain from trading, but they also have a duty to keep secret the relevant information they possess.

Finally, the nonpublic information must be material. That is, as the statute phrases it, the information must "be able to notably influence" the stock price. The requirement is expressed in terms of potentiality, meaning that the price effect must be verified on an *ex ante* basis. It directly follows that, in proving the materiality of the information, it is not sufficient to show that the price of the security moved after disclosure of the information, because there may have been other concurring elements affecting the price of the security.

The Act gives no hint as to what sort of facts or events make the information material.<sup>99</sup> Only Italian case law, which at the present is non-existent, will be able to itemize material facts and events. The most plausible general criterion seems to be the one adopted in the United States in *Basic Inc. v. Levinson* which held that information is deemed to be material when there is a substantial likelihood that its disclosure would have been considered significant by a reasonable investor.<sup>100</sup>

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art. 6, ¶ 3(a).

99. Some legal systems have proceeded to a listing of "corporate" and "market" events that are per se material, thus negating the prosecution's need to prove their materiality. This approach, while ostensibly favoring greater certainty for the application of the law, is obviously incomplete, given the infinite number of factors that can affect the price of a security. The greater specificity in the statute, the greater its effectiveness, but also, the easier the chance of finding loopholes. The truth of the matter is that, consequently, those systems, along with the statutory list of material events, have also adopted a general "any other material fact" residual clause similar to the one in the Italian statute. This is how the Swiss Criminal Code is structured. STGB art. 161. In the United States, SEC Rule 14e-3 itemizes takeovers as material information. 17 C.F.R. §240.14e-3 (1995). However, insider trading case law under Rule 10b-5 relies upon a general notion of material information. 17 C.F.R. §240.10b-5 (1995); see generally *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Even CONSOB, in the disclosure regulations it issued under articles 6 and 7 of the Insider Trading Act to prevent the creation of favorable grounds for insiders to trade, imposed a list of specific facts that required companies and other issuers of listed securities to timely disclose to the market, although it also included a general "material facts disclosure" clause. CONSOB Regulations, *supra* note 93, tit. III (entitled "Disclosure to the public of news, facts, statistics and studies that may carry an interest for shareholders, investors and for the correct functioning of the market").

100. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). It is important to

For purposes of Italy's law, the *Basic* materiality test should be read in conjunction with the provision of article 3 of the Act which requires that the influence that the nonpublic information be able to exert on the concerned security price must be "notable."<sup>101</sup> Thus, not just any materiality will suffice, but a significant materiality. Among commentators, this qualification has been criticized because it leaves uncertainty in the exact definition of the illegal behavior.<sup>102</sup> It is perhaps even outside the constitutional norm that criminal offenses be precisely defined in all their elements. A possible suggestion may be that the more significant materiality envisaged by the law does not really imply any quantitative analysis of the influence exorable on securities prices. Information may be deemed to be more significantly material when a higher number of investors consider it in adjusting their investment decisions. It could then be inferred that the Act's "notable" requirement qualifies its "reasonable investor" standard to include information that is going to be perceived as material by a wider set of investors, and not just by a few professional investors, thus fully adopting *Basic*'s standard.

#### VIII. THE COVERAGE OF THE INSIDER TRADING STATUTE: THE NOTION OF SECURITIES

According to article 1 of the Act, the Italian insider trading statute limits its application to securities admitted to trade on any Italian or other EC country regulated exchange.<sup>103</sup> Italian law does not encompass a precise definition of what financial instruments are to be considered securities. So far, the term "securities" has been held to include company shares and debentures, treasury bills and bonds, commercial papers, future and option contracts (on currencies, indexes, interest

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note that the Court in *Basic* further held that the materiality test must be adapted to the specific facts and events of the case. Thus, no information will be material per se; rather, "materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" *Id.* at 238 (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)).

101. Insider Trading Act, *supra* note 1, art. 3.

102. For instance, it is difficult to imagine what criterion would be used to determine that a 5% influence, rather than a 2% influence, meets the "notable" standard. See Casella, *supra* note 80, at 866-67.

103. Insider Trading Act, *supra* note 1, art. 1.

rates, or any other security), certificates of bank deposits, and any other evidence of debt/credit or property arising from a financial relationship,<sup>104</sup> documented in any standardized form and thus marketable to, or among, the public.<sup>105</sup> The Insider Trading Directive, on the other hand, adopted a closed definition of securities by actually listing those financial instruments that should be considered securities for the purposes of insider trading regulation. They are:

- (a) shares and debt securities, as well as securities equivalent to shares and debt securities;
- (b) contracts or rights to subscribe for, acquire or dispose of securities referred to in (a);
- (c) futures contracts, options and financial futures in respect of securities referred to in (a); and
- (d) index contracts in respect of securities referred to in (a).<sup>106</sup>

The adoption of a closed definition of securities, following the Directive's indications, would have carried the advantage of reducing uncertainties as to borderline interpretations, although, at the same time, it would have introduced an element of rigidity that might favor loopholes. The open and flexible nature of the notion of securities in the Italian legal system, despite the vigorous debate it raises,<sup>107</sup> allows the insider trading prohibition to be more effective in protecting investment flows, because it is not really concerned with what kind of existing or developing financial instrument is chosen by the investor to invest his savings.<sup>108</sup>

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104. A similar definition is in article 18-bis of the Law of June 7, 1974, No. 216, the statute that institutes and regulates CONSOB and the solicitation of public savings. Law of June 7, 1974, No. 216, Gazz. Uff. (June 8, 1974, No. 149), 119 Lex Part I, at 1273, art. 18-bis. More or less the same definition is found in article 2(1) of the Securities Act of 1933. 15 U.S.C. § 77(b) (1994). Notice that the notion of security presumes an underlying financial relationship, investing risk capital, giving credit or assuming debt. Amazingly, thus far the notion of security has not been construed as encompassing any underlying commodity transaction.

105. Antonio Serra, *Valori mobiliari*, 46 ENCICLOPEDIA DEL DIRITTO 200 (1993).

106. Insider Trading Directive, *supra* note 1, art. 1, ¶ 2.

107. For an overview of the debate, see Carla R. Bedogni, *Valori Mobiliari*, in ENCICLOPEDIA GIURIDICA TRECCANI 1 (1994).

108. In the United States, however, it is difficult to discern whether an insider would have a fiduciary relationship in transactions involving non-stock securities, such as bonds and debentures. The difficulty may render ineffective the application of the fiduciary duty theory in prosecutions of insider trading under SEC Rule



The securities that may be the object of the Italian insider trading law are more precisely defined by the requirement that they be listed on the regulated exchanges<sup>109</sup> within the European Community.<sup>110</sup> Italy's regulated exchanges are: the Borsa Valori (the official Stock Exchange); the Mercato Ristretto (a segment of the official Stock Exchange where securities with a lesser trading volume are usually listed, similar to the Unlisted Securities Market in the United States or in the United Kingdom); the MTS (the telematic exchange for Treasury bonds), and the MIF (for futures trading). Any future exchanges will only be considered regulated exchanges, hence the securities traded thereon will be granted insider trading protection, if there is some kind of state regulatory intervention either in the establishment or in the function of the exchange.<sup>111</sup> The same criteria must also be adopted with regard to EC exchanges, as also made clear by the Directive when restricting its scope to securities traded "on a market which is regulated and supervised by authorities recognized by public bodies . . . ."<sup>112</sup>

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10b-5. See *supra* note 71 and accompanying text. The loophole may only be overcome by fully accepting the "fraud-on-the-source" (misappropriation) theory as the basis for liability. For an overview of the issue in debate, see generally Harvey L. Pitt & Karl A. Groskaufmanis, *A Tale of Two Instruments: Insider Trading in Non-Equity Securities*, 49 BUS. LAW 187 (1993).

109. A securities exchange is any public place where vendors and buyers of securities meet to transact their business. It does not imply a physical reunion, but it can take place through any instrumentality that allows the prompt distribution of the information regarding the bid and ask offers (through intermediaries and/or through telecommunications contact). The purpose of a securities exchange is to facilitate transactions by creating an organized pattern for the conduct of negotiations, ultimately resulting in the formation and diffusion of prices. See generally Cinzia Motti, *Il mercato come organizzazione*, in *BANCA IMPRESA E SOCIETÀ* 455 (1991).

110. The territoriality criterion for the application of the insider trading law provides that insiders' transactions on securities listed on an EC exchange be subject to prosecution only if effected within the Italian territory. However, insiders' transactions on securities listed in Italy should be prosecuted in Italy even if effected abroad. The territoriality criterion corroborates article 9 of the Insider Trading Act, which requires collaboration agreements among national and international supervisory agencies. Insider Trading Act, *supra* note 1, art. 9.

111. Recently, CONSOB has issued regulations for establishing "local exchanges," to allow trading in securities which are not listed on the official Borsa Valori or Mercato Ristretto. Regulation of Sept. 30, 1994, No. 8469, Gazz. Uff. (Oct. 12, 1994, No. 239) 80 Lex Part I, at 3386. The trading structures that will be created following these regulations will be regulated exchanges as well.

112. Insider Trading Directive, *supra* note 1, art. 1, ¶ 2. As far as Italy is

The reason for limiting the application of the law to securities traded on public exchanges is evident in the objectives that the legislature pursued in prohibiting insider trading, i.e., the protection of the credibility of the capital market through the enhancement of investors' confidence.<sup>113</sup> Securities exchanges are facilities to dispose of one's assets and, at the same time, by being publicly accessible, represent the meeting point of the supply and demand of public savings. The immediacy, anonymity, and impersonality characterizing trading on exchanges make it very difficult for any private law remedy, based upon contract or tort, to be enforced against the insider as a defense for the weaker party to the transaction (i.e., the least informed). However, transactions on listed securities are worthy of protection as an expression of the interaction between the general supply and demand of public savings, whose correct functioning is deemed essential to encourage overall economic growth and welfare.<sup>114</sup> This justifies the stronger criminal

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concerned, the requirement that exchanges be under some kind of government supervision is not novel. Traditionally, the creation of a securities exchange has been held to be within state prerogatives and not completely available to private initiative. See generally Valentino Vulpetti, *Profili Istituzionali Del C.D. "Mercato Secondario Dei Titoli Di Stato"*, 27 QUADERNI CERADI SERIE « RICERCHE » 1 (1991); Cinzia Motti, *Il Mercato Come Organizzazione*, in *BANCA IMPRESA E SOCIETÀ* 455 (1991). The Investment Business Act authorized CONSOB to institute new public exchanges for securities and to regulate any trading taking place thereon. Investment Business Act, *supra* note 17, arts. 20-23. Hence, any Italian exchange can be individuated as regulated through its formal act of public recognition. The situation is different with respect to other EC countries, such as England, where the creation and supervision of securities exchanges is not an exclusive prerogative of the state or of some delegated government agency. Quite often, in fact, securities exchanges in England are the result of private initiative, and are self-regulated by intermediaries and investors. However, the wording of the Insider Trading Directive seems to imply that mere self-regulation, unsupported by at least some sort of quality recognition by the state, will not be sufficient to turn an organized exchange into a "regulated exchange" for the purposes of insider trading enforcement. England meets this criterion through the rules promulgated under the Financial Services Act of 1986. Financial Services Act, 1986, ch. 60, §37.

113. See Insider Trading Directive, *supra* note 1, pmbl. ¶ 9.

114. There is a constitutional background for such protection in the Italian Constitution: "The Republic encourages and safeguards savings in all its aspects . . . . It [also] encourages . . . direct or indirect investment in large productive enterprise." Costituzione art. 47. In private transactions, this "public interest" in preserving the confidence in the system appears weaker, because such confidence can well be attained through the self-protection mechanisms that general contract law assures to private individuals, as, for instance, the possibility of voiding the contract should elements of deceit recur. For example, Messineo argues that the nondisclosure of facts relevant to the substance of a contract is bad faith

protection granted by insider trading laws to persons engaging in transactions in listed securities, as compared to the mere civil remedies available with regard to transactions in non-listed securities.

In apparent contradiction with these conclusions is the fact that the insider trading prohibitions apply to any trading of listed securities, whether on or off the exchange. A violation of the law, and the criminal enforcement thereof, is then possible also in a private purchase or a private sale of listed securities. The parties to these private transactions, should they hold inside information, do preserve the same duties and are subject to the same criminal penalties as if they were operating on anonymous and impersonal exchanges, although the situation does not seem to be any different from any private transaction in unlisted securities. The extension to instances where caveat emptor mechanisms easily may be enforced as a measure of self-protection by the individual parties seems to contrast with the public savings protection rationale previously suggested. This extension goes beyond the EC Directive, whose concern was mainly to protect transactions characterized by the impossibility or difficulty in evaluating the other party's good faith, either because of the impersonality of exchange transactions, or because of the anonymity assured by the intervention of professional intermediaries in private transactions.

Article 2 of the Directive, while stating that the insider trading prohibition should apply to any purchase or sale of listed securities effected by the means of the intervention of a professional intermediary, also allows member states not to enforce the prohibition with regard to off-exchange transactions without professional intermediation.<sup>115</sup> Italy's failure to

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behavior and is therefore a justified basis for avoidance. FRANCESCO MESSINEO, *IL CONTRATTO IN GENERE* 300 (1973). In supporting this argument, the author cites article 1892 of the Civil Code. *Id.* Article 1892 governs insurance contracts and states that a contract can be voided if the contractor, acting with intent or in a grossly negligent manner, fails to disclose any circumstances the knowledge of which would have caused the insurer not to agree to the contract or to close it on different terms. C.C. art. 1892. The same result is reached by Visintini, although she argues for a private remedy, concluding that the duty to disclose any special facts regarding a contract being closed is part of the general duty of good faith in contract negotiations, as prescribed in article 1337 of the Civil Code. GIOVANNA VISINTINI, *LA RETICENZA NELLA FORMAZIONE DEI CONTRATTI* (1972); see C.C. art. 1337.

115. Insider Trading Directive, *supra* note 1, art. 2, ¶ 3.

implement this restriction seems excessive and shows an intent of the legislature to moralize the market for securities, without however correspondingly enhancing any general economic interest. The only rational justification for extending liability to face-to-face transactions of listed securities without intermediaries may be the absence of effective concentration of securities bargains on the exchanges.<sup>116</sup> This, while being likely grounds for going around the insider trading prohibitions, causes fragmentation of the supply and demand of investment resources and hence requires that the allocation of those resources, wherever it takes place, not be further affected by the distorting factors added by possible insider trading practices.

## IX. CONCLUSION

Ironically, the Italian law concerning insider trading, despite the attempt at codification, by no means reaches the same degree of certainty as U.S. law. In its strictly literal interpretation, the Italian statute seems to concentrate on possession of material nonpublic information, with no direct reference to abuses of position or breaches of duties. The mere fact of entrusting a person with confidential information seems sufficient to turn this person into an "insider" and impose on him a duty to abstain from trading. Moreover, the tipping and recommending prohibitions not requiring any actual trading, the possible requirement of "general intent" in the trading prohibition, and the regulatory powers given to CONSOB aimed at ensuring timely disclosure of material facts to the market, seem to confirm that the protection envisaged by the law is addressed at removing the danger that any unequal access to information may occur. Interpretative efforts are being made in order to restrain the scope of the letter of the law and, as shown, there is room for such efforts to be at least partially successful. However, if these efforts are unsuccessful, then the purpose of the statute will remain the right of all

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116. The Investment Business Act, *supra* note 17, art. 11, requires that all transactions on listed securities take place on regulated exchanges, although such requirement is only applicable to authorized broker-dealers. Moreover, the concentration requirement is waivable in bloc transactions, even when broker-dealers are involved. Investment Business Act, *supra* note 17, art. 11.

investors to equal access to material information rather than the regulation of fraudulent behavior that upsets financial markets and investor expectations.

From a comparative perspective, it is important to point out that viewing insider trading legislation as regulation of the fraudulent gain and misuse of material nonpublic information, as it is in the United States, is quite different from viewing it as regulation of investors' equal access to information. They are qualitatively different approaches. They may both be valid options for the legislature as long as it is understood that each one of them is aimed at the protection of a different set of values. The U.S. approach is concerned with dishonesty in the conduct of the market. In general terms, it seems to assert the principle that anybody may enter the market, but must do so "with clean hands." Therefore, its anti-fraud nature probably justifies the harshness of the criminal punishment. The equal access approach of Italy, instead, is concerned with the alleged inherent unfairness of unequal market positions. In the first case, the anti-fraud approach, the emphasis is on the behavior leading to the unequal market position. Instead, in the second case, the equal access approach, the main emphasis is on the inequality situation *per se*.

However, in adopting either approach, any legal system should be wary of the existing tension in the securities market between different policies: the necessity to foster the free flow of information, on one side, and the need to strengthen the confidence of investors by setting rules for fair conduct of the market, on the other side.<sup>117</sup> The compromise between these equally important features for the correct functioning of the financial market is not always easy and requires continuous contingent adjustments. Therefore, any rigid normative definition may end up favoring too much one policy or the other, thus hampering the correct allocation of financial resources through the market mechanisms.

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117. See, e.g., *Dirks v. SEC*, 463 U.S. 646, 653-54, 658-59 (1983) (demonstrating the awareness of such tension).

## Appendix

Law of May 17, 1991, No. 157. Rules Concerning the Use of Nonpublic Information in Securities Transactions, and the National Commission for Companies and the Securities Exchange (CONSOB).<sup>1</sup>

Article 1. 1) For the purposes of this Act, securities are all those traded on Italian and other EC regulated exchanges.

Article 2. 1) It is prohibited to purchase or to sell or to effect any other transaction, even through the interposition of another person, in securities, including the relative rights of option pertaining thereto, when one is in possession of nonpublic information obtained by virtue of being a shareholder of a company, or by reason of the exercise of a function, even public, a profession or an office.

2) It is also prohibited to communicate to third parties, without any justifying motive, the information under paragraph 1 of this article, or to recommend third parties, on the basis of said information, to effect the transactions under paragraph 1 of this article.

3) The shareholders asserting even *de facto* control over the company pursuant to article 2359 of the Civil Code,<sup>2</sup> the directors, the liquidators, the officers, the members of the internal supervisory board, and the auditors of accounts are prohibited from purchasing or selling or effecting any other transaction, even through the interposition of another

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1. Law of May 17, 1991, No. 157, Gazzetta Ufficiale della Repubblica Italiana [Gazz. Uff.] (May 20, 1991, No. 116), 77 Lex Part I, at 1241.

2. Article 2359 of the Italian Civil Code states, in pertinent part, that a controlling relationship exists when: a) a company has the majority of the votes that can be exercised in the ordinary shareholders' meeting of another company; b) a company has enough votes in the ordinary shareholders' meeting of another company so as to exercise a dominant influence; and c) a company can exercise a dominant influence over another company by virtue of a contractual relationship with it. Codice civile [C.C.] art. 2359.

person, in securities, after a meeting of the board of directors, or equivalent body, has been called to resolve upon operations which are able to notably influence the price of the security itself, and before the resolution has been made public. When the provisions under this paragraph are violated, the penalties under paragraph 5 of this article are doubled.

- 4) The prohibitions of the preceding paragraphs are extended to all those who, directly or indirectly, have obtained information, knowing of its nonpublic character, from persons that possess such information by reason of the exercise of their function, profession or office.
- 5) In the course of the criminal proceeding, the provisions under article 290 of the Code of Criminal Procedure apply.<sup>3</sup> The violation of the provisions of the preceding paragraphs is punished with imprisonment up to 1 year and with a fine of between 10 million and 300 million lire, except that the judge may increase the fine up to three times as much when, due to the gravity of the violation, the fine may be deemed inadequate even if imposed to its maximum. The accessory penalties under articles 28,<sup>4</sup> 30,<sup>5</sup> 32-bis (para. 1),<sup>6</sup> and 32-ter<sup>7</sup> of the Criminal Code are to be imposed for a period not less than 6 months and not exceeding 2 years. The sentence involves the publication of the sentence in at

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3. Article 290 of the Italian Code of Criminal Procedure allows judges temporarily to enjoin the defendant from exercising specific professions or entrepreneurial activities, or from holding corporate offices. Codice di procedura penale [C.P.P.] art. 290.

4. Article 28 of the Criminal Code disqualifies violators from holding public office. Codice penale [C.P.] art. 28.

5. Article 30 of the Criminal Code disqualifies violators from conducting a profession or trade which requires a special authorization or license. C.P. art. 30.

6. Article 32-bis disqualifies violators from holding corporate or management office. C.P. art. 32-bis, ¶ 1.

7. Article 32-ter disqualifies violators from contracting with the Public Administration. C.P. art. 32-ter.

least two national daily newspapers, of which one must be an economic newspaper.

- 6) The penalties under paragraph 5 will also be applied to acts committed abroad, provided that the acts committed abroad deal with securities traded on Italian regulated exchanges. In all other cases, the provisions of articles 7, 8, 9, and 10<sup>8</sup> of the Criminal Code apply.
- 7) The Ministers and Undersecretaries of State are prohibited from purchasing or selling or effecting any other transaction, even through the interposition of another person, in securities, after a meeting of the Council of Ministers or of an Interministerial Committee has been called in order to adopt resolutions which could notably influence prices, and before said resolutions have been made public. When the provisions of this paragraph are violated, the penalties under paragraph 5 are doubled.

Article 3. 1) Nonpublic information under article 2 means information which is specific of determinate content, that has not been made public, concerning one or more issuers of securities or one or more securities, and which, if made public, would be able to notably influence the price of the security.

Article 4. 1) The provisions of articles 2 and 3 do not apply to transactions effected by the Italian State, by the *Banca d'Italia* (the Central Bank), by the *Ufficio Italiano Cambi* (the Foreign Exchange Office), and by any other person acting on their behalf for reasons connected with monetary policy, foreign exchange policy and the management of public

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8. Articles 7-10 of the Criminal Code regulate situations in which Italian criminal law applies to offenses committed outside Italian territory. C.P. arts. 7-10.



debt or of official reserves.

- Article 5.
- 1) Whoever divulges false, exaggerated or deceptive news, or effects simulated transactions or any other artifice, which are able to notably influence the price of securities, will be punished by a term of imprisonment not exceeding 6 months and a fine of between 1 million and 30 million lire.
  - 2) If the violation under paragraph 1 of this article is committed with the purpose of causing a notable alteration of the price of securities, or the appearance of an active market on such securities, the penalties under article 501 of the Criminal Code<sup>9</sup> are to be imposed.
  - 3) In any violations under paragraphs 1 and 2 of this article, if the notable alteration of the price of securities or the appearance of an active market on such securities takes place, the penalties thereof are increased. The accessory penalties under articles 28, 30, 32-*bis* (para. 1), and 32-*ter* of the Criminal Code are to be imposed for a period not less than 6 months and not exceeding 2 years.
  - 4) Article 501, paragraph 3, of the Criminal Code applies.<sup>10</sup>
  - 5) The penalty is doubled if the crimes under paragraphs 1 and 2 of this article are committed by the shareholders exercising even *de facto* control over the company pursuant to article 2359 of the Civil Code, the directors, the liquidators, the officers, the members of the internal supervisory board, the auditors of accounts, the officers of companies or enti-

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9. Article 501 of the Criminal Code, subtitled "Fraudulent Manipulation of Prices in the Public Markets or on Commercial Exchanges," prescribes, in pertinent part, penalties of up to 3 years imprisonment and a fine of between 1 million and 50 million lire. C.P. art. 501.

10. Article 501, ¶ 3 states that penalties are doubled if the offense is committed by a citizen in order to favor foreign interests, or if the offense causes a depreciation of the value of the national currency or of government bonds, or if it causes a price increase in goods commonly or widely consumed. C.P. art. 501, ¶ 3.

ties issuing securities, or of broker-dealer companies, or by *agenti di cambio* (certified securities brokers), or by members or employees of CONSOB, or by the local market authorities, or if the crime is committed by means of the press or other mass media.

- Article 6.    1) CONSOB shall prescribe, with regulations to be issued within 180 days from the date this Act becomes effective, the methods of registration, through electronic procedures in each regulated exchange by security and by intermediary, of all transactions effected in securities, and it shall also prescribe the methods of registration, through electronic procedures, to be adopted by each person acting as an intermediary for the transactions effected on securities, classified by security and by client. With the same regulations, CONSOB shall prescribe the methods, the terms and the conditions for the disclosure to the public of all news, facts, statistics and studies, concerning the listed companies and their controlled companies, whether subsidiaries or companies in any way connected, pursuant to articles 1 through 9 of the Law of October 10, 1990, No. 287,<sup>11</sup> though not quoted, being of interest to the shareholders, the investors, and to the correct functioning of the market.
- 2) With the same regulations, CONSOB shall prescribe the methods and terms by which brokers or intermediaries must report the off-exchange transactions on securities listed in the *Borsa Valori* or on those admitted to the *Mercato ristretto*.
- 3) The regulations shall also prescribe:
- a) if the directors object, by filing a motivat-

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11. This law embodies the Italian antitrust law. Articles 1-9 of the law regulate agreements, abuses of dominant position, and concentrations of firms. Law of Oct. 10, 1990, No. 287, Gazz. Uff. (Oct. 13, 1990, No. 240), arts. 1-9, 76 Lex Part I, at 1839.

ed complaint, claiming that the spread of the news under paragraphs 1 and 2 of this article may cause serious harm to the company, they must give immediate communication to CONSOB which, within 48 hours, having examined the arguments brought forward, may exclude, even partially or temporarily, the spread of the information itself, provided this shall not induce error in the public with regard to essential facts and circumstances;

- b) the company or the entity may not, in the meantime, proceed to disclose to the public any subsequent news under paragraphs 1 and 2 of this article, which in all cases must immediately be communicated to CONSOB.

- Article 7.
- 1) Persons that violate the provisions of the regulations under article 6 are subject to the following sanctions, considering the gravity and the possible recidivism of the violation:
    - a) reprimand by CONSOB;
    - b) pecuniary sanctions between 10 million and 250 million lire imposed by decree of the Minister of Treasury, on the advice of CONSOB.
  - 2) The sanctions shall be given publicity, at the expense of persons against whom they are imposed, pursuant to the methods prescribed by CONSOB.

- Article 8.
- 1) CONSOB shall effect the acts necessary to verify any violation of the provisions under articles 2 and 5 using, against all persons mentioned in the articles 2 and 5, the powers provided by article 3 of the Decree-Law of April 8, 1974, No. 95.<sup>12</sup> For this purpose

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12. Decree-Law of Apr. 8, 1974, No. 95, Gazz. Uff. (Apr. 9, 1974, No. 94), art.

CONSOB may collaborate with any public administration and may request all necessary information from persons mentioned in articles 2 and 5, and from the financial intermediaries involved in the transactions. The denunciation under articles 361 and 362 of the Criminal Code<sup>13</sup> must be proposed exclusively to the President of CONSOB.

- 2) The directors and liquidators, the members of the internal supervisory board, the auditors of accounts, the officers of companies or entities, and all other persons under obligation pursuant to paragraph 1 of this article, who do not comply with the terms of CONSOB's requests, or who obstruct or delay the exercise of CONSOB's functions, shall be subject, unless the act constitutes a more serious crime, to the penalty of arrest not exceeding 3 months or of a levy between 2 million and 40 million lire.
- 3) The President of CONSOB shall transmit to the *Pubblico Ministero* (District Attorney) competent under paragraph 4 of this article, through a motivated report, the documentation collected during the verifying activities pursuant to paragraph 1 of this article, whenever it is believed that there has been a violation of the provisions under articles 2 and 5.
- 4) For criminal violations of the provisions under articles 2 and 5, the competent court is the one sitting in the capital city of the court

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3, 119 Lex Part I, at 979, *modified by* Law of June 7, 1974, No. 216, Gazz. Uff. (June 8, 1974, No. 149), art.3, 119 Lex Part I, at 1481, *amended by* Law of June 4, 1985, No. 281, Gazz. Uff. Supp. (June 18, 1985, No. 142), art. 5, 141 Lex Part I, at 1273. Article 3 of the Law of June 7, 1974, No. 216, grants CONSOB broad powers to require full disclosure from listed companies, to impose penalties on directors, members of the supervisory board, officers, and auditors of accounts of listed companies who do not cooperate. Law of June 7, 1974, No. 216, Gazz. Uff. (June 8, 1974, No. 149), art. 3, 119 Lex Part I, at 1481.

13. Articles 361 and 362 of the Criminal Code state that public officials must report to the judicial authorities, in a timely manner, any offense of which they have notice in the performance of their duties. C.P. 361-362.

of appeals district in the territory in which the crime has been committed.

- 5) If notice of the crimes under articles 2 and 5 is acquired differently, the proceeding judicial authority shall inform the President of CONSOB in a timely fashion.
- 6) In proceedings for crimes under articles 2 and 5, CONSOB exercises the same rights and powers that the Code of Criminal Procedure assigns to persons offended by the crime, and CONSOB also exercises the powers recognized under articles 505 and 511 of the same Code of Criminal Procedure<sup>14</sup> to the entities and associations representing the interests harmed by the crime.

- Article 9.
- 1) Contrary to the provisions under paragraph 11 of article 1 of the Law of June 7, 1974, No. 216,<sup>15</sup> CONSOB shall collaborate and exchange information, within its competencies, with the competent authorities of the other EC Member States. Moreover, if based on reciprocity agreements, CONSOB may collaborate and exchange information with the competent authorities of non-EC Member States.
  - 2) The data and news obtained pursuant to paragraph 1 are protected official secrets, within the limits of article 1, paragraph 11 of the Law of June 7, 1974, No. 216.

- Article 10.
- 1) In the first paragraph of article 2631 of the

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14. Under articles 505 and 511 of the Code of Criminal Procedure, CONSOB will be able to intervene at the trial and question witnesses, experts and other intervening parties; it may ask the judge to admit new evidence; and it may ask that a full reading of the acts and reports acquired during the investigation be given during the course of the trial. C.P.P. arts. 505, 511.

15. Article 1, ¶ 11 prescribes that all data, news, and information acquired by CONSOB in the course of its activities are protected by secrecy even against all public administrative bodies, except for the Minister of Treasury. Law of June 7, 1974, No. 216, Gazz. Uff. (June 8, 1974, No. 149), art. 1, 119 Lex Part I, at 1481, ¶ 11, *amended by* Law of June 4, 1985, No. 281, Gazz. Uff. Supp. (June 18, 1985, No. 142), art. 5, 141 Lex Part I, at 1273.

Civil Code,<sup>16</sup> after the words: “*resolutions of the board*,” add the following: “*or of the executive committee*.”

- 2) In the second paragraph of the same article 2631, after the words: “*from the resolution*,” add the following: “*or from the operation*.”

Article 11. 1) This Act shall become effective the day after its publication in the *Gazzetta Ufficiale* (Official Gazette).

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16. Article 2631 prescribes criminal penalties for corporate directors who do not forebear action when a conflict of interest arises. C.C. 2631.

