Insider Trading Regulations in the Context of the Principle of 'Rule of Law': The United States and the European Union Perspective*

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> Chiarella misappropriated – stole to put it bluntly – valuable non-public information intrusted to him in the most confidence. He then exploited his ill-gotten informational advantage by purchasing securities in the market. In my view, such conduct plainly violates section 10 (b) and rule 10b-5.[1]

A. Raison d'être Behind Insider Trading Regulations in the Context of the Principle of 'Rule of Law'

'Rule of Law' is a well established fundamental legal principle recognized in the majority of democratic nations worldwide. It acts as a guideline for those who are given the power to rule or create and pass the laws and those who are ruled or obligated to follow the laws. The principle can be delineated in many different ways. Its key function of laying down various criteria for lawmakers to create a system of regulations, which would balance the interests of populace, has stayed the same since its early introduction in the ancient legal systems and remained unchanged when liberal constitutionalists finally gave it a modern definition in the 19th century.

Rapid developments in all spheres of society need the attention of the regulators. The field of securities regulations is not an exception. In all nations where people have a possibility to exchange transferable interests representing financial values,[2] commonly known as securities, the necessity of legal instruction is inevitable. Evolving legal regulation needs to be capable of incorporating changing legal needs, conflicting interests, and maintaining equilibrium in categories such as justice, security, and fairness.

The role of the principle of 'rule of law' in the process of securities regulation should not be underestimated, and its functions will be discussed in this paper.

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* The author dedicates this article to his Mother and Brother.

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1 *Chiarella v. U.S., 445 U.S. 222, 240-43 (1980)* (Burger, C.J., dissenting).

2 En.wikipedia.org/wiki/Security_(finance).

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There are no boundaries for global and fundamental principles of law. Their spirit and power is present in all contemporary democratic jurisdictions. The governments of the European Union and the United States recognize the 'rule of law' as an attainable aspiration and viable objective in their respective legal systems. The Declaration of Independence passed in 1776 states that,

> to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; ... it is the right of the people ... to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.[3]

Article 177 in Title XX of the Treaty Establishing the European Community passed in 1957 asserts that "Community policy [...] shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."[4] The existence of these declaratory statements in the fundamental legal instruments illustrates their importance for both nations.

One aspect of securities regulation draws the particular attention of governmental watchdogs. Trading, "e.g. buying or selling securities when in possession of material non-public information pertaining to those securities, and (ii) tipping, e.g. conveying material non-public information to a second party for the purpose of enabling that party to either trade in the relevant securities or tip yet another party."[5] Insider trading activities are not a recent phenomenon for the regulators, but it took ample time for them to create the legal ground for positively functioning insider trading regulations, and thus achieve an important step forward towards the 'rule of law'.

B. The Relationship Between Insider Trading Regulations and the 'Rule of Law'

The definitional difference between 'rule by law' and 'rule of law' is essential and facilitates the distinction between the different roles law can play in the society. Under rule "by" law, law is an instrument of the government, and the government is above the law. In contrast, under the rule "of" law, no one is above the law, not even the government. At its core, the 'rule of law' is an autonomous legal order.[6] "The principle of 'rule of law' stipulates that the authority of the law does not depend entirely on law's formalistic means, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures such as politics and religion."[7] As an autonomous legal order, rule of

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3 The Declaration of Independence. Para. 2 (US 1776).

4 Treaty Establishing the European Community, 10 Nov. 1997, OJ 1997 C340.

5 E. Gaillard, The Law Of Europe, The United States And Japan: Insider Trading 286 (1993).

6 Overseas Young Chinese Forum Volume 1, No. 5, April 30, 2000 available at http://www.oycf.org/Perspectives/5_043000/Contents.html.

7 S. Holms, Passions and Constraints: On the Theory Of Liberal Democracy 15 (1995).

law has at least three meanings. First, rule of law is a regulator of government power. Second, rule of law means equality before law. Third, rule of law means procedural and formal justice.

Any legal category can be tried with the test of 'rule of law'. The aspiration of the majority of modern democracies is that all fields of social regulation should pass the test, and as a result the state's entire legal system can be considered as based on the 'rule of law'. The goal of the regulators and policy makers in the area of securities regulations is that their work would comply with the fundamental requirements of the 'rule of law' test.

The first prong of the test is related to the idea that government has the power to regulate a certain field and this power is strictly limited. There are always certain ways to avoid the abuse of governmental power and to ensure that the work of the regulators would not step over the lines where it becomes too invasive. On the other hand, there is a danger to the social order in society if this area is not regulated enough, the interests of the populace are not protected, and there is no consistency in the people's actions. This situation can be even more unsafe, and any democratic government would try to avoid it at any cost. The solution to comply with the first element of the 'rule of law' test is accomplishable if the regulators can find a balance between two elements. The first element relates to the creation of social order in society. Another one associates with the aspiration of governments to provide the populace with the right amount of intrusiveness, that assists in doing business, instead of hindering and worsening the state of affairs. The equilibrium between those two is the necessary key to pass this prong of the test. The efforts of regulators need to provide more confidence for people who are directly involved in the business of securities exchanges and need a certain amount of security in their activities.

The second prong of the 'rule of law' test is related to the idea that all people should get reasonably equal treatment before the law. This means that the government of any state cannot unfairly, unjustly or arbitrarily discriminate between citizens. No person can be treated as inferior or superior to any other person in society simply because of human attributes or ethnic, racial, social or religious background. This same notion is applicable when we consider relations between the people who trade securities. The perception that everybody needs to be in a reasonably equal position when they sell or buy securities is analogous to this rule. The reality is that we can not have absolute equality between security traders because of the nature of security exchange transactions. Some people do not get an informational advantage only because of lack of expertise in this field, while others can have an informational advantage because of their experience and knowledge in the field. The position of a person with an informational advantage puts him in an unequal position compared with other market players in securities exchange actions. The goal of the government should be to mitigate the consequences of such inequality to the lowest level possible.

The criminal character of insider trading activities was recognized very early when the first securities regulations were passed in the United States. §10 (b) of the Securities Exchange Act identified the criminal nature of insider trading but it took the Securities Exchange Commission many years until the mechanism of rule enforcement was worked out and thus equality between the players in the process of securities exchanges was essentially implemented. A rule without an enforcement system cannot be considered as actually operational. So even when the rule was created with the Securities Exchange Act in 1934, the 'rule of law' test was not passed because the rule itself could not provide the protection for the people affected by insider trading.

It is almost impossible for any government to achieve absolute equality between the securities traders, because of the specifics of this area. More than one hundred years ago a journalist wrote that "there is no 'equality before the law' possible but between the men economically free. Men are today economically the subject of the capitalist. 'Equality before the law' is under such circumstances a hollow mockery."[8] There is some substance to this thought even today, because the government has no mechanism to control every single transaction. However, in all probability there is no need to do that. "It is widely agreed that, even in societies where the rule of law is respected, law plays only a limited role in regulating commercial transactions. Many transactions are so complex that the law cannot possibly cover all contingent circumstances. The cost of recourse to law may be too high in relation to the potential benefit."[9] There is always a possibility of fraud and dishonesty in the market transactions and especially when they take place in impersonal markets.[10] Behavior of people who frequently and consistently commit fraud can be defined as opportunism.[11] "If people were regularly to behave in an opportunist fashion, market exchange would become risky, rare, and confined largely to carefully structured face-to-face transactions in which exchanges ... would be made simultaneously, and with close scrutiny ..."[12]

Many processes in the field of business are reputation based, and dishonest actions by a business person are not left unnoticed. As the former Chairman of the US Federal Reserve Alan Greenspan said in one of his speeches "in today's world, where ideas are increasingly displacing the physical in the production of economic value, competition for reputation becomes a significant driving force, propelling our economy forward."[13] This is also pertinent to dealings in the field of securities exchanges. Mr. Greenspan refers to the 'reputation based' society. In the exchanges of securities context, where impersonal markets are involved, this can mean the reputation of the securities market itself. It is in the best interest of securities traders to keep the market reliable to safeguard potential future profits. The reliability of the securities market itself can be easily lost if too many traders would base their actions on deceitful and mendacious schemes directed towards making quick profits. The destruction of the market system is inevitable

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[8] D. Leon, *Equality Before the Law*, V (5) The People (1895).

[9] M. Moore, *How Difficult is it to Construct Market Relations? A Commentary on Platteau*, 30 J. of Development Studies 818 (1994).

[10] D. S. Karjala, *Statutory Regulation of Insider Trading in Impersonal Markets*, 1982 Duke L.J. 627 (1982).

[11] Moore, *supra* note 9, at 818.

[12] *Id.*

[13] Alan Greenspan, Chairman, The Federal Reserve, Commencement Address Harvard University, Cambridge, Massachusetts (10 June 1999).

in such circumstances. This is not what the security trader pursues, however. The reputation of the securities market can become a weighty motivation for traders to hold off from committing fraudulent action.

In this context, the natural processes in the business world can fill the enforcement gaps that appear because of the government's inability to ensure the proper implementation of all rules at all the times. There is a declarative provision in the preamble of the European Union Directive on Insider Dealing and Market Abuse stating that "[a]n integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives."[14] In the long term, insider trading activities are antipodes of the proper functioning of securities markets and economic growth.

The last prong of the 'rule of law' test concerns the enforcement of procedural justice. This notion is closely related to the idea that procedural justice is concerned with making and implementing decisions according to fair processes. "People feel affirmed if the procedures that are adopted treat them with respect and dignity, making it easier to accept even outcomes they do not like."[15] There has to exist a certain level of procedural protection for the parties in breach of regulations. The violators of insider trading rules need to be prosecuted, and thus strict rules of justice enforcement need to be followed. There is a requirement that the procedures would be fair. Fairness also is often referred to as consistency, hence there is an emphasis on consistency. Fair procedures should guarantee that like cases are treated alike. Any distinctions "should reflect genuine aspects of personal identity rather than extraneous features of the differentiating mechanism itself."[16] It is also important that the representatives of government, officials, be neutral and impartial. Unbiased decision-makers must carry out the procedures to reach a fair and accurate conclusion. Those involved should believe that the intentions of third-party authorities are benevolent, that they want to treat people fairly and take the viewpoint and needs of interested parties into account.[17] One more element is directly related to transparency of procedural justice. All the parties need to be heard. This is especially important for the weaker parties and enforcement of their rights. The final decision seems to be fairer when these elements are present and the decision-maker can arrive at a well informed and just final decision.

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14 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Abuse, OJ 2003 L 96/16. The deadline for implementation was 12 October 2004.

15 M. Deutch, Justice and Conflict: The Handbook of Conflict Resolution: Theory and Practice 45 (2000).

16 R.T. Buttram *et al.*, Equity, Equality and Need: Three Faces of Social Justice 272 (1995).

17 *Id.*, at 273.

C. The Role of the United States in the Process of Development of Insider Trading Regulation

I. The Early Stages of Insider Trading Regulation in the United States

The stock market crash of 1929 showed to the US policy makers the importance of a high standard of disclosure and the significance of correct and reliable information in the activities of the securities registration and exchange. United States law on insider trading cannot be understood without mentioning the fact that it was a process of gradual evolution by way of statutory enactment, common law interpretation and regulatory promulgation from the early twentieth century to the present, and is still in a state of flux and development.[18] The securities regulations in the United States is predominantly federal law the foundation of which is to be found in the Securities Act of 1933 ('The Securities Act') and the Securities Exchange Act of 1934 (the 'Exchange Act').

Before the enactment of these federal securities regulations, a party to a securities exchange transaction was protected only from material misrepresentations and misleading half truths of the other party on which he had relied to his detriment.[19] This protection was not enough to protect the parties to business transactions from such activities when one party having an information advantage uses it against another party to make profits or avoid losses. The government of the United States would have continued staying away from securities market regulations with only minimal interference after even such crises as the 1929 crash, but the scale of the entire post crisis consequences was so huge that the legislators had to act immediately to fix the situation caused by The Great Depression. The crisis itself affected numerous sectors of the economy, many areas of social life and, even more importantly, various social classes of the populace.

The reaction of the United States government was far-reaching federal legislation aimed at regulating and controlling the United States securities markets. The Securities Act governs conduct in the issuing and registration of securities, while the Exchange Act governs conduct in the exchange of securities; that is in their purchase and sale on the securities markets. The regulatory scheme chosen by the policy makers is two-pronged, involving, on the one hand, detailed statutory enactment and, on the other, the creation, by the Exchange Act, of the Securities and Exchange Commission (the 'SEC') as a regulatory body empowered to oversee the conduct of securities transactions and to promulgate regulations implementing federal securities laws.[20] The intention of the legislators

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[18] *See* Gaillard, *supra* note 5, at 285.

[19] B. Bergmans, Inside Information and Securities Trading: A Legal and Economic Analysis of the Foundations of the Liability on the USA and European Community 79 (1991).

[20] *See* Gaillard, *supra* note 5, at 287.

was to make the processes in the securities markets more transparent in order to gradually eliminate the consequences of the 1929 crisis as well as avoid similar occurrences in the future.

The primary underlying statutory prohibitions that have been construed to forbid insider trading are found in §§10 (b) and 14(e) of the Exchange Act and §17(a) of the Securities Act. None of these sections mentions 'insider trading'; their application to this field has been by way, first, of judicial interpretation and, second, of SEC regulation. SEC Rules 10b-5 and 14e-3 contain regulations used to deal with insider trading.

Access to specific business information is a privilege and usually causes a situation when one person gains an informational advantage as opposed to the other. These kinds of activities are very likely to occur in the context of transactions with securities. This is a breach of the principle of 'rule of law' which states that the government has a right to pass laws and make certain fair standards in society. Having an illegal informational advantage when trading securities is without a doubt the breach of the inequality prong of the 'rule of law' test.

The most direct reference to insider trading in the early federal securities regulations is Section 16(b) of the Securities Act, which basically regulates short swing profits by corporate insiders as a result of trading in the securities of their companies, but this was not too accurate both in terms of legislative wording and actual reality in the securities trading markets.

The Securities Exchange Commission and the common law courts worked hard to give interpretation of the actual legislation by Congress in the early 1930s. In 1942, the Securities and Exchange Commission promulgated rule 10b-5, which "has developed into the primary tool utilized to combat fraud in the securities market, and into the policing device in controlling 'inside trading' on the basis of non-public material information."[21] So the Commission started using its powerful tool to promulgate regulations and thus to fill the gaps in the developing securities markets.

In the 1980s, the Securities Exchange Commission initiated a series of highly publicized SEC investigations and legal proceedings involving insider trading on Wall Street on a massive scale. The results of the numerous investigations revealed the loopholes in the securities regulations and confirmed the fact that there was much needed to be done in order to comply with the 'rule of law' standard. These scandals led to widespread calls for amendments to the federal securities laws to increase the enforcement powers of the SEC and to enact stronger sanctions aimed at deterring insider trading offenses. "In relatively swift succession, the Insider Trading Sanctions Act of 1984 ('ITSA'), the Insider Trading and Securities Fraud Enforcement Act of 1988 ('ITSFEA'), and the Securities Law Enforcement and Penny Stock Reform Act of 1990 (the 'Enforcement Act') were enacted."[22] The significant number of legislative acts and the considerable increase of the Securities Exchange Commission power, both in investigative and enforcement matters, improved the overall situation in the securities markets.

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[21] H.S. Bloomenthal, Securities Law Handbook 360 (1988).

[22] *See* Gaillard, *supra* note 5, at 287.

The adoption of Regulation FD,[23] which became effective on 23 October 2000, was another significant move towards the 'rule of law' in the context of United States securities regulations. This regulation requires that:

> Whenever an issuer, or any person acting on its behalf, discloses any material non-public information regarding that issuer or its securities to any [enumerated] person ... the issuer shall make public disclosure of that information ... : (1) Simultaneously, in the case of an intentional disclosure; and (2) Promptly, in the case of a non-intentional disclosure.[24]

Regulation FD was one more attempt by the SEC to fight illegal insider trading. It can be argued, however, that "unlike nearly all other securities regulations, Regulation FD did not require harmful conduct or even a reasonable likelihood of harmful conduct. In similar but distinct fashion, Regulation FD operates as a burden on private speech to private parties, again without requiring a showing of harm or likelihood of harm."[25] Too much regulation or regulation without the relevant authority can not be considered as a legal instrument in the context of the 'rule of law' standard because it does not pass the first prong of the test. An increase of the players in the securities markets and new schemes of fraud brought more challenges to the security regulations policy makers.

II. The US Supreme Court's Role in the Regulation of Insider Trading

The courts also have a huge influence on the development of securities regulation and is development to the point where it stands now. The courts, experts of interpretation and direction of United States law, contributed a great deal to the formation of insider trading doctrines which gradually evolved and became a followable example to other nations.

The early court decisions showed that the judicial branch used a common law approach to Rule 10b-5 where the court held that in order to apply, there had to be fraud resulting from a failure to disclose. The duty to disclose arose from a fiduciary duty an 'insider' owed the transacting party, a corporate shareholder. Absent such a fiduciary relationship, or a duty arising from special circumstances, trading without disclosing the relevant information was not fraud.[26] There was a need to extend the list of possible violations. This was set out in the case *Cady, Roberts & Co.,*[27] declaring that not only face to face transactions, but also open market operations could violate Rule 10b-5, and that not only traditional corporate insiders (officers, directors and controlling shareholders) could be subject to liability, but also other parties, for instance, a stockbroker representing

[23] 17 C.F.R. §243.100 ("FD" stands for "fair disclosure").

[24] *Id.*

[25] A. Page & K. Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?* 39 U.C. Davis L. Rev. 84 (2005).

[26] *Kardon v. National Gypsum Co.*, 73 F. Supp. 798, 800 (E.D. Pa. 1947).

[27] *In Re Cady, Roberts & Co.*, 40 SEC 907 (1961), Securities Exchange Act Release No. 6668, 8 November 1961.

the respondent firm.[28] This decision is considered a breaking point setting in motion the modern law of insider trading, because the Court "for the first time treated exchange-based insider trading as federal securities fraud.[29] So the Court became very early an important participant in securities formation. The Securities Exchange Commission in *Cady, Roberts and Co.* established for the first time the 'disclose or abstain' rule which meant that

> insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgments. If [...] disclosure prior to effecting a purchase or sale would be improper or unrealistic under the circumstances [...], alternative is to forego the transaction.[30]

So the Securities Exchange Commission tried to expand the effect of Rule 10b-5 to the wide range of insiders who were able to avoid liability before.The *Texas Gulf Sulphur*[31] case, decided in 1968, clarified some concepts of insider trading regulations.

> Anyone who, trading for his own account in the securities of a corporation, has access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, may not take advantage of such information knowing it is unavailable to those with whom he is dealing, i.e. the investing public. [...].

Thus, anyone in possession of material inside information must either disclose it to the investing public, or, if unable to disclose due to corporate confidentiality rules, he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed. The novelty in this case was the newly created notion that the security traders need to have relatively equal access to material information before making the decision either to sell or buy securities.

Another gem in the crown of securities regulation was the decision in the *Chiarella* case.[32] This was not a typical situation because it did not involve the traditional insider and thus expanded the list of persons subject to liability for insider trading. This is also known as an alternative theory of liability which covers persons who unlawfully obtain or misappropriate material non-public information and trade on such information. Vincent Chiarella was an employee of the marketing company specializing in preparing soliciting materials for bidders in tender offers. From the confidential documents he was entrusted to, Chiarella was able to find out information about the companies that were the targets for takeover bids. He made profits by buying shares before the public announcements and then selling them afterwards. The court held in this case that the 'insider trading' rule

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[28] *See* Bergmans, *supra* note 19, at 10.

[29] D. C. Langevoort, *Symposium: Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Regulation*, 99 Colum. L. Rev. 1319 (1999).

[30] *In Re Cady, Roberts & Co.*, 40 SEC 907 (1961), Securities Exchange Act Release No. 6668, 8 November 1961.

[31] *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d. Cir. 1968).

[32] *Chiarella v. United States*, 445 US 222 (1980).

is premised on the policy that "all investors trading on impersonal markets have relatively equal access to material information."[33] The market insider, Chiarella, through his particular position misappropriated material non-public information. The court held that

> for the securities markets to function properly, it is essential that those who occupy such strategic places in the market mechanism be forbidden to reap personal benefit from information received by virtue of their position. Indeed, rule 10b-5 prohibits corporate insiders from trading on non-public corporate information only because their ready access to the intimate details of persons with whom they deal. [...] Anyone – corporate insider or not – who regularly receives material non-public information may not use that information to trade in securities without incurring an affirmative duty to disclose. And if he cannot disclose, he must abstain from buying or selling. Regular access to market information became therefore the appropriate test for imposing this duty.[34]

Chiarella was not able to avoid liability for his actions and thus eliminated a possibility for similar people who used their positions and possibly loopholes in the statutes in order to earn profits and put other people in the market in disadvantaged positions. Chiarella's failure to disclose the information to the stock sellers constituted an inherent unfairness and a deceptive device listed in the Securities Act.

Noteworthy to the development of insider trading regulation in the United States was the US Supreme Court's interpretation of the meaning of fraud and 'fiduciary duty' in Rule 10b-5 cases. This issue was addressed in *Dirks v. SEC*[35], where the Court held that a corporate tippee could not be guilty of §10(b) and Rule 10b-5 violations for failure to disclose material, non-public information, absent a breach of fiduciary duty by the corporate tipper.[36] Central to the Court's finding was the absence of any fraudulent conduct by the tipper and the lack of any personally beneficial motive in disclosing the information to the tippee.[37]

The US Supreme Court's analysis of the scope of §10(b) and Rule 10b-5 "evidenced a general reluctance to expand the type of acts deemed manipulative and deceptive, while evidencing a willingness to expand the category of persons owing a fiduciary duty to trading parties."[38] The Court left open the possibility that one who misappropriates non-public information, in breach of a fiduciary duty owed to the source of such information, violates §10(b).[39]

§14(e) permits the SEC to promulgate a rule that is "reasonably designed to prevent acts and practices that are fraudulent."[40] The SEC established Rule 14e-

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33 *Id.*, at 223
34 *Id.*, at 97.
35 *Dirks v. SEC*, 463 U.S. 646 (1983).
36 *Id.*, at 660.
37 *Id.*, at 663.
38 J.J. Urgese, *United States v. O'Hagan: Rule 10b-5, the "Judicial Oak Which Has Grown From Little More Than a Legislative Acorn," and the Antifraud Legislation of the Securities and Exchange Act of 1934*, 31 Akron L. Rev. 433 (1998).
39 *Id.*, at 434.
40 15 U.S.C. §78n(e) (1997).

3(a), which imposes a duty on traders in connection with a tender offer to either disclose non-public information relevant to the offer or to abstain from using such information.[41]

Another development in the rich case law on insider trading regulation was the decision and thus validation of the misappropriation theory in *United States v. O'Hagan*.[42] James O'Hagan challenged the validity of Rule 14e-3 as a permissible exercise of the SEC's 14(e) rule-making authority. He argued that Rule 14e-3 impermissibly redefined fraud in 14(e) by omitting a fiduciary duty requirement.

Prior to *O'Hagan*, the Supreme Court had not considered the validity of Rule 14e-3.[43] The federal courts have interpreted Rule 14e-3(a) to impose liability on a person who fails to disclose non-public information in connection with a tender offer, without requiring a breach of a fiduciary duty. In the context of securities, fraudulent conduct requires a breach of a fiduciary duty.[44] Thus, the Supreme Court's task in *O'Hagan* was to determine whether the SEC exceeded its rulemaking authority by excluding this requirement.[45] The theory endorsed by the US Supreme Court in *O'Hagan* allowed prosecuting for "trading on the basis of non-public information by a corporate 'outsider' in breach of a duty owed not to the trading party, but to the source of the information." [46]

III. Analysis of the Elements of Insider Trading Regulation in the United States

A solid understanding of the main elements of insider trading regulation helps to characterize the main pillars of the insider trading legal institute and thus identify the need for comprehensive and far-reaching regulations in this area.

1. Parties Affected by the Insider Trading Liability

First it has to be noted that both business entities and individuals fall into the category of 'insiders'. Securities regulation in the United States, for the purposes of insider trading, distinguish three categories of insiders:

a. the corporate insider trader;

b. the insider 'tipper'; and

c. the non-insider 'tippee'.

[41] 45 Fed. Reg. 60,410 (1980).

[42] United States v. O'Hagan, 521 U.S. 642 (1997).

[43] M.J. Voves, *United States v. O'Hagan: Improperly Incorporating Common Law Fiduciary Obligations Into S 14(E) of the Securities and Exchange Act*, 81 Minn. L. Rev. 1015, 1030-31 (1997).

[44] *Chiarella v. United States*, 445 U.S. 222, 228 (1980).

[45] J.J. Urgese, *United States v. O'Hagan: Rule 10b-5, the "Judicial Oak Which Has Grown From Little More Than a Legislative Acorn," and the Antifraud Legislation of the Securities and Exchange Act of 1934*, 31 Akron L. Rev. 435 (1998).

[46] *Id.*, at 643.

A fiduciary relationship is the most significant element that has to be present for the insider to fall under the first category. A fiduciary relationship exists primarily for the members of the business entity, such as officers and directors, and employees. Since a corporation "can buy and sell its own securities, it, too can be categorized as an insider."[47] Investment bankers, attorneys or accountants, and their employees are also "classified as temporary insiders for the purposes of insider trading regulation."[48] Another category of insiders is referred to as the parties who received the information from the people, usually the corporate insiders, with access to non-public material information enabling them to trade on it. While the original tipper is normally "a corporate insider, subsequent 'tippees', to whom confidential information is conveyed, are frequently not fiduciaries or employees of the corporation from which, or about which, the confidential information is obtained."[49] The last category is defined as corporate entities. When wrongful actions are done through corporate accounts, the corporate entity is considered to be liable as principal for the insider's wrongful conduct. There is, however, a distinction between the actions of corporate employees who are wrongfully tipping and the actions of corporate entities because it would be not fair to hold liable the corporate entity for wrongful but unauthorized actions of its dishonest employees.

2. Definition of Inside Information

First, it is worth noting that neither The Securities Act of 1933 nor The Securities Exchange Act of 1934 define what is inside information. The content of the term was developed mostly by common law. Confidentiality and materiality are two elements shaped by the courts to define inside information in the scope of insider trading dealings. The court defined inside information as information which "has not been disseminated in a manner making it available to investors generally."[50] In this context the requirement of operative public dissemination can be satisfied by disclosing information in reports filed with the SEC or the Exchanges, or publishing it in press releases.

It has been suggested that disclosing information to a sufficient number of investment analysts could be viewed as "the functional equivalent of public disclosure, based on the theory that such persons have an ability to influence the price of stock so that its value will properly reflect the significance of the information."[51] The Court's and SEC's official positions differ in terms of the period of the time between the information dissemination and the point when the general public assimilates the information and becomes equal to the insiders in terms of trading decisions based on the disclosed information. Even after disclosure,

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[47] *Kohler v. Kohler Co.*, 319 F.2d 634, 638 (7th Cir. 1963).

[48] *Dirks v. SEC*, 463 U.S. 646, 655 n. 14 (1983).

[49] *See* Gaillard, *supra* note 5, at 290.

[50] *In re Investors Management Co.*, [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCh) 78,163, at 80, 519 (July 29, 1971); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 854 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

[51] D.G. Langevoort, Insider Trading Regulations 154, 155 (1991).

"the insider must wait a period of time in order for the public to assimilate the information."[52] The judicial reasoning is rational to justify the rule "[w]here the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting immediately upon public dissemination."[53] It is hard to determine the exact time the market needs in order to react to the new information and the courts provided only general guidelines to fill this legal gap. The materiality element was defined by the Supreme Court in the case *TSC Industries v. Northway, Inc.*[54] The court held that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[55] This standard does not require proof that disclosure of the omitted fact would probably have caused "the reasonable shareholder to vote differently; rather, it contemplates that it is likely, under all the circumstances, that the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[56] In *Basic* the Court addressed the question of 'soft' information.[57] The case involved undisclosed preliminary merger negotiations between two companies. 'Hard' information refers to factually verifiable matters. In contrast, 'soft' information is speculative opinions, reports and similar subjective sources. The court held that "materiality will depend at any given time upon 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."[58]

D. Insider Trading Regulation in the European Union

I. The Early Stages of Insider Trading Regulation in the European Community Before the Adoption of Directive 89/592/EEC

There is no doubt that people traded securities while in possession of non-public material information long before the applicable laws were passed prohibiting such activities. In the United States, legislative attempts to control insider trading activities, in Europe referred to as 'insider dealing', started earlier than in Europe. Obviously, this does not mean that there were no insider trading activities taking place in the securities markets of the European Community during the time when these activities were not legally regulated. The press at that time reported "a sufficient number of 'scandals' of proven or suspected 'insider dealing' to show that Europe is not an island of honesty in a world of greed. It is likely that this practice was less frequent"[59] in the past, e.g. because the number of transferable

[52] *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d. 854 (2d. Cir. 1968).
[53] *Id.*, at n.18.
[54] 429 U.S. 810 (1976).
[55] *Id.*, at 449.
[56] *See* Gaillard, *supra* note 5, at 286.
[57] 485 U.S. 238.
[58] *Id.*
[59] *See* Bergmans, *supra* note 19, at 79.

securities was smaller or because take-over bids were less frequent, "but even then, it was not [an] unknown problem."[60] These can be referred to as golden times for insider dealers because they were able to get involved, without interference of the government, in very attractive securities trading schemes allowing them to use their informational advantage to make easy profits.

There are several reasons why the European policy makers did not pay proper attention to insider trading issues on the Union level. First of all, the small scale of the securities markets in the Member States due to the lack of a uniform capital market can be considered an important factor in the delay of legislation at the EU level. Listings of publicly traded companies in the United States were much longer than those in the countries of the old world. The second reason for the lack of regulation is related to the recognized philosophical approach that self regulatory measures are sometimes considered in many countries "a more efficient way, [...] to cope with this problem than a stringent regulation."[61] In other words, the policy makers in the field of securities regulation did not believe that, bearing in mind all the above arguments, there was any need for government control of insider dealing activities, and liberal view to the processes existed for some time until the first legislative attempts took place in the late 1980s.

Earlier efforts in Europe to regulate the processes of insider trading were done not on the European Community level but by its Member States. France, one of the founders of the European Steal and Coal Community in 1952, passed Ordinance #67-833 on 28 September 1967, which instituted the *Commission des Operations de Bourse*. The Commission had a similar function as the Securities Exchange Commission in the United States. The *Commission des Operations de Bourse* was an administrator of a reporting procedure, which was well-established by the United States at that time. Germany chose a different path and adopted non-mandatory Insider Trading Guidelines in 1970 (amended in 1976 and 1988). The instrument applied to the insiders of those companies, which voluntarily bound themselves to follow the guidelines. The first steps are always hard. The French started to regulate insider trading activities and broke the ice in the late 1960s, but it was not enough. The inconsistencies in the methods used by the Member States to regulate insider trading activities were detrimental to the reputation of the market and thus acted as a good way to "to expose cross-border misuses of inside knowledge."[62] Soon enough, the Union could not cope without a uniform harmonized regulation in the common market context.

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[60] W.G. Hubscher, *Die Umsetzung der Regelung der Insider-Geschäfte in Deutsches Recht*, *in* H. E. Buschgen, U.H. Schneider (HRDG) Der Europäische Binnenmarkt 1992- Auswirkungen für die Deutsche Finanzwirtschaft 329 (1990).

[61] *Id.*

[62] Economic and Social Committee, Opinion on the proposal for a Council Directive coordinating regulations in insider trading, 88/C35/10, adopted on 16 December 1987, OJ Eur. Comm. No. C 35 of 8 February 1988, at 22.

II. The Situation in the EU After Adoption of Directive 89/592/EEC

The doctrine of the 'rule of law' eventually won in the battle of consistent regulation versus lack of uniform regulation. The first attempt of the European Community Commission to regulate insider trading activities in 1977 was too abstract and lacked binding effect because of its legal form. The Commission passed a formal and non-binding Recommendation to the Member States concerning a European Code of Conduct Relating to Transactions in Transferable Securities.[63] The European Community policy makers did not introduce any other more thorough proposals for insider trading future regulation until 1987 when the draft of Directive 89/592/EEC was first introduced for consideration. The Directive does not forbid 'insider dealing' directly. This is related to the nature of the Directive as a legal instrument in the European Union. A Directive is binding on the Member States as regards the objective to be achieved but leaves it to the national authorities to decide on how the agreed Community objective is to be incorporated into their domestic legal systems. So the 1989 Directive only sets up a certain standard for the Member States. Each Member State has to choose the form of implementation of the standard in their respective legal systems. The Member States cannot fall below the common standard, however.

Since 1989, the harmonization Directive forms the basis for the prohibition of insider trading activities on the territory of the European Union. The final text of the Directive replaced the criterion of 'residence on their territory', which was used in the amended proposal (Article 2, 3 (2)) by 'place of action'. This definitely expanded the possibility to prosecute persons "without a residence within the Community, but it may lead in certain cases to the involvement of several jurisdictions, in which case cooperation is particularly important."[64] The Member States were expected to create the domestic legislation and end the period when insider trading was not constructively prohibited.

III. Analysis of the Elements of Insider Trading Regulation in the EU

The history of insider trading regulation in the European Union is not as long as it is in the United States. Beginning with the 1933 Securities and 1934 Securities Exchange Acts, both the Securities Exchange Commission and the United States courts undertook extensive work in order to build a solid foundation for insider trading regulation. There is no doubt that due to the lack of identifiable uniform regulation in the European Union, the Member States had to take some action in order to control to a certain extent the activities of insider trading. Consequently, insider trading regulation started in the separate Member States like the special laws in France[65] or Great Britain.[66] The nature of directives in the European Union makes the Member States "responsible for transposing EU law into national law,

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[63] OJ 1977 L212/37, with Annex, OJ 1977 L 294/28.

[64] *See* Bergmans, *supra* note 19, at 83.

[65] Art. 162-1 of Law No. 66-537, 24 July 1966.

[66] *See* Law of England, Vol. 7 (1), 4th ed. (1988), §1060 *et seq.*

implementing these laws in a way that fulfils the aims set by the EU law and enforce the law in such a way that the law has the same effect in all member states."[67] The first attempt to regulate insider trading was the Insider Dealing Directive[68] (the 'IDD') passed in 1989. Subsequent legal instruments in the European Union can amend or replace the existing laws. The Market Abuse Directive[69] (the 'MAD') passed in 2003 replaced the 1989 Directive.[70] It is essential to comprehend the main elements used in these legal instruments. One element concerns the parties who are considered to be insiders according to the directives and thus are subject to the insider trading liability and another is the definition of inside information.

1. Parties Affected by the Insider Trading Liability

As it often happens in the legislative process in the EU, the Member States had widely divergent opinions when it was time to define the 'insider' in the scope of the draft insider trading directive. Member States were divided into two camps: "those which treated anyone holding inside information as an insider and those which required some link with the company or issuer before a person in possession of inside information became subject to the prohibition on insider dealing."[71] Finally the Member States reached a consensus, and the IDD was adopted with a broad definition of insiders. We can find three categories of insiders in Article 2, paragraph 1 of the Directive. The first category covers any person who possesses inside information "by virtue of his membership of the administrative, management or supervisory bodies of the issuer."[72] The second category of primary insiders includes any person who possesses inside information "by virtue of his holding in the capital of the issuer."[73] There is no reference to the amount of shares the insider should have in order to qualify for this category. In practice it is rare that the shareholders possessing less than 10% of shares would have access to non-public information, but nevertheless all shareholders are covered. This standpoint is most likely "understood on the basis that the Directive states an insider dealing prohibition. It makes sense to have such prohibition for all shareholders irrespective of the amount of the shareholdings, even though, as a matter of practice, shareholders with shareholdings under 10 percent will rarely possess inside information by virtue of being shareholders."[74] The regulators

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[67] K. Lanno & M. Levin, Securities Market Regulations In The EU: The Relations Between The Community and Member States 116 (2003).

[68] Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, OJ 1989 L 334/30. The deadline for implementation was 1 June 1992.

[69] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Abuse, OJ 2003 L 96/16. The deadline for implementation was 12 October 2004.

[70] E. Avgouleas, The Mechanics and Regulations of Market Abuse: Legal And Economic Analysis 250 (2005).

[71] J. Welch *et al.*, Comparative Implementation of the EU Directives (I) – Insider Dealing And Market Abuse 11 (2005).

[72] Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, OJ 1989 L 334/30. The deadline for implementation was 1 June 1992.

[73] *Id.*

[74] K.J. Hopt, *The European Insider Trading Directive*, 27 C.M.L.R. 51 (1990).

were following the concept of a very wide circle of insiders. The final category of primary insiders covers any person who possesses inside information "by virtue of the exercise of his employment, profession or duties."[75] It is worth to be noted that the Commission's initial proposal was limited to information obtained by an insider "in the exercise of his profession and duties. It was the European Parliament that suggested extending the definition to cover information acquired by an insider 'in the exercise of his employment."[76] This is by all means the broadest category of insiders because it includes the issuer's employees, with the exception of management and insiders exterior to the company who can be defined as persons outside the company. The secondary insider is defined as "any person who, with full knowledge of facts possesses inside information, the direct or indirect source of which could not be other than primary insider."[77] The inclusion of such a broad range of persons into the category of insiders can be understood as being "so comprehensive that it is difficult to imagine what could be left … to Member State's discretion."[78] Indeed, Member States were left with very little discretion when they worked on implementing the directive into their national legal systems.

The MAD of 2003 defines the insider as a person who possesses non-public material information:

(a) by virtue of his membership in the administrative, management or supervisory bodies of the issuer; or

(b) by virtue of his holding in the capital of the issuer; or

(c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or

(d) by virtue of his criminal activities.[79]

If we compare the different forms the Member States chose to incorporate the MAD in their national systems we can see that there is no material difference between the laws of France, Germany and the UK implementing the MAD in relation to the definition of insider. Spanish law, however, retains its "very wide definition of insider as any person in possession of inside information, but introduces a new qualification that the person knows or ought to know that he was in possession of inside information."[80] It is still unclear how the Spanish courts will decide whether an individual knew or ought to have known that the information he held was actually inside information.[81] "Whereas MAD describes the means by which

[75] Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, OJ 1989 L 334/30. The deadline for implementation was 1 June 1992.

[76] *See* Welch, *supra* note 75, at 10.

[77] Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, OJ 1989 L 334/30. The deadline for implementation was 1 June 1992.

[78] R. Fornasier, *The Directive on Insider Dealing*, 13 Fordham Int'l LJ 149 (1989-1990).

[79] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Abuse, OJ 2003 L 96/16. The deadline for implementation was 12 October 2004.

[80] *See* Welch, *supra* note 75, at 11.

[81] *Id.*, at 67.

the information has been obtained, for example board membership, Spanish law remains indifferent and covers every person who holds inside information provided he ought to have known that it was inside information."[82] So in practice the definition of an 'insider' chosen by the Spanish legislators does not have any significant difference. It is obvious that the MAD did not change the fundamentals established in the IDD when the definition of information was provided.

2. Definition of Inside Information

The nature of information and the purpose of information are the two criteria that help to define 'inside information'. The IDD defines inside information as information which:

(1) has not been made public;

(2) is of a precise nature; and

(3) is likely to have a significant effect on the price of the securities which it concerns.[83]

Before the Directive was passed, there were many negotiations on how to define 'public information'. The Member States were again divided into two camps; "those taking the view that publication to market professionals is sufficient to make the information 'public' and those requiring far wider circulation. France and the UK appear at opposite ends of the spectrum."[84] The UK legislators defined this concept in the most precise way when they incorporated the Directive into their national laws. It was clear that information could be treated as made public, even though it was available only to a section of the public, rather than the public at large, or even if it could be acquired only by persons "exercising diligence or expertise."[85] The precision element could not be satisfied by a 'simple rumor', and thus the information needs to be accurate to satisfy the requirements of this element. The last requirement related to the nature of the inside information concerns the material effect on the price of securities. This can be explained by the fact "that all information unknown to the public is 'not necessarily inside information', which is precisely the case where the information could not have any effect on the price of the securities concerned."[86]

A 'purpose' element of the inside information is important in the context of the 'externalization' and 'internalization' of inside information. A takeover bid for the issuer launched by another company is a good illustration of 'external information'. In contrast, an increase in an issuer's profits epitomizes an example of 'internal' information.[87] Transactions by a bidder in his capacity as a bidder in the securities of a company subject to a takeover bid do not fall under the insider

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82 *Id.*

83 Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing,OJ 1989 L 334/30. The deadline for implementation was 1 June 1992.

84 *See* Welch, *supra* note 75, at 11.

85 *Id.*

86 *See* Gaillard, *supra* note 5, at 9.

87 *Id.*

trading umbrella. However, the example of internal information would qualify the transaction as an insider trading dealing.

The MAD's definition of inside information does not differ too much from the concept of inside information found in the IDD. The MAD defines inside information as:

> information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.[88]

The main concept of the definition remains the same in the new directive. The elements and their interpretation derived from the IDD continue to be the definitional ground for the perception of 'inside information'.

E. Insider Trading Regulation as a Form of Protection Against the Breach of the Principle of 'Rule of Law': The United States and the European Union Perspective

A breach of the principle of the 'rule of law' can be realized in many forms. We must conclude that a particular piece of legislation breaches the 'rule of law', if we cannot say that the law was passed by the government with a legitimate authority to act on behalf of society. Furthermore, there is a breach if we cannot confirm that the government exercised its power to balance the interests of all the parties in the public, hence the legislation puts some parties in a more favorable position compared to others, making the addressees of the law not equal. Lastly, there is a breach if we cannot demonstrate that there are reasonable rules for due process and an equitable enforcement mechanism. In all three cases, we must conclude that the legislation breaches the 'rule of law' principle.

The fundamental principle of the 'rule of law' supplies an abstract outline for designing an ideal legal system. It represents "a synthesis of normative values and processes that is grounded in precepts of natural justice, that promotes and legitimizes the mechanisms of formal justice, and that is perceived by those subject to its restraints as producing actual justice."[89] The need to regulate insider trading activities can be understood as a form of getting closer to the ultimate legal system and thus a step forward towards a society with a genuine implementation of rule of law ideas. Of course, we must make a distinction between the existence of a piece of legislation – the law on the books – and the actual application and enforcement of the same. We cannot substantiate or back-up the idea that a legal system is completely complying with the requirements of the principle of 'rule

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[88] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Abuse, OJ 2003 L 96/16. The deadline for implementation was 12 October 2004.

[89] G. De Q. Walker, The Rule of Law: Foundations of Constitutional Democracy 1 (1988).

of law' if the laws are de facto not implemented and/or there is no reasonable mechanism to enforce them. The United States recognized the problem very early when the Securities Act of 1933 was passed with Section 16(b) in it. That was the first step followed by Rule 10b-5 in 1942. The aspiration of the judicial branch to bring more clarity and to fill the loopholes resulted in numerous court decisions interpreting the existing law and creating new rules in the field of insider trading. The consistent path towards better regulations can be rationalized as a valid effort of regulators to achieve a better functioning legal system with the 'rule of law'.

By the end of the 1970s the United States had already generated a comprehensive system of rules and enforcement mechanisms. By contrast, the late 1970s mark the 'embryonic' stage for the European Community in regulating insider trading activities. The lack of social order in any area of social interaction means the extinction of the principle of rule of law. Social order is "a complex of interrelated normative and descriptive systems that reflects – through social custom and politically determined rules – shared notions of justice, governance, politics, economics, and group and interpersonal relationships."[90] The idea that society cannot operate without social order explains why the function of social order "is to accommodate the tension, inherent in all human activity, between the common good and the individual good, between obedience to the general will and pursuit of free will."[91] Such values as equality, fairness and certainty become of immense importance for regulators who want to advance the legal system to the state of 'rule of law'. A situation where parties in securities exchange transactions take advantage and make profits because of unfair and unjust informational advantage can not be tolerated and raises the question of a legal gap. The Member States of the European Community progressed in coping with the poorly regulated area by putting together, and thus harmonizing and unifying, the laws in the field of insider trading by passing a legal instrument in the form of Directive 89/592/EEC. The most recent attempt to incorporate modern developments in the insider trading area was Directive 2003/6/EC passed in 2003. This last step towards a reasonable social order for securities exchange activities meant one more improvement for the Member States of the European Union in the process of building a legal system governed by the 'rule of law'.

A rule without an implementation and enforcement mechanism can be considered a dead rule or at most a guideline, and certainly not an imperative in the context of the 'rule of law' standard. The problem with the insider trading regulation for many years was the lack of a proper system capable of enforcing the rules. The incentive in the United States to prohibit illegal insider trading activities was expressed in 1934 under Section 10(b) of the Securities Exchange Act. The post act developments made it possible to create a system with the potential of implementing the rules.

The grounds for the enforcement mechanism of insider trading regulations in the European Union can be found in the IDD adopted in 1989. Article 8 of IDD imposes an obligation on each Member State to "designate the administrative

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90 J. Rawls, Political Liberalism 11 (1993).

91 R. M. Hutchins (Ed.), Great Books of the Western World. 54 vols. (1952).

authority or authorities competent, if necessary in collaboration with other authorities to ensure that the provisions adopted pursuant to this Directive are applied. It shall so inform the Commission which shall transmit that information to all Member States."[92] Article 14 of MAD also refers to the importance of enforcement.

> Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.[93]

The European Union also has an institution called the European Securities Committee[94] within its institutional system. The governing bodies of the European Union understand the importance of keeping the rules alive by creating imperatives for the Member States obligating them to establish a properly functioning enforcement system of insider trading regulations. The European Union had a chance to analyze the intricacies of the enforcement system of the United States before adopting its own model. There is no ground for stating that the current state of enforcement regulations in the area of insider trading in the European Union or the United States could pass the third prong of the 'rule of law' test because the existence of a good model does not guarantee the proper functioning in practice. It is not in the scope of my paper to discuss the details or identify the problems in the enforcement stage of insider trading regulations either in the European Union or in the United States. As long as we can state that some of the insider traders can avoid liability for their actions, we can conclude that there is still space for improvement.

All the activities in the markets require a balanced intervention by the governments in the form of rules and regulations. No regulation at all can bring the unwanted consequences and chaos without social order. Too much regulation can lead to unnecessary disharmonization in the market processes. The history of the United States and the European Union in the regulation of insider trading can be described as a consistent path towards a society with the 'rule of law'. It would be premature to say that the final goal is achieved and that there is no need for further developments. This conclusion can lead to the idea that the absolute 'rule of law' is an everlasting aspiration for those who seek it.

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92 Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, OJ 1989 L 334/30. Art. 8. The deadline for implementation was 1 June 1992

93 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Abuse, OJ 2003 L 96/16. Art. 14. The deadline for implementation was 12 October 2004.

94 Decision 2001/528/EC of of 6 June 2001 Establishing the European Securities Committee, OJ 2001 L 191/45.