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French Insider Trading Law: A Survey

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COMMENT

FRENCH INSIDER TRADING LAW: A SURVEY

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I. INTRODUCTION

In February and March of 1989, a highly publicized insider trading scandal caused the French to acknowledge serious deficiencies in their securities laws.[1] The previous November, Pechiney (a conglomerate owned by the French Government) acquired Triangle Industries (a United States corporation) for more than $1.5 billion.[2] A preliminary investigation by the United States Securities and Exchange Commission (SEC) revealed an unusual amount of trading in triangle shares in the days leading up to the acquisition.[3] A subsequent report by the French Commission des opérations de bourse (COB) resulted in the indictment of Max Theret, a financier very close to the Socialist Government, and Roger-Patrice Pelat, a war hero and confidant of French President François Mitterand.[4] There was no disclosure, however, of the government insiders who assisted Theret and Pelat.[5]

From their insider trading, Theret and his associates allegedly made a profit of US$1.48 million, while Pelat and his family pocketed US$360,000.[6] To be sure, such figures are minute in comparison to the profits Ivan Boesky and Michael Milken allegedly made via insider activity in the United States.[7] Nevertheless, when the French Government failed to charge a single government official with insider trading violations, the French people were bewildered and upset. The ensuing political pressures forced the Government to look closely at French insider trading law and the procedures for

1. Singer, *Cherchez l'argent, From Balzac to Salvador Dali*, THE NATION, Mar. 13, 1989, at 333.

2. *Id.* Triangle Industries was the parent company of American National Can, a renowned packaging company. *Id.*

3. *Id.*

4. Cody, *Charges Filed Against Friend of Mitterand: Insider Scandal Escalates in France*, Wash. Post, Feb. 17, 1989, at B1, col. 3 [hereinafter *Scandal*]. Pelat spent so much time consulting with President Mitterand that presidential aides jokingly referred to Pelat as "vice president." Cody, *Panel Says Mitterand Friend Benefitted From Stock Deal*, Wash. Post, Feb. 1, 1989, at F1.

5. *Scandal*, *supra* note 4.

6. *See* Singer, *supra* note 1.

7. *Id.*

its enforcement.[8] As one commentator observed, "It's . . . indisputable that there's going to have to be some toughening up on all sorts of insider trading . . . because there's an awful lot escaping through the network."[9] French insider trading law was deficient for a variety of reasons, illustrated by the following facts: 1) French insider trading law, before the indictment of Theret and Pelat, did not contain a provision broad enough to encompass tippees;[10] 2) even if COB investigators had conclusively identified a French Government official who illicitly disclosed the inside information to Theret and Pelat, the official would have been innocent unless the prosecutor proved he *wrongfully intended to disrupt the normal workings of the stock market*;[11] and 3) in the twenty-two years since France promulgated its first insider trading statute, the Government had filed only a dozen criminal insider trading suits.[12]

This Comment examines the piecemeal development of French insider trading law. First, Section II outlines the United States methods for regulating insider trading.[13] With the United States as a reference point, Section III then describes the limited success of the first French insider trading statute. Next, in Section IV, the Comment explains and criticizes the 1970 reforms of French insider trading law. In addition, Section IV analyzes the French case law that developed subsequent to the 1970 reforms. Finally, Sections VI and VII study the recent legislative adjustments for earlier statutory deficiencies. By way of conclusion, the Comment provides several suggestions for future reform.

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8. *See* Neher, *France Plans its Own SEC to Police Trading*, Chi. Tribune, Jan. 23, 1989, at 3, col. 1; *French Watchdog Unit Polices Stock Market*, L.A. Times, Oct. 18, 1989, at D3, col. 3 [hereinafter *French Watchdog*].

9. Whelan, *Scandals and Weak Rules Undermine French Stock Market Ambitions*, Reuter Libr. Rep., Jan. 18, 1989, at 2 (NEXIS, omni library).

10. Theret and Pelat were indicted under Article 17 of Law No. 88-70, passed in 1988. Law No. 88-70, art. 17 (Jan. 22, 1988), 1988 Journal Officiel de la République Française [J.O.] 1111, 1988 Recueil Dalloz-Sirey, *Législation* [D.S.L.] 134 (adding art. 10-3 to Ordinance No. 67-833 (Sept. 28, 1967), 1967 J.O. 9589, 1967 D.S.L. 373) [hereinafter Article 10-3].

11. *Id.*

12. de Mahenge & Persiaux, *France*, in INTERNATIONAL SECURITIES REGULATION 58 (R. Rosen ed. 1988).

13. The outline of the U.S. insider trading law is particularly appropriate here. The applicable U.S. statutes and case law have served as the primary inspiration and as constant points of comparison for the French scheme. *See* Tunc, *Observations*, 1976 La Semaine Juridique (Juris-Classeur Périodique) [J.C.P.] II No. 18,329; Tunc, *Observations*, 1977 J.C.P. II No. 18,543.

II. United States Regulation of Insider Trading

The United States deals with insider trading through two sections of the Securities Exchange Act of 1934,[14] Section 10(b)[15] and Section 16(b).[16] Section 16(a)[17] deems directors, officers, and ten percent (or more) shareholders to be insiders of the corporation and requires them to file periodic statements with the SEC indicating any changes in their holdings in the corporation.[18] With regards to these holdings, Section 16(b) contains a blanket prohibition: the insiders listed in Section 16(a) cannot retain any profits from the purchases and sales or sales and purchases made within six months of each other.[19] The SEC does not have the power to enforce Section 16(b); it merely compiles and then publishes the statements. Instead, the issuer itself may bring suit for disgorgement of the profits.[20] If the issuer fails to file suit within sixty days, or does not diligently pursue the suit, any shareholder of the issuer may file suit on behalf of the corporation.[21] Congress intended Section 16(b) to inhibit officers, directors, or owners of ten percent or more of the shares from benefiting from inside information in the short term.[22] Section 16(b) is particularly effective because it does not require proof that the insider actually used or relied on inside information.[23]

The broad language of Section 10(b) prohibits any person from employing manipulative or deceptive devices in contravention of SEC rules.[24] Rule 10b-5, promulgated under Section 10(b) to

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14. 15 U.S.C. §§ 78a-78kk (1988).

15. 15 U.S.C. § 78j (1988).

16. 15 U.S.C. § 78p(b) (1988).

17. 15 U.S.C. § 78p(a) (1988).

18. In practice, the corporation's general counsel normally compiles periodic lists of the insiders' purchases and sales and then files the statements on the insiders' behalf. The insider, however, not the corporate issuer, has the ultimate responsibility for filing ownership reports. *See* B. Rider & H. Ffrench, The Regulation of Insider Trading 22 (1979) [hereinafter Rider & Ffrench].

19. 15 U.S.C. § 78p(b) (1988). The insider must relinquish to the corporation all profits made on such transactions. *Id.*

20. *Id.*

21. *Id.*

22. Rider & Ffrench, *supra* note 18, at 22.

23. *Id.*

24. Section 10(b) provides that it shall be unlawful for any person:

> [t]o 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

deal specifically with insider trading,[25] is a major catch-all fraud provision. With respect to the purchase or sale of any security, it is unlawful for any person to (a) employ any device to defraud, (b) make any untrue statement of material fact or omit any statement that affects the interpretation of a material fact, or (c) engage in any act that involves fraud or deceit.[26]

As developed by the courts, the general elements of a Rule 10b-5 cause of action are as follows:[27]

(1) a non-disclosure,[28]

(2) of material non-public information,[29]

(3) made with scienter,[30]

(4) in breach of a fiduciary duty.[31]

Furthermore, case law arising under Rule 10b-5 extends the prohibition on insider trading to the tipper-tippee situation. Thus, a tippee is liable for trading where the tipper breaches a fiduciary duty by giving the information to the tippee, *and* the tippee knows or should have known that the tipper has breached the fiduciary duty.[32] A tipper may be liable even if he does not purchase or sell any of the securities in question. Thus, a tipper would be liable if he communicates material, non-public information in breach of a fiduciary duty to a tippee who either trades based on the information or tips another.[33]

> and regulations as the commission [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(h) (1988).

25. 17 C.F.R. § 240.10b-5 (1989).

26. *Id.*

27. *See* Bornstein & Dugger, *International Regulation of Insider Trading*, 2 COLUM. BUS. L. REV. 375, 380 (1987).

28. *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 449-50 (1976); Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

29. *Basic, Inc.*, 485 U.S. at 224 (management's interest in timing of non-disclosure is valid, but not so important as the materiality of the undisclosed information to an interested investor); Harkaly v. Apparel Indus., 571 F.2d 737, 741 n.5 (2d Cir. 1978).

30. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-94 (1976) (language of 10(b) and 10b-5 requires knowing and intentional conduct; private cause of action for damages under 10(b) and 10b-5 will not lie in the absence of an allegation of scienter).

31. Chiarella v. United States, 445 U.S. 222 (1980) (a duty to disclose arises from a relationship of trust and confidence; it is the relationship, not the access to material, nonpublic information, that gives rise to the duty).

32. Dirks v. SEC, 463 U.S. 646, 661-63 (1983) (tippee inherits tipper's duty and breach, so tipper must have a fiduciary duty to the issuer and must breach it for tippee to be liable under 10b-5).

33. *Id.* Otherwise, a non-trading tipper could subsequently search out the tippee and split the profits.

U.S. securities law also regulates insider trading in varying degrees through Rule 14e-3,[34] Section 17(a) of the Securities Act of 1933,[35] and the Insider Trading Sanctions Act of 1984.[36]

III. French Law — The 1967 Statute

Prior to 1967, French law had no provisions directly addressing insider trading.[37] Nevertheless, Article 419 of the French Penal Code prohibited the use of fraudulent schemes, such as the circulation of false statements or rumors, to influence supply and demand in the marketplace.[38] The French Government, however, manifesting its *laissez faire* attitude towards the stock markets, failed to prosecute any securities traders under Article 419.[39] Insider trading was not only unpunished, it was rampant.[40] In fact, the French did not perceive insider trading as an area of concern; they accepted it as a traditional practice (a sort of custom) that insiders enjoyed for

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34. 17 C.F.R. § 240.14e-3 (1989). Rule 14e-3, promulgated in 1989 under Section 14(e) of the Securities Exchange Act of 1934, prohibits material misstatements and non-disclosures and fraudulent or manipulative practices in connection with tender offers. *Id.*

35. 15 U.S.C. § 77g(a) (1988). Section 17(a) is an anti-fraud provision which only applies to the acts of the seller of securities. *Id.* It has been used occasionally in insider trading cases. *See, e.g., Dirks*, 463 U.S. at 651.

36. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (codified as amended in scattered sections of 15 U.S.C.). The Act added § 21(d)(2) to the Securities Exchange Act of 1934. It did not create a separate basis of liability from Rule 10b-5, but instead provided the SEC with potent enforcement mechanisms. The SEC may now impose fines of up to three times the illegal trading profits or losses avoided and may impose additional criminal penalties. 15 U.S.C. §§ 78u, 78ff (1988).

37. Hawes, Lee & Robert, *Insider Trading Law Developments: An International Analysis*, 14 Law & Pol'y Int'l Bus. 335, 341 (1982) [hereinafter Hawes]; Miller, *France*, in International Capital Markets and Securities Regulation § 7.16[2], at 7-37 (H. Bloomenthal ed. 1989).

38. Code Pénal [C. pen] art. 419 (Fr.); *see also* Rider & Ffrench, *supra* note 18, at 234.

39. Rider & Ffrench, *supra* note 18, at 232, 234.

40. *Id.* Of course, the problem was partially attributable to inadequate corporate disclosure provisions. Thus, the majority of share trading was based on insufficient information, making it difficult to distinguish reliable facts from hyperbolic rumors. *Id.* at 234. Lack of conclusive statutory interpretation may account for the remainder of the problem. As recently as July 1988 a COB report complained that "[t]he present drafting [of French insider trading law] doesn't, in our view, allow us to draw with certainty a precise line between legal and illegal." *French Watchdog, supra* note 8. The head of the COB explained, "By definition, financial markets are markets of insider traders (given the constant flow of price-sensitive data within the stock exchange). Insider trading isn't a question of essence, but one of degree." *Id.* The line between "inside" and "open and notorious" information is perhaps obscured in France because there have been so few judicial decisions concerning insider trading (a dozen as of January 1989). *See* de Mahenge & Persiaux, *supra* note 12. In contrast, the United States has been able to develop the concept through case law, in the tradition of stare decisis.

their own benefit, and for that of friends and relatives.[41] As a result, the average Frenchman held a cynical, albeit complacent, opinion of the French capital markets.[42] Starting in 1967, in an attempt to foster the confidence of non-institutional investors in the French securities markets, the French Government commenced an attack on insider trading.[43]

The *Ordonnance* of 28 September 1967 (the "1967 Ordinance"), in addressing the offense of insider trading for the first time, created the COB.[44] Originally, the 1967 Ordinance focused exclusively on disclosure, thus closely following the SEC provisions that inspired it.[45] Article 162-1 of the 1967 Ordinance required that the stipulated insiders[46] disclose any securities transactions within six days of the transaction.[47] The COB would subsequently compile and publish a public record of insider activity.[48] The Government intended these public records to deter insider trading by disclosing corrupt insiders to their peers.[49] Believing that the disclosure of unethical practices would arouse public hostility and shame, the Government assumed professional organizations and/or the corporations themselves would call for the dismissal of the

41. Tunc, *A French Lawyer Looks at American Corporation Law and Securities Regulation*, 130 U. PENN. L. REV. 757, 759 (1982).

42. RIDER & FFRENCH, *supra* note 18, at 234. "The poor reputation that the French capital markets have enjoyed has been a direct result of secretiveness and probable self-interest of corporations and their controllers." *Id.* One French broker recently explained, "Until Paris markets are really cleaned up, we're going to have a hard time establishing ourselves as credible, trustworthy players." Rossant & Comes, *The Paris Bourse Calls in the Gendarmes*, BUS. WK., Mar. 28, 1988, at 41. The credibility of the Paris markets is of particular importance today, as Paris competes for capital with London, Zurich, Frankfurt, and the other major European money centers. *Id.* But, as Barry Gillman, managing director of Prudential-Bache Global Funds observes, institutional investors recently have had to contend with much bigger insider trading scandals in New York, London, and Tokyo. Neher, *supra* note 8.

43. RIDER & FFRENCH, *supra* note 18, at 233. The Government focused its efforts on those traders in privileged positions. *Id.*

44. Ordinance No. 67-833 (Sept. 28, 1967), 1967 J.O. 9589, 1967 D.S.L. 373 (amending Law No. 66-537 (July 24, 1966), 1966 J.O. 6402, 1966 D.S.L. 265) [hereinafter 1967 Ordinance].

45. Miller, *supra* note 37, § 7.16[1], at 7-37.

46. The "stipulated insiders" of a corporation included the following: the president, general managers, and members of the boards of the company; the legal and natural persons in the corporation who exercise the functions of administrators; members of the supervisory board; and permanent representatives of persons who exercise any of the aforementioned functions. 1967 Ordinance, *supra* note 44, art. 8 (adding art. 162-1 to Law No. 66-537 (July 24, 1966), 1966 J.O. 6402, 1966 D.S.L. 265).

47. *Id.*; *see* RIDER & FFRENCH, *supra* note 18, at 234.

48. RIDER & FFRENCH, *supra* note 18, at 234.

49. *Id.*

crooked insiders.[50]

Nevertheless, French law did not prohibit insider trading per se. Indeed, an insider could trade at will as long as he or she reported the transactions to the COB. The courts were empowered to impose criminal sanctions and forfeiture of profits *only* on those insiders who failed to report a trade.[51]

The reporting obligation produced a flood of insider reports that the COB, with its very small staff,[52] was incapable of handling.[53] By 1969, the COB openly admitted that it had been unable to monitor most of the reports.[54] To make matters worse, the COB also admitted that it was incapable of investigating the increasing number of insiders that were ignoring the reporting obligations altogether.[55]

Eventually, the COB used the power granted to it under its organic statute[56] to submit proposals to the Government for

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50. *Id.*

51. Hawes, *supra* note 37, at 342.

52. Originally, the COB staff comprised only forty persons, four of whom were actual inspectors, all crammed into several rooms in the suburbs of Paris. Bezard, *Le Nouveau Visage de la Commission des Opèrations de Bourse*, 1989 REVUE INTERNATIONALE DE DROIT COMPARÉ 929, 932.

53. Miller, *supra* note 37; RIDER & FFRENCH, *supra* note 18, at 235.

54. RIDER & FFRENCH, *supra* note 18, at 235. The COB suspected insiders, striving to bury the agency in paper, filed many superfluous reports of insignificant trades. Hawes, *supra* note 37, at 342.

In its original form, Article 162-1 of the 1967 Ordinance closely resembled Section 16(b) of the Securities Exchange Act of 1934, because it stipulated that statutory insiders were obliged to report their securities transactions to the market regulator, the COB. The COB, like the SEC under Section 16(b), then published lists of the transactions, and the onus was on the issuer to take action against the insider.

There were also important differences. For one, Section 16(b) provided the additional rule that the insider must return to the issuing corporation any profits made on the proscribed transactions, while Article 162-1 lacked any similar requirement. As such, Article 162-1 did not provide a cause of action. 1967 Ordinance, *supra* note 44; *see* RIDER & FFRENCH, *supra* note 18, at 234.

Article 162-1 differed from Section 16(b) in two other important ways. First, the COB had only about 40 persons to analyze the lists and investigate insider activity. *See* Bezard, *supra* note 52. In comparison, the present SEC work force totals over 2,000 persons and has the benefit of modern technology. Neher, *supra* note 8. Second, the COB required the reporting and publication of *all* securities transactions by insiders. 1967 Ordinance, *supra* note 44, art. 8 (adding art. 162-1 to Law No. 66-537 (July 24, 1966), 1966 J.O. 6402, 1966 D.S.L. 265). In contrast, Section 16(b) requires the U.S. insider to report *only* those securities transactions where he is a statutory insider of the issuer(s). *See supra* notes 18-22 and accompanying text. Thus, the SEC is charged with monitoring comparatively fewer reports than was the COB under Article 162-1.

55. RIDER & FFRENCH, *supra* note 18, at 235.

56. 1967 Ordinance, *supra* note 44, art. 4.

amending legislation.[57] The COB recommended the abandonment of the disclosure approach in favor of a complete prohibition on insider trading.[58] The French Parliament concurred with the COB's recommendation and, in December 1970, adopted legislation making insider trading a crime.

IV. THE 1970 CHANGES

A. *The Legislation*

The Law of 23 December 1970[59] (the "1970 Statute") completely abandoned the disclosure approach, marking a new era in French insider trading regulation.[60] The 1970 Statute consists of three major parts: 1) a provision that certain insiders must hold their securities in a manner easily verifiable by the COB;[61] 2) the criminalization of the act of insider trading;[62] and 3) the criminalization of the use of false or misleading information to influence the price of a security.[63]

The 1970 Statute's entirely revised version of Article 162-1 ("Revised Article 162-1") redefines the *initiés internes* as directors and certain officers of a company, their permanent representatives

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57. Delmas-Marty, *Le 'délit des initiés' va-t-il changer la bourse?*, 1977 RECUEIL DALLOZ-SIREY, CHRONIQUES [D.S. Chr.] I 91, 92 n.13.

58. Hawes, *supra* note 37, at 342. French commentators have criticized the COB and the Government for the abandonment of the disclosure approach, identifying it as a sign of "ignominious" defeat and as evidence of insufficient government interest in providing the COB with adequate resources. RIDER & FFRENCH, *supra* note 18, at 235. But, as J. Donnendieu de Vabre, then President of the COB, explained, "When one considers that the only result of the Herculean task of [monitoring insider trading] was to require further disclosure of operations without sanctioning the insider for the operations themselves, it is readily understandable why the COB requested a change in the law." Address by J. Donnendieu de Vabre, Second International Securities Law Conference (Apr. 3-4, 1975), *reprinted in* MULTINATIONAL APPROACHES - CORPORATE INSIDERS 41, 43 (L. Loss ed. 1975). Perhaps if the original Article 162-1 had provided a cause of action for the issuer's shareholders against the insider for disgorgement of profits to the corporation (as Section 16(b) contains), the law would have hindered French insiders to a greater extent and the COB would have felt less frustrated.

59. Law No. 70-1208 (Dec. 23, 1970), 1970 J.O. 11,981, 1971 D.S.L. 17 [hereinafter 1970 Statute].

60. *Id.* art. 4 (adding art. 10-1 to 1967 Ordinance, *supra* note 44) [hereinafter Article 10-1]. Excluding a few instances, all subsequent French legislation regulating insider trading has added to, rather than changed, the 1970 Statute.

61. *Id.* art. 1 (replacing 1967 Ordinance, *supra* note 44, art. 8 with a revised version of art. 162-1) [hereinafter Revised Article 162-1].

62. Article 10-1, *supra* note 60.

63. *Id.*

(*e.g.*, accountants and attorneys), their spouses (unless separated under judicial decree), and their unemancipated minor children.[64] These insiders must hold their shares in nominative form[65] or, if they hold any shares in bearer form, they must deposit such shares in a bank.[66] If the *initiés internes* deposit the bearer form securities in a bank,[67] they must give notice of the deposit to the COB.[68] Revised Article 162-1 applies both to listed and unlisted securities issued by any corporation with which the insider is affiliated (including the primary corporation's subsidiary, parent, or parent subsidiary).[69] Failure to comply results in a significant fine.[70]

Under the 1970 Statute, Article 10-1, paragraph 1 ("Article 10-1(1)") directly criminalizes the act of insider trading.[71] Article 10-1(1) adds a new category of insiders: the "*initiés externes*,"[72] *i.e.*, all other persons "who have at their disposal while exercising their professional functions privileged information on the technical, commercial, or financial circumstances and operations of a com-

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64. Revised Article 162-1, *supra* note 61.

65. In France, most shares and debentures are in bearer form, thereby hindering the COB's ability to ascertain a shareholder's identity. This is a result of a long-standing tradition of secrecy in business matters. Miller, *supra* note 37, § 7.09[3], at 7-28. The use of bearer form securities makes it difficult to inform security holders of new developments in the corporation. The COB has addressed this problem by developing guidelines for companies which wish to use the press to disclose information to the public at large. *Id.* Still, one must consider whether the prevalent use of bearer form securities contributes to the disparity between the general public's information and the information accessible to insiders. Such a result further blurs the distinction between confidential and non-confidential information in France. *See supra* note 40.

66. Revised Article 162-1, *supra* note 61. The insiders are under an obligation to ensure that they place all securities covered by Article 162-1 into nominative form or into a depository within one month of assuming insider status. Decree No. 71-615, art. 1 (July 23, 1971), 1971 J.O. 7363, 1971 D.S.L. 327 (adding art. 153-1, to Decree No. 67-236 (Mar. 23, 1967), 1967 J.O. 2843, 1967 D.S.L. 137). Furthermore, where the insiders have assumed insider status before acquiring the securities, they are obliged to transfer the securities into nominative form or into a depository within twenty days. *Id.* (adding art. 153-2).

67. The bank or financial institution must be registered with the Conseil National de Credit, a government agency. The deposits may also be placed with a registered *agent de change* (stockbroker). Decree No. 71-615, art. 1 (July 23, 1971), 1971 J.O. 7363, 1971 D.S.L. 327 (adding art. 153-1, to Decree No. 67-236 (Mar. 23, 1967), 1967 J.O. 2843, 1967 D.S.L. 137).

68. Revised Article 162-1, *supra* note 61.

69. *Id.*

70. Law No. 66-537, art. 485 (Jul. 24, 1966), 1966 J.O. 6402, 1966 D.S.L. 265, *as modified by* 1967 Ordinance, *supra* note 44, art. 11.

71. Article 10-1, *supra* note 60, para. 1 [hereinafter Article 10-1(1)].

72. French legislation does not actually use the terms "*initiés internes*" or "*initiés externes*" to refer to insiders. These terms are used by French commentators and courts to distinguish between the two categories of insiders as defined by French law.

pany."[73] Both groups of insiders (*initiés internes* and *initiés externes*) are forbidden to carry out, either by themselves or through intermediaries, any securities transaction which exploits privileged information before that information becomes available to the general public.[74] The 1970 Statute subjects a violator of Article 10-1(1) to a prison term ranging from two months to two years and/or a fine of up to four times the profits realized.[75]

Meanwhile, Article 10-1, paragraph 2 ("Article 10-1(2)") imposes criminal penalties upon anyone who knowingly disseminates false or misleading information about a corporation in order to influence the conditions of the securities markets.[76] This prohibition primarily aims at preventing two practices: 1) where journalists or syndicates circulate false or inflammatory reports on certain issuers and then trade on the impact of their reports[77] and 2) where company managers communicate to the public over-optimistic information, in order to provoke an artificial rise in the stock's value and, in turn, facilitate the issuing of additional shares.[78] Under Article 10-1(2), the Government need not show that the author of the untrue statement actually benefitted from the statement; a wrongful intention to influence the market is sufficient.[79]

Remarkably, Article 10-1(2) has not yet been applied,[80] apparently due to the difficulty in fulfilling the scienter — or wrongful

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73. Article 10-1(1), *supra* note 71.

74. *Id.*

75. *Id.* As an alternative to the four times profits penalty, the statute establishes minimum and maximum guidelines of FF5,000 and FF5 million respectively. *Id.*

76. *Id.* para. 2 [hereinafter Article 10-1(2)]. Violators of 10-1(1) and 10-1(2) are subject to the same criminal penalties.

77. RIDER & FFRENCH, *supra* note 18, at 235.

78. de Mahenge & Persiaux, *supra* note 12, at 56. The Government, however, did not intend to place a duty on directors to correct rumors and false information. RIDER & FFRENCH, *supra* note 18, at 235.

79. Article 10-1(2), *supra* note 76; RIDER & FFRENCH, *supra* note 18, at 235.

80. In *Société "La Commande Electrique,"* the sole case to date involving Article 10-1(2), La Commande Electrique (LCE), a French publicly-traded company, brought suit against Editions Boursières, a company that provided both financial information and a service for exchange of financial information between subscribers through a computer network. Judgment of July 5, 1988, Trib. gr. inst., Paris. ___ Recueil Dalloz Sirey, *Jurisprudence* [D.S. Jur.] ___. LCE's share price had plunged after Editions Boursières' exchange service showed several erroneous reports that LCE's major supplier was terminating its contract. LCE brought suit under Article 10-1(2) claiming that Editions Boursières had either authored or been an accomplice to the dissemination of false or misleading information with an intent to destroy LCE's share price. The court held, however, that although someone had disseminated false information with the requisite intent, there was no proof that Editions Boursières had done anything but provide the vehicle for dissemination.

intention — requirement.[81] This has discouraged both commentators (who view Article 10-1(2) as the only provision capable of regulating securities fraud in France)[82] and victims (who would like to attach their civil claims to successful criminal ones).[83]

B. *The Case Law*

Since the promulgation of the 1970 Statute, only a dozen insider trading cases have reached the courts.[84] French courts have referred to past decisions in order to clarify the ambiguities arising under the French insider trading statutes.[85]

1. The Level Playing Field

In *X . . . Otis Europe/Otis Elevator*,[86] "*X*," the chief executive officer of the European joint venture of Otis Elevator, Inc., flew to the United States to convince Otis to take over B.D.R., one of the joint venture's other shareholders. Just before leaving, *X*

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81. Miller, *supra* note 37, § 7.16[6], at 7-41. Article 10-1(2) requires the State to prove 1) the *initié* knowingly disseminated false or misleading information and 2) this was done with the intent to influence market conditions where the securities are traded. *Id.* In contrast, a prosecutor in an Article 10-1(1) case need only prove the trader possessed inside knowledge and that he made transactions while in the possession of that knowledge. *Id.* at 7-42.

Still, Article 10-1(2), with its "fraud on the market" emphasis, appears more reasonable than the Rule 10b-5 analysis adopted in Carpenter v. United States, 791 F.2d 1024 (2d Cir. 1986), *aff'd* 484 U.S. 19 (1987), where the Court of Appeals held that a *Wall Street Journal* reporter was guilty of violating Rule 10b-5. The reporter leaked information to tippees who traded on the predicted market impact of the reporter's upcoming securities column. The Second Circuit found that the reporter had a duty to the newspaper, had breached that duty, and had thereby potentially harmed the newspaper's reputation. The Supreme Court split on the issue of whether this constituted a proper application of 10b-5, and therefore affirmed.

The Supreme Court's split decision acknowledged that the Second Circuit, aspiring to regulate the deceptive or unfair use of inside information, may have forced a roundabout interpretation of Rule 10b-5. *Carpenter* focused on the reporter's breaching a fiduciary duty to the *Journal*, even though *Journal* stock was not among those traded based on the reporter's tips. Article 10-1(2), meanwhile, is a more directly worded statute that avoids the 10b-5 duty/breach conundrum. Article 10-1(2) would have directed the court to the truly essential question: did the reporter disclose the information with the wrongful intent of influencing conditions of the securities markets?

82. *See* Miller, *supra* note 37, § 7.16[6], at 7-42.

83. *Id.*

84. de Mahenge & Persiaux, *supra* note 12.

85. The cases do not cite previous decisions. However, they often use the exact language used in previous cases in order to describe certain judicially created doctrines or definitions.

86. Judgment of Oct. 29, 1975, Trib. gr. inst., Paris, 1976 D.S. Jur. 53.

placed an order for FF71,179 worth of B.D.R.'s securities. After several days of negotiations in the United States, *X* returned to Paris, where the takeover announcement catapulted the price of B.D.R.'s shares.

The court first determined that *X* was in fact an *initié externe* — in possession, through the course of his profession, of confidential information concerning the technical, commercial or financial management of B.D.R. — within the scope of Article 10-1(1).[87] The court further held that the material element of the crime was *X*'s use of confidential information while trading.[88] *X* argued that the court should imply a scienter requirement in Article 10-1(1).[89] He claimed that French legislators used the word "*exploité*," or exploit, as a link between "confidential information" and "transaction" in order to create a criminal intent requirement.[90] That is, *X* claimed that *exploité* requires the prosecutor to prove that *X* intended to use the information for the illegal purpose of gaining an unfair financial advantage on the stock exchange.[91] This interpretation would have considerably narrowed the scope of Article 10-1(1). The court, however, rejected *X*'s interpretation. The court explained that Article 10-1(1), unlike Article 10-1(2), explicitly avoids the word "scienter."[92] Accordingly, the court ruled that Article 10-1(1) does not require showing the trader acted with the specific intent to defraud the market and recovered a dishonest financial gain.[93] Rather, the mere possession of inside information regarding a company while trading in that company's securities is sufficient to prove the insider "exploited" the information.[94] The

87. *Id.* *X* argued that he was outside the scope of Article 10-1(1) because he was not a statutory insider. *X* claimed that because he was CEO of a company other than the one in which he bought shares, he was not an *initié interne* under Revised Article 162-1. The court explained that *X* was an *initié externe*, since *X* was the sole inspiration of Otis Elevator's takeover of B.D.R. *Id.*

88. *Id.*

89. *Id.* *X*'s possession of confidential information on the financial state of B.D.R. was indisputable; after all, he was the primary instigator of its takeover.

90. *Id.*

91. *Id.*

92. *See supra* notes 71-83 and accompanying text.

93. This standard, although somewhat controversial among commentators at the time, governed subsequent judicial decisions. *See* Judgment of Oct. 15, 1976, Trib. gr. inst., Paris, 1978 D.S. Jur. 381 note at 385 J. Guyénot. One commentator correctly noted that Article 10-1(1) clearly states that a violator could be fined up to four times the profits "if profits were realized." Judgment of Oct. 29, 1975, 1976 D.S. Jur. 53 note at 56 M. Delmas-Marty.

94. Pursuing a monetary profit is not an element of Article 10-1(1). Inside information can be used for other purposes. In the *Otis Elevator* case, for example, *X*'s acquisition of a large number of B.D.R. shares before the takeover permitted him to become an officer of

legislature intended the statute to reach any insider who knowingly uses privileged information in his market calculations.

The court in *X . . . Otis Europe/Otis Elevator* justified its decision on the following policy grounds: "*X* acted with full awareness, in defrauding the regular game of the securities market and in breaking the necessary equality between all its clients by his illicit action."[95] Thus, the court implied a moral element in the statute. The crime was not that *X* made, or intended to make, a profit using inside information. Rather, the crime was that *X* tilted an otherwise level playing field in his advantage through his use of inside information.[96]

2. The "Complete Abstention" Doctrine

Subsequent case law developed the doctrine of "complete abstention" as a means of maintaining a "level playing field."[97] Under this interpretation of Article 10-1(1), any *initié*, whether *interne* or *externe*, may buy or sell the securities of any company, so long as the *initié* does not possess knowledge of inside information about that company that is not known to the company's shareholders and the general public.[98]

B.D.R. at the time of the takeover and thereafter. Judgment of Oct. 29, 1975, 1976 D.S. Jur. at 55.

95. *Id. See also* Judgment of Mar. 30, 1979, Trib. gr. inst., Paris, 1980 La Semaine Juridique (Juris-Classeur Périodique) [J.C.P.] II No. 19,306 (1st case) note A. Tunc ("The absence of speculative intent invoked as a defense by the defendant is inconsequential; it is sufficient that, by his illicit action, [the defendant] broke the equality that must exist between all those speculating in the stock market so that the interplay of the offer and the demand determines the stock price").

96. This rationale parallels the original impetus for France's insider trading laws: to inspire the average Frenchman's confidence in the stock markets. *See supra* notes 42-45 and accompanying text. That principle frequently justifies French insider trading reforms. Accordingly, in the mid-1980s, the French Government took other steps to promote small-investor confidence in the markets. The Government "privatized" several large national banks and companies, undervaluing the shares sold to the general public (in order to guarantee the small investor an immediate profit) and placing severe restrictions on the number of shares any one investor could buy (so that the large institutional investors could not buy all the shares of a particular company). de Jonquieres, *Best-Seller with a Choice of Endings; Privitisation in Europe*, Fin. Times, Sept. 10, 1986, § 1, at 24, col. 5.

97. Judgment of May 26, 1977, Cour d'appel, Paris, 1978 D.S. Jur. 379.

98. *Id.* Unlike U.S. case law, which focuses on the knowledge or disclosure to those on the other end of a particular transaction, the French doctrine focuses on whether the information has been disclosed to *all* potential buyers and *all* potential sellers. *Compare* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 845, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (all facts necessary to make an informed judgment must be disclosed to those on the other end of the transaction) *with* Judgment of Jan. 28, 1985, Trib. gr. inst., Paris, 1985 D.S.

The first case to espouse this doctrine was *D . . . Compagnie Française d'enterprise*,[99] a case involving *D*, a former C.E.O. of a public works corporation. *D* suffered a drastic salary cut due to a demotion, but he remained privy to inside information. *D* thereby learned that the corporation's ventures in Morocco lost FF22 million more than previously estimated.[100] *D* sold his shares long before the information became public.[101] Upon the public release of the information seven months later, the share price dipped to under half *D*'s selling price.[102]

The trial court held that since *D*'s bank had requested that *D* sell his shares in the corporation, it was unclear that *D* had used the insider information in his decision to enter into the transaction.[103] Consequently, the trial court dismissed the State's charges against *D*, because the court could not conclude *D* had exploited the information.[104]

Jur. 357 note J.P. Marchi (if the information has not been publicly disclosed, then the *initié* is under a duty to abstain from trading in the market).

99. Judgment of May 26, 1977, 1978 D.S. Jur. at 379.

100. *Id.*

101. The financial press generally continued to proclaim that the operation was in sound financial condition until the official announcement of the loss seven months later. One specialized financial daily, however, repeatedly issued general warnings about the corporation's financial state around the time of *D's* sale of his shares. *Id.* at 380. The court of appeals confronted the issue of whether the financial daily's reports transformed the information into public knowledge. The court of appeals held that such pessimistic, fragmented, and incomplete statements were not of the requisite character to achieve the transformation. *Id. Poron*, a 1985 case, had a more expansive holding on this issue. Judgment of Jan. 28, 1985, Trib. gr. inst., Paris, 1985 D.S. Jur. 357; *see infra* notes 122-38 and accompanying text.

102. Judgment of May 26, 1977, 1978 D.S. Jur. at 379.

103. Judgment of Dec. 19, 1975, 1976 J.C.P. II No. 18,329 (2d case). Since *D* owed the bank approximately FF45,310, the bank pressed *D* to maintain a diversified portfolio of stocks to guaranty his debt. Judgment of May 26, 1977, 1978 D.S. Jur. at 380. After *D*'s salary had been cut in third by his demotion, he sold much of his existing stock in the corporation thereby making cash available for the purchase of a diversified portfolio. *Id.* Furthermore, *D* claimed that he first had offered to sell his shares to one of his superiors in the corporation, and subsequently consulted with an attorney to see if French law required him to file a notice with the COB before selling his shares. *Id.*

104. The trial court held that the phrase "exploitation of privileged information," as contained in Article 10-1(1), "could only mean the abusive use of such information for personal gain." This constituted a departure from the same court's position in *X . . . Otis Europe/ Otis Elevator* that the mere possession of inside information regarding a company in whose securities the insider is trading constitutes sufficient proof that the insider exploited the information. Such departure was heavily criticized by French legal critics who believed that, even if the statutory term "exploitation" was somewhat ambiguous, all insiders should be forbidden from trading while in the possession of inside information. Tunc, *Observations*, 1976 J.C.P. II No. 18,329.

The court of appeals reversed, using its fact-finding powers[105] to discover that *D*'s wife had a substantial stock portfolio, the profits from which could have easily guaranteed *D*'s debts.[106] Thus, according to the court of appeals, *D* had not entered the transaction under the "most pressing necessity."[107] The court held that *D*'s actions were criminal because he sold securities while in the possession of important, undisclosed information relating to those securities.[108] The court's decision implied a presumption of illegality vis-a-vis any transaction involving an insider who trades securities about which he retains material, undisclosed information. Although the court recognized the possibility of mitigating circumstances, such as the "most pressing necessity" exception, it was willing to go to great lengths (*e.g.*, appellate level fact finding) to avoid an actual application of the exception. Since considerable facts are necessary to show the most pressing necessity, an insider is under a general obligation to completely abstain (hence, the "complete abstention doctrine")[109] from transactions where he has any inside information relating to the subject securities.[110]

Until the statutory changes adopted in 1983,[111] *D . . . Compagnie Française d'enterprise* constituted the definitive judicial interpretation of the term "exploité," as used in Article 10-1(1). Despite perfunctory challenges to such judicial interpretation by insider trading defendants, the "complete abstention doctrine" was

105. In most civil law countries, the appellate courts can perform fact-finding functions. *See* Capalli, *Comparative South American Civil Procedure: A Chilean Perspective*, 21 U. MIAMI INTER-AM. L. REV. 239, 286 (1990). Since civil law countries tend to discount witnesses and rely almost exclusively on documentary evidence, the appellate courts need not interview witnesses; they merely open up the record to the submission of additional documents. *Id.* at 272.

106. Judgment of May 26, 1977, 1978 D.S. Jur. at 380.

107. *Id.*

108. *Id.*

109. *See also P . . . Carrefour/Allobroge*, Judgment of Oct. 15, 1976, Trib. gr. inst., Paris, 1978 D.S. Jur. 383 ("If the law did not create an interdiction which resulted in a permanent obstacle to managing a stock portfolio, it had at any rate an effect of imposing on all insiders an obligation to abstain [from trading] during the period preceding the disclosure of the information to the public . . . .").

110. The court, in holding that *D*'s situation was not one of "most pressing necessity," failed to elaborate a definition of what kind of situations would satisfy the exception. Presumably, if an *initiè* could show that he was going bankrupt and needed to liquify his shares in the corporation about which he held inside information, the courts would not convict him of a crime. Since the *D . . . Compagnie Française d'enterprise* case, no appellate courts have revisited the "most pressing necessity" exception, hence it probably represents the current state of the law. Miller, *supra* note 37, § 7.16[3], at 7-39.

111. *See infra* notes 177-91 and accompanying text.

reconfirmed by the French legislature in 1983.

3. Privileged Information

a. Public Disclosure

The original version[112] of Article 10-1(1) broadly defined inside information as any "privileged information on the technical, commercial or financial operations of a company."[113] French courts have carried the burden of elucidating Article 10-1(1)'s cryptic definition.

In *Saint-Guilhem*,[114] a financial journalist purchased stock in two companies after he had interviewed their officers, but before he published the information. The journalist sold the stock after his news reports caused an increase in the share prices of the respective companies. The court found the journalist to be an *initié externe* guilty of using inside information gained in the course of his profession.[115] The information was privileged because it had not penetrated public knowledge at the time the journalist bought the securities.[116] In other cases, however, the COB declined to prosecute stock buyers who authored or inspired news reports and then traded on the predictable effect of such reports.[117] The COB found that although such a practice violated the ethical canons of journalism,[118] the information was publicly accessible before publication of the reports. Thus, the information was not privileged, and the news reporters/securities traders had not violated French

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112. In 1983, the French Legislature amended the statutory definition of inside information. *See infra* notes 182-85 and accompanying text.

113. Article 10-1(1), *supra* note 71.

114. Judgment of May 12, 1976, Trib. gr. inst., Paris, 1976 J.C.P. II No. 18,496 (1st case).

115. *Id.*

116. *Id.* Hence, when the court determined that the journalist had no access to *inside information* concerning two other companies about which he wrote articles, the court refused to punish the journalist for trading in the securities of those two companies. The critical difference in the two sets of transactions was that in the first two instances, the journalist bought the companies' shares while in possession of information to which the general public had no access until the articles were published; in those transactions that went unpunished, the journalist merely used information easily obtainable by the public at large.

117. COMMISSION DES OPÉRATIONS DE BOURSE, NEUVIÈME RAPPORT AU PRÉSIDENT DE LA REPUBLIQUE 87 (1976).

118. The COB's policy was to inform the directors of the implicated publications, leaving at their discretion any punishment of the journalists. *Id.*

securities law.[119]

The courts in *D . . . Compagnie Française d'enterprise*,[120] *Caudrelier-Bênac*[121] and *Poron*[122] further defined "privileged information." In *D . . . Compagnie Française d'enterprise*, the former CEO sold his shares based on confidential information about his company's losses. Around the same time, a small daily financial journal with limited circulation published some vague disclosures regarding the losses.[123] The court of appeals held that the journal's statements were too vague, fragmented, and incomplete to remove the privileged label from the CEO's information.[124]

In *Caudrelier-Bênac*, the court examined the following question: At what point can confidential information be imputed to a company's executive without actually proving that he received such information? In this case, the executive had placed orders to sell his shares in the company before an internal meeting where the company officially informed its executives of substantial company losses.[125] The prosecution proved that the executive may have had access to the information before he placed his orders to sell, that he could have deduced from various internal indicators that the company was about to absorb heavy losses, and that the executive had no other motive to sell the shares except to avoid losing money from the subsequent drop in share price.[126] Nevertheless, the court held that because the prosecution could not show the exact conversation or paper which informed the executive of the losses, such confidential information could not be imputed to

119. *Id.* If the information is not privileged, then Article 10-1(1) does not attach. Additionally, the news reporters did not violate Article 10-1(2), because that law applies only to the dissemination of *false* or *misleading* information about the technical, commercial, or financial operations of a company. The news stories in question were accurate representations of non-confidential information and were neither false nor misleading in any way. *Id.*

Presumably, the French Parliament adopted Article 10-3, *supra* note 10, to rectify, *inter alia*, this situation. That statute subjects anyone who intentionally tries to interfere with the normal operations of the stock market "through the deception of another" to the same penalties as Article 10-1(1). Proving the reporter/buyer actually deceived a seller, however, would be extremely difficult where the reporter did not possess any more privileged or confidential information than did the buyer. Therefore, as it pertains to the news reporter cases, Article 10-3 is probably not a substantial improvement.

120. Judgment of May 26, 1977, 1978 D.S. Jur. at 380.

121. Judgment of Mar. 17, 1976, Trib. gr. inst., Paris, 1976 J.C.P. II 18,496 (2d case).

122. Judgment of Jan. 28, 1985, 1985 D.S. Jur. at 357.

123. *See supra* note 101.

124. Judgment of May 26, 1977, 1978 D.S. Jur. at 380.

125. Judgment of Mar. 17, 1976, 1976 J.C.P. II No. 18,496 (2d case) note A. Tunc.

126. *Id.*

him.[127]

The *Poron* court clarified the standard for determining when information loses the "privileged" label.[128] Poron was an executive with the corporation Centre Est Distribution Succursaliste (Cedis).[129] In a private meeting that Poron attended, the CEO of Cedis announced an 11.75% increase in turnover and 33% increase in dividends over the previous year.[130] Poron and his immediate family bought FF191,050 worth of Cedis stock before a press conference was called to announce the dividend.[131]

In response to insider trading charges, Poron argued that the information was no longer privileged when he bought the shares.[132] In making his argument, Poron cited two news reports. The first report, published two months before his purchase, discussed the possibility of the Cedis stock price rising due to its admission to the futures market. The second report, published the day of the

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127. *Id.* André Tunc, the noted French commentator, ridiculed the court's holding, remarking that the French dictionary defines the word "information", *inter alia*, as a group of significant indicators and that it is ridiculous to expect French prosecutors to assemble more proof than that which existed in *Caudrelier-Bénac*. As Tunc explained, prosecutors cannot always find colleagues of a business executive to testify that they saw him receive confidential information which he is accused of using illicitly. *Id.*

French courts, however, have continued to require specific proof that the insider received the confidential information. In *C . . . and B . . . Société Thomson*, the court dismissed the charges against two insiders for absence of such specific proof. Judgment of May 13, 1986, Trib. gr. inst., Paris, __ D.S. Jur. __ . *C* was an engineer in the French Ministry of Defense and was heavily involved in the French arms sales negotiations with Saudi Arabia. For seven months, *C* had been divesting his investment portfolio of shares in Thomson C.F.S., a French multinational which manufactures, among other things, high tech arms. On January 12, 1984, *C* attended a Defense Ministry meeting at which a significant contract between Thomson and the Saudi Government was announced. He left the meeting, cancelled his remaining sell order, and requested that his broker buy five to six thousand shares of Thomson. The court dismissed the charges against *C*, however, because *C* proved that he had entered the meeting after the announcement and the prosecutor could present no other proof of a specific instance where *C* was told or read about the contract before it was made public on January 18, 1984.

With respect to *B*, a head-hunter with high level contacts in Thomson, the prosecutor showed that between January 9th and 12th, *B* had bought 11,450 shares in Thomson for a total of FF4.5 million. Furthermore the prosecutor presented evidence that *B* had called a high level Thomson executive on January 12th asking him to confirm the existence of the contract. Nevertheless, the court held that the call was placed *after B* had placed his orders to buy Thomson shares and that knowledge of the contract could not therefore be imputed to *B* at the time of the purchase.

128. Judgment of Jan. 28, 1985, 1985 D.S. Jur. at 357.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

private meeting, predicted a 15% increase in profits and dividend for Cedis.[133]

The court held that the news stories contained uncertain and hypothetical information.[134] Such a disclosure, although public, was insufficient to remove the "privileged" label from the information released at the Cedis meeting.[135] The vast difference between the second report's estimated dividend (15%) and the actual announced dividend (33%) proved the uncertainty.[136] The court enumerated a standard for such situations: the publishing of information cannot strip that information of its confidential nature unless the report satisfies the COB's required formalities for informing shareholders.[137] The consequences of the court's standard are far-reaching; French insiders are likely to retain an extraordinary amount of information that has penetrated the public domain but has *not* entered a COB-approved report to shareholders.[138] Consequently, this standard profoundly restricts insiders.

b. Ripeness: The What and When of "Privileged Information"

A recurrent issue in defining privileged information is the quality and ripeness of the information which the *initiés* retain while trading. If an insider is privy to a rumor about a company's prospects, at what point is the rumor definitive enough to be privileged?[139]

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 359. The COB has established an elaborate array of standards for corporate disclosure to shareholders. Miller, *supra* note 37, § 7.09[2], at 7-28.

138. On one hand, the court's strong standard should have some perverse effects. If the court's words are taken literally, non-insiders who undertake extensive research on issuing companies would be able to trade on the basis of that information before the issuer published it according to COB guidelines; yet equally well-prepared *initiés*, whether *internes* or *externes*, would be unable to engage in the same trades.

On the other hand, such a standard provides an incentive for the corporation and the *initiés* to disclose important information to the public. Market regulators such as the COB and SEC always promote the most rapid and trustworthy disclosure of information possible, so that investors may make informed decisions. *Cf.* Basic, Inc. v. Levinson, 485 U.S. 224, 230 (1988) (justifying extensive disclosure requirements: "there cannot be honest markets without honest publicity").

139. Consider the fairness of a CEO (or other executive) who trades when he foresees — based on his executive observations — a profitable future for his company. Naturally, a CEO's perspective of his own company is an unfair advantage over the average investor

In *Babcock Fives*,[140] for example, the court of appeals instructed that privileged information must be "precise, special, and certain."[141] In the case, an officer of the company ordered his bank to sell his shares shortly before the company announced significant losses.[142] According to the court of appeals, at the time the officer placed his order to sell, he was aware of only vague rumors within the company.[143] His information was not "precise, special and certain" enough to be privileged.[144] The officer's receipt of more specific information from the company's board of directors before the bank actually executed the order was inconsequential; the officer did not place his order on the basis of specific enough information to violate Article 10-1(1).[145]

In *Banque de Madagascar*,[146] an actuary initiated ongoing negotiations for a friendly takeover of the bank before leaving on an extended vacation. Subsequently, the actuary bought shares in the bank before the takeover became public knowledge. The actuary claimed that his information was too indefinite because he did not know both if the takeover would be successful and the actual dollar amount minority shareholders would receive as a premium.[147] The court, focusing intensely on the actuary's 100% profit, held that the actuary breached his duty not to trade. The court based its holding on two considerations: first, at the time the actuary received his information, the negotiations were *likely to result* in a

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whose sources for speculation are indirect and frequently unreliable. A broad interpretation of "privileged information" would virtually preclude the CEO from trading in his company's securities altogether. Such a preclusion, however, may also provide a disincentive for the CEO to improve his company's performance.

140. Judgment of Mar. 30, 1977, Cour d'appel, Paris, 1978 J.C.P. II No. 18,789 (1st case).

141. *Id.*; *see also* Miller, *supra* note 37, § 7.16[2], at 7-38.

142. Judgment of Mar. 30, 1977, 1978 J.C.P. II at 18,789.

143. *Id.*

144. *Id.* The rumors to which the officer was exposed were fairly alarming: the company was missing payment deadlines on loans; it was threatening to modify its corporate structure and fire a significant number of employees; and it had encountered certain problems in the commercialization of its products. *Id.* The court considered these rumors, heard only by company insiders, to be too general and imprecise to constitute inside information. *Id.*

145. *Id.* Nor did the officer withdraw his order after receiving more specific information. The court held that the important moment with regards to possession of the inside information is the placing of the order by the insider, rather than the execution of that order. *Id.* Thus, the officer was under no duty to cancel his order to sell his shares after he received the more specific (and therefore inside) information. *Id.* The court's holding in the *Babcock Fives* would appear to be more forgiving than the complete abstention doctrine.

146. Judgment of Apr. 18, 1979, Trib. gr. inst., Paris, 1980 J.C.P. II No. 19,306 (2d case) note A. Tunc.

147. *Id.*

takeover; second, the premium he would command as a minority shareholder, although unknown, was *likely to be* much higher than the market price.[148]

4. *Initiés Externes*: The Scope of the Incidental Clause

According to Article 10-1(1), any person who obtains privileged information *incidental to the exercise of his profession or functions* may not use that information to buy or sell on the market.[149] The courts have broadly construed the "incidental" clause of the statute. In *P . . . Carrefour/Allobroge*,[150] *P*, the head of an independent architecture firm, was working with the CEO of Allobroge. While in the Allobroge office building, *P* saw the Allobroge CEO meeting with the CEO of a rival company.[151] Based on that sighting and on vague rumors circulating at the time, *P* speculated the two companies were preparing a joint venture.[152] *P* subsequently bought FF637,623 worth of stock in Allobroge.[153] Shortly thereafter, the two companies announced the joint venture, and Allobroge stock more than doubled in price.[154]

In convicting *P* of insider trading and sentencing him to six months in prison, the court ruled that *P* obtained the information in the exercise of his profession.[155] The court reasoned that *P*'s observations and conclusions (regarding the identities and plans of the CEOs) were only possible because *P*'s job brought him to the offices of Allobroge.[156]

Such a broad categorization of *initiés internes* produces ridiculous — indeed, unenforceable — law. For example, suppose a professional photographer takes a few pictures of the decaying physical plant at a company's main factory. With his newly acquired knowledge, the photographer sells his stock in the company. Sending such a speculator to jail would not only be absurd, but identifying and apprehending such "violators" would be nearly impossible. If the *P . . . Carrefour/Allobroge* court had focused on a

148. *Id.*
149. *See supra* notes 71-73 and accompanying text.
150. Judgment of Oct. 15, 1976, 1978 D.S. Jur at 383.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

reasonable application of law rather than on *P*'s large profits, it may have reached a different result. Basically, the court overlooked the obscure quality of *P*'s information; *P* merely saw two CEOs emerging from a room. This information, like that in *Babcock Fives*, was not "precise, special and certain."[157] Yet, the *P . . . Carrefour/Allobroge* result contradicts *Babcock Fives*.[158] Of course, the trial court heard *P . . . Carrefour/Allobroge* one year before the court of appeals decided *Babcock Fives*. Nevertheless, this illustrates the French judicial system's inconsistent interpretation of an imperfect statute.

Another revealing case involved a bank director who acted as the personal account supervisor for a friend. After the friend informed the bank director of his intentions to acquire control of a certain company, the bank director purchased shares in the company.[159] According to the court, the director's acquisition of the information was incidental to his profession rather than incidental to his personal friendship with his client.[160] This case, like *P . . . Carrefour/Allobroge*, exemplifies the semantic limitations of Article 10-1 and the concomitant judicial willingness to broaden the statutory language.[161]

C. Weaknesses of the 1970 Statute: A Summary

The 1970 Statute and the cases arising under it had three major weaknesses: first, the absence of an explicit provision for prohibiting the transfer and use of information by tippers and tippees; second, the statute's use of the ambiguous term "*exploité*;"[162] and third, the ineffective application of penalties for insider trading crimes.

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157. Judgment of May 26, 1977, 1978 J.C.P. II at 18,789.

158. *Id.* (where an executive is privy to mere rumors within his company, right to trade not barred); *see supra* notes 140-45 and accompanying text.

159. COMMISSION DES OPÉRATIONS DE BOURSE, DIXIÈME RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE 97 (1977)) [hereinafter DIXIÈME RAPPORT].

160. *Id.* Of course, if the court had found that the director received the information in his capacity as a friend, the director would have been innocent. Until 1988, French law contained no provision criminalizing speculation by a tippee who received his information outside the course of his profession. *See infra* notes 192-200 and accompanying text.

161. Hawes, *supra* note 37, at 345.

162. *See supra* notes 90-95 and accompanying text.

1. The Tipper/Tippee Problem

The 1970 Statute specifically sanctioned persons who bought or sold securities on the basis of information received incident to their profession or functions,[163] but made no provision to prohibit the use and exchange of inside "tips."[164] The Government, therefore, could only prosecute *initiés internes* or *initiés externes*; any other party was free to use or exchange inside information without penalty of law.[165] Furthermore, the COB was frustrated in two cases in which persons outside the statutory definition of "insiders" — the son of a company president and the mother-in-law of a company officer — bought stock the basis of information received from their *initiés* relatives.[166] The COB lost both attempts to prove the buyers were straw parties for the *initiés internes*.[167] Even the COB publicly acknowledged that the mere use and exchange of tips was legal —as long as an *initié* was not steering third parties to trade on his behalf.[168] The 1970 Statute's approach to the tipper-tippee problem reflected a deeply rooted tradition in France's business community: insiders were expected to give friends and relatives tips, even if the insiders did not share in the subsequent trade.[169]

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163. 1970 Statute, *supra* note 59.

164. Thus, in the case discussed *supra* notes 159-61 and accompanying text, the court could not penalize the friend/tipper, and it had to stretch Article 10-1(1) to reach the bank director/tippee.

165. DIXIÈME RAPPORT, *supra* note 159, at 94.

166. *Id.* (son case); COMMISSION DES OPÉRATIONS DE BOURSE, ONZIÈME RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE 94 (1978) (mother-in-law case) [hereinafter ONZIÈME RAPPORT].

167. ONZIÈME RAPPORT, *supra* note 166, at 94. The 1970 Statute punished only the insider who traded directly on the basis of the information or who used another person as an intermediary. The COB frequently examined tippees to determine if, in participating in the prohibited transaction, the tippees were really acting on behalf of the tipper. In one such case, the mistress of a director acquired shares in a company in which the director's company was about to invest, before the director's company announced such investment plans. The COB determined that the director and his mistress were not tipper and tippee, but rather author of the crime and accomplice. DIXIÈME RAPPORT, *supra* note 159, at 93. In such a case, the COB could bring an action against both parties.

168. RIDER & FFRENCH, *supra* note 18, at 235 (citing *Small Investors Protected From Insider Dealing*, The Times, July 12, 1974); de Mahenge & Persiaux, *supra* note 12, at 58.

169. *See* RIDER & FRENCH, *supra* note 18. Only a small number of French companies are publicly traded, and many officers and directors of publicly held corporations in France know one another. Aside from attending local social and business functions, many of the business leaders attended one of several elite French business schools. Consequently, the French business community is a relatively intimate society where age-old traditions die hard.

2. The *Exploité* Problem

The 1970 Statute was unclear regarding the prosecution's burden of proving the insider's intent to exploit privileged information. According to the *X . . . Otis Europe/Otis Elevator* court, *exploité* meant only that the insider knowingly used inside information when he initiated the transaction; whether the insider sought financial benefit was irrelevant.[170] Subsequent defendants, however, continued to argue that the text of the statute contained a scienter requirement and required a finding that the insider traded with the sole purpose of speculation.[171] Such a reading of the statute would have made it much tougher to convict an insider, since no insider in French case law has ever admitted both that he possessed inside information and that he engaged in a market transaction because of his inside knowledge.[172]

3. The Enforcement Problem: Ineffective Application of Penalties

Although the 1970 Statute permitted courts to impose stiff penalties, the French courts failed to send any guilty *initiés* to jail.[173] Indeed, *initiés* suffered only negligible fines.[174] By any standard, therefore, the convicted inside traders did not endure severe punishment.[175] Seemingly, the courts believed public exposure of

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170. *See supra* notes 90-96 and accompanying text. Of course, *X . . . Otis Europe/Otis Elevator*'s persuasiveness as a trial court decision is attenuated. Subsequent appellate level cases, however, confirmed the requirement that the insider have knowledge of confidential information at the time of the transaction.

171. *See, e.g.*, Judgment of Oct. 15, 1976, 1978 D.S. Jur at 384; Judgment of Mar. 30, 1979, Trib. gr. inst., Paris, 1980 J.C.P. II No. 19,306 (1st case) note A. Tunc; Judgment of Apr. 18, 1979, 1980 J.C.P. II at 19,306.

172. Miller, *supra* note 37, § 7.17[3], at 7-39. Instead, the insider has always proffered an alternative explanation.

173. In fact, some courts have approved prison sentences for *initiés*, but those courts — for a variety of reasons — have suspended every sentence. Miller, *supra* note 37, § 7.16[4], at 7-40. *See, e.g.*, Judgment of Oct. 29, 1975, 1976 D.S. Jur. at 53 (suspended sentence of six months); Judgment of May 12, 1976, 1976 J.C.P. II at 18,496 (1st case) (suspended sentence of two months); Judgment of Oct. 15, 1976, 1977 J.C.P. II at 18,543 (2d Case) (suspended sentence of three months); *Id.* (3d case) (suspended sentence of six months); *Id.* (4th case) (suspended sentence of ten months).

174. Hawes, *supra* note 37, at 345 (citing A. Tunc, Insider Trading in France 5 (Oct. 30, 1980) (paper delivered at London Conference on New Trends in Company Law Disclosure)). It was a rare case where the *initié's* fine was even as large as his illicit profit. *Id.*

175. In theory, persons suffering a loss because of an insider's illegal trading have a right to pursue damages in the criminal courts through an "*action civile*." Miller, *supra* note 37, § 7.16[5], at 7-40. The judge would hear such an action simultaneously with the State's "*action publique*." *Id.*

corruption would deter further abuses (a theory abandoned by the French Legislature in 1970.)[176]

V. THE 1983 AMENDMENTS

Still facing rampant insider trading in 1983, the French Parliament adopted a comprehensive reform of Article 10-1 ("Revised Article 10-1").[177] Revised Article 10-1 guarantees stricter penalties, broadens the scope of privileged information, clarifies the *exploité*/criminal intent ambiguity, attempts to deal with the tipper/tippee problem, and extends its coverage to corporations or other legal entities.[178]

The Revised Article 10-1 mandates that courts impose fines no less than the profit (if any) made on the transaction.[179] Addition-

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In practice, however, owing to the Court of Cassation's rigid requirements, only one civilian suit has ever been attached to a criminal action. de Mahenge & Persiaux, *supra* note 12, at 58; Miller, *supra* note 37, § 7.16[5], at 7-40.

In the one such *action civile* to date, a financial newspaper claimed to have suffered moral damage when an employee illegally used confidential information gained in the course of investigative reporting and attached its suit against the employee to the criminal action. Although the court found the defendant guilty of the crime, the court refused to award damages in the civil action, finding no link between the crime and the alleged moral damage to the newspaper. Judgment May 12, 1976, 1976 J.C.P. II at 18,496; *see supra* notes 114-19 and accompanying text. *But cf.* Carpenter v. United States, 484 U.S. 19 (1987), *aff'g* 791 F.2d 1024 (2d Cir. 1986) (court of appeals held that defendant reporter had a duty to the newspaper, breached that duty by leaking information to traders, and therefore violated Rule 10b-5).

COB investigations and reports, however, have induced some private settlements out of court. In these, the insider has relinquished his profit and compensated the injured party. COMMISSION DES OPÉRATIONS DE BOURSE, HUITIÈME RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE 99 (1975).

176. *See supra* text accompanying note 58.

177. Law No. 83-1, art. 35 (Jan. 3, 1983), 1983 J.O. 162, 1983 D.S.L. 95 (replacing Article 10-1, *supra* note 60) [hereinafter Revised Article 10-1].

178. Other than the additions or revisions explicitly addressed in this Comment, Revised Article 10-1 duplicates the original Article 10-1. *See* Article 10-1, *supra* note 60; Revised Article 10-1, *supra* note 177.

179. Before the 1983 amendments, thirteen of fourteen cases resulted in fines lower than the illegally obtained profits. Moreover, many of the fines were outrageously low relative to the profits. *See, e.g.*, Judgment of Oct. 15, 1976, 1977 J.C.P. II at 18,543 (3d case) (profits over FF100,000 but a fine of only FF20,000).

The 1983 amendments, mandating increased fines, had an immediate effect on court sentencing. In *Poron*, a January 1985 case, the *initié* bought FF97,950 worth of stock while in possession of insider information. Poron still held the stock when the COB started its investigation, and never sold it thereafter. Even if Poron had sold the stock at its subsequent peak, he would have realized a profit of only FF19,000. The court actually fined him over four times that amount (FF80,000). *See* Judgment of Jan. 28, 1985, 1985 D.S. Jur. at 358.

ally, Revised Article 10-1 raises the minimum alternative fine from FF5,000 to FF6,000.[180] Presumably, this measure was a response to criticism that the court's meager fines lacked deterrent effect.[181]

Revised Article 10-1 extends the scope of privileged information beyond that of the 1970 Statute and its case law. Under the 1970 Statute, privileged information concerned the "technical, commercial or financial operations of the issuer."[182] Revised Article 10-1 reaches all information "on the prospect or situation of an issuer of securities, or on the prospective evolution of a transferable security."[183] This new definition reflects legislative recognition that securities have a commercial existence separate from their issuers.[184] Taken literally, however, Revised Article 10-1 may impose abstention on analysts whose jobs require monitoring general market conditions, government intervention, and/or other external developments.[185] French case law has not yet delineated the actual scope of Revised Article 10-1's privileged information clause.

Revised Article 10-1 also recognized a doctrine already evident in some of the French jurisprudence: the absence of a scienter requirement in Article 10-1(1). As discussed above, one interpretation of the previous text of Article 10-1(1) was that unless the *initié* exploited the privileged information for financial benefit, he was not guilty of insider trading.[186] Although the courts generally rejected this interpretation, defendants continued to advance it.[187] Finally, after twelve years of silence, the legislature confirmed the view of the bench by prohibiting insiders "to engage, or knowingly permit others to engage . . . in one or more operations *on the basis*

180. Revised Article 10-1, *supra* note 177, para. 1.

181. *de Vigneral/Compagnie de navigation fruitière*, the sole pre-1983 case in which a French court levied a fine superior to the amount earned by the insider, was heralded as a breakthrough by noted French commentator Andre Tunc. Judgment of Oct. 26, 1979, Trib. corr., Paris, 1981 J.C.P. II No. 19,518 note A. Tunc. Professor Tunc referred to the fine in that case as a true "punishment" in contrast to the mere "confiscations" of other cases. *Id.*

182. Article 10-1(1), *supra* note 71.

183. Revised Article 10-1, *supra* note 177.

184. de Mahenge & Persiaux, *supra* note 12.

185. For example, a securities analyst might discover through market research into obscure but non-confidential data, that Yoplait, a French yogurt manufacturer, was about to go bankrupt. He would consequently have information regarding the "prospective evolution of" BSN Gervais-Danone, Inc.'s securities (since BSN is Danon yogurt's parent company). As a result, Revised Article 10-1 could preclude the analyst from investing in BSN Gervais-Danone until the information about Yoplait was publicized. *See supra* note 40.

186. *See supra* notes 93-95.

187. *See* Judgment of Oct. 29, 1975, 1976 D.S. Jur. at 55; *see also supra* notes 86-96 and accompanying text.

of the above-mentioned information . . . ."[188] This language — more relaxed than the *exploité* provision of the preempted statute — seemingly quashes further argument regarding an Article 10-1(1) scienter requirement.[189]

Lastly, Revised Article 10-1 specifies that insider trading prohibitions also include "moral persons" (*e.g.*, companies, partnerships, or trusts).[190] If such an entity commits a trading violation, then its managers (legal or *de facto*) will be liable for the crime as if they had personally committed it.[191]

VI. Article 10-3

In 1988, the French Parliament passed Article 10-3, which sanctions "any person who, directly or through an intermediary, has wilfully carried out, or tried to carry out on the securities, futures, or options markets, acts aimed at influencing the normal functioning of the market through the deception of another."[192] Article 10-3 is significant in its additions to the regulation of everyday insider trading and to the tipper-tippee situation. Under Article 10-3, *any person* holding confidential information regarding a particular transaction is under an obligation to refrain from acting on it.[193] The prosecution must show, however, that the non-insider had a wrongful intention (scienter). Article 10-3's scienter requirement manifests a policy judgment that non-insiders should be outside the presumption of wrongful intent.

Article 10-3 requires proof that the individual tipper or tippee intended to disrupt the level playing field by the use and exchange of inside information. The case against a tippee is less complicated: if the tippee possessed inside information at the time he traded, and there was no overriding reason for the tippee to trade in the

188. New Article 10-1, *supra* note 177 (emphasis added).

189. *Poron* was the first published opinion in which the defendant did not raise the absence-of-criminal-intent defense. Judgment of Jan. 28, 1985, 1985 D.S. Jur. at 357.

190. New Article 10-1, *supra* note 177, para. 1.

191. *Id.*

192. Article 10-3, *supra* note 10. Article 10-3 applies the same penalties as Article 10-1. Under Article 10-3, the state prosecutor must seek the opinions of the COB and market regulators before initiating the lawsuit. In private cases, the trial judge must request the opinions of the COB and market regulators before reaching a decision. *Id.*

193. Article 10-3, *supra* note 10; de Mahenge & Persiaux, *supra* note 12, at 58. As discussed *supra* notes 72-74 and accompanying text, Article 10-1 only applied to the stipulated insiders — *initiés internes* and *initiés externes*.

particular corporation's stock,[194] the court can find scienter. The case against the tipper, however, presents greater difficulties for the prosecution: the tipper could always claim that he was merely indiscreet, that he had no knowledge of the tippee's intention to trade on the basis of the disclosed information.

In the early months of 1989, when investigators unveiled the Pechiney scandal,[195] Article 10-3 emerged from its infancy to become a functional statute. Neither Pelat nor Theret — the principal culprits — were statutory insiders; in fact, the COB's report alleged that Theret received the inside information from a tipper inside the French Government.[196] Thus, where Theret and Pelat held confidential information which they failed to disclose before buying securities and thereby intended to realize an illicit profit, they disrupted the "normal functioning of the market."

Unfortunately, Article 10-3 was powerless as applied to the government tipper. Without extremely convincing proof of the tipper's wrongful intent an action against the tipper would fail. Most probably, the COB and the Government were reluctant to expose a fellow government official without conclusive proof that the official violated the statute. In any event, neither the COB nor the government prosecutor ever identified Theret's tipper.[197]

To critics of the French securities industry, this was unacceptable. While President Mitterand was making public statements condemning "takeover mania," the COB appeared inept.[198] Everyone knew that at least on tipper in the Government was involved, but investigators seemed to willfully discover nothing.[199] French

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194. Wrongful intention would be even easier to prove if the tippee was not a regular participant in the stock market or was a relative of the tipper.

195. The COB published the report of its investigation on February 1, 1989. Baumgardner, *SEC/COB Agreements; The French Perspective*, N.Y.L.J. June 21, 1990, at 6, col. 6. In the history of the COB, this was the first time the COB had released the results of such an investigation to the public. *Id.* The report was published in Le Figaro. Le Figaro, Feb. 1, 1989, at V-VI. *See also Scandal, supra* note 4; *Financier Theret Indicted in French Insider Trading Row*, Reuter Bus. Rep., Mar. 3, 1989, at 1 (NEXIS, omni library).

196. *Scandal, supra* note 4. Pechiney was a government-owned company pursuing a takeover of U.S.-based Triangle Industries.

197. *Id.*; *see also* Lever, *SEC Probe Causes Flap in France*, Nat'l L.J., Apr. 10, 1989, at 8.

198. Phillips, *The French Evolution*, INSTITUTIONAL INVESTOR, June 1989, at 3 (int'l ed.) (NEXIS, omni library). Criticism of the COB's impotence was widespread and harsh. *See, e.g.*, Le Figaro/L'Actualité, Jan. 10, 1989, at I, col. 1; *La COB: Un Gendarme sans Baton*, Le Figaro, Jan. 19, 1989, at III, col. 5; Le Figaro, Jan. 19, 1989, at I, col. 3.

199. In the wake of the scandal, one Finance Ministry aide resigned but was never indicted. Lever, *supra* note 197. Once again, the French Government confirmed the public's

law was inadequate; without potent legislation, the COB had a limited capability to regulate. One observer commented that while "[t]he SEC terrorizes the actors on Wall Street[,] . . . the COB does not really frighten anyone in Paris."[200]

VII. THE 1989 AMENDMENT

Responding to the Pechiney scandal, the Socialist Government won approval for Law No. 89-531 (the "1989 Amendment"),[201] which increased the COB's power of investigation and dealt more directly with the tipper problem.[202] The law inserts a paragraph between paragraphs 1 and 2 of Revised Article 10-1. The new paragraph imposes criminal sanctions "on anyone who, in the course of his profession or function holds privileged information on the future or present situation of an issuer, or the future evolution of a security or negotiable option, and communicates that information to a third party outside the normal course of his profession or his functions."[203] Thus, the 1989 Amendment appears even more potent than U.S. law on the tipper situation: on its face, the statute does not require the French prosecutor to show scienter, a fiduciary duty of confidentiality to an employer, or an ensuing trade based on the information.[204]

If properly enforced, the 1989 Amendment will revolutionize the conduct of French insiders. As recently as January 1989, commentators complained that "[f]ar too long insider trading has been going on in France unchecked. It's been very much a domestic game."[205] The 1989 Amendment, however, provides a relatively mild punishment for its violators. While other insider traders are punishable by two months to two years in jail and a fine of FF6,000 to FF10 million (and/or up to ten times the profit real-

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perception of the Government's nonchalant attitude towards insider trading. *Id*; Baumgardner, *supra* note 195.

200. Le Figaro/L'Actualité, Jan. 10, 1989, at I, col. 1.

201. Law No. 89-531, art. 8 (Aug. 2, 1989) 1989 D.S.L. 266 (amending Revised Article 10-1, *supra* note 177) [hereinafter 1989 Amendment).

202. Baumgardner, *supra* note 195, at 7, col. 1.

203. 1989 Amendment, *supra* note 20.

204. *Id.* Some commentators have expressed the opinion that the 1989 Amendment contains a mental element: that "[t]he accused must know that he has communicated privileged information to be convicted." Petersen, *Insider Dealing in France: Beefing up the COB*, INT'L FIN. L. REV., Dec. 1990, at 34. Such a mental element, however, falls far short of requiring the prosecutor to show scienter, fiduciary duty, or an ensuing trade based on the communicated information.

205. Neher, *supra* note 8.

ized),[206] violators of the 1989 Amendment are punishable by a mere one to six months in jail and/or a fine of FF10,000 to FF100,000.[207] The more lenient treatment of tippers reflects the constrained ability to prove a tipper's intent.

VIII. Conclusion

In recent years, the French have made some progress in developing a law to eradicate insider trading. The 1989 Amendment should finally inhibit the rampant exchange of inside tips that existed in the past. Article 10-3, on the other hand, may be somewhat less successful. It creates a cause of action against anyone who acts to influence the "normal functioning of the market" through the "deception of another."[208] Although the Article permits the Government to prosecute non-statutory insiders where the Government can show scienter,[209] the statute is unable to reach news reporters or others who trade based on the probable effect of their own published articles, if these articles contain truthful and nonconfidential information.[210] In such a scenario, the information is true and accessible to the public, thus there is no deception. Amending Article 10-3 so that it prohibits "acts *wrongfully* aimed at influencing the normal functioning of the market" would eliminate the "deception of another" loophole. Lastly, if the French are truly serious about eliminating insider trading in their markets, they must re-adopt a statute similar to Section 16 of the Securities Exchange Act and improve the COB's physical resources to handle the increased workload that would ensue. Section 16, particularly Section 16(b), is simple to administer and easy for market participants to understand; questions such as materiality, scienter, causation, and reliance do not arise.[211] By completely prohibiting short term speculation by insiders, Section 16(b) is also efficient.[212] The

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206. The 1989 Amendment raised the maximum fines. 1989 Amendment, *supra* note 201. The previous alternative maximums were FF5 million or four times the profit realized. *See* Revised Article 10-1, *supra* note 177. The 1989 Amendment also empowered the COB to obtain court orders for search and seizure operations carried out pursuant to COB investigations. 1989 Amendment, *supra* note 201.

207. 1989 Amendment, *supra* note 201.

208. *See supra* note 192 and accompanying text.

209. *See supra* text accompanying notes 193-97.

210. *See supra* note 119.

211. *See* Rider & French, *supra* note 18, at 46.

212. *Id.* Due to its purely objective criteria, extensive, probing investigations are unnecessary.

United States Court of Appeals for the Second Circuit once explained Section 16(b)'s *raison d'être*:

> Commonly termed a "crude rule of thumb," the statute seeks to prevent insiders from realizing profits on securities held for short periods of time. It is not aimed solely at the actuality of evil, or the veritable employment of inside information for purely speculative purposes, but also at the *potentiality* for evil inherent in all insider short-swing trading.[213]

The original Article 162-1, France's one-time counterpart to Section 16(b), failed for two reasons: 1) the absence of a statutory cause of action against the violators and 2) a severe manpower shortage at the COB, exacerbated by Article 162-1's requiring *initiés internes* to file reports on *all* their trading.[214] A new counterpart to Section 16(b) should include several provisions. First, the statute must provide a cause of action (like Section 16(b)'s disgorgement of profits requirement) for the shareholders of the issuer against the violators. This is even more crucial in France than in the United States because the French tradition of condoning insider trading would make French corporations less likely to take private action against the violators. Second, the statute should follow Section 16(b)'s example in requiring the insiders of an issuer to file only the records of their transactions in that issuer's securities. Third, the COB — which currently has less than one-tenth of the SEC's budget and staff — must receive the appropriations necessary to significantly improve and enlarge its resources.

The French have reached a turning point in the regulation of insider trading. Before 1967, insider trading was virtually an accepted practice. Subsequently, from 1967 until 1989, the French Parliament adopted legislation with the ostensible goal of creating a fair, honest market, but only a few violators were convicted. Today, however, the convergence of world markets demands a more aggressive response to securities corruption. Largely due to the Pechiney scandal, both the French public and the international investment community have acknowledged the French deficiencies. In turn, French lawmakers have begun to appreciate the importance of effective securities regulations.[215] As the 1992 European

213. Newmark v. R.K.O. Gen., Inc., 425 F.2d 348, 350-51 (2d Cir. 1970) (emphasis added).

214. *See supra* notes 46-50 and accompanying text.

215. *See Insider Trading Developments*, Fin. Reg. Rep., June 1990 (NEXIS, omni library).

commercial unification approaches, much of the necessary legal framework is in place. With a few adjustments, including a Section 16-type statute and an increased commitment to the COB, the French may be within reach of a legitimate, trustworthy securities exchange.[216]

216. Pursuant to the 1989 Amendment, which granted the COB specific powers to issue insider trading regulations subject to the approval of the Minister of Finance, the COB recently issued six new regulations relating to the issue of privileged information. The most important aspect of these new regulations is a definition of the term itself. For this purpose, "privileged information" is information not in the public domain, which is precise and concerns one or more issuers, securities, futures, or listed 'financial products' and which if made public, could produce an effect on the trading or situation of the security, future or 'financial product' concerned." The regulations further provide for new procedure, "rescrit," whereby the COB may be consulted in advance on whether a certain action is permissible. (This procedure is the French equivalent of the SEC no-action letters). These reforms, if properly implemented, should provide to the players of the French financial markets greater certainty on the precise bounds of both insider information and insider dealing.

Lastly, the regulations permit the COB to impose limited financial sanctions on violators of the insider trading statutes without recommending that such violators be prosecuted in the courts. Jean Saint-Geours, the newly appointed chairman of the COB, explained: "The COB's power to inflict financial sanctions allows us to escape from the all or nothing dilemma. In France, it is very serious to transmit a case to the law courts. It is considered a sign of infamy, so much so that the COB has often been accused of not being willing to take this step and so appeared to be doing nothing. In this perspective, the fine is a very useful intermediate sanction." Graham, *Sanctions to protect—The COB has been given greater powers*, Fin. Times, Oct. 22, 1990, at VIII. Mr. Saint-Geours' attitude, however, appears in line with the old-fashion French view that insider trading is not a serious crime; until such attitudes are changed, the French financial markets will be suspect to international and small investors.