Germany

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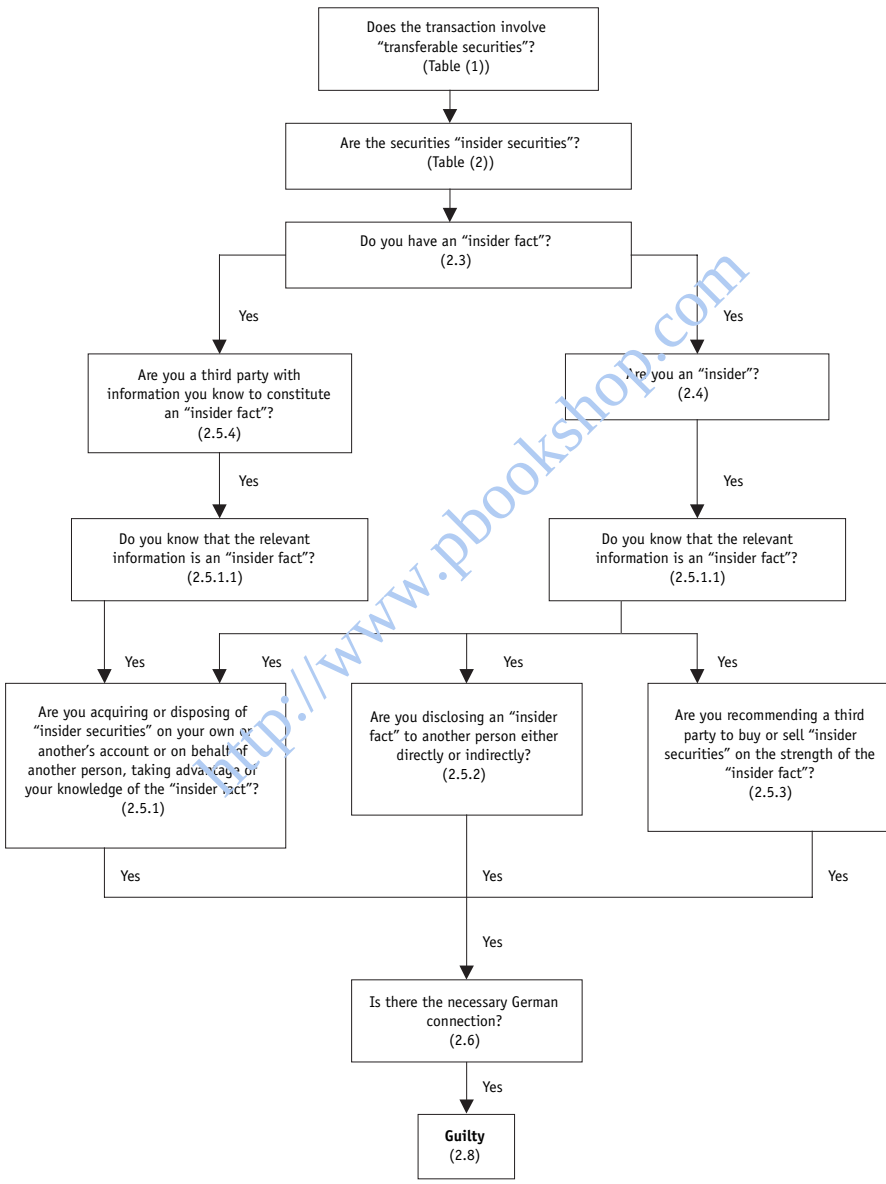

1 INTRODUCTION

German insider dealing rules are regulated in the German Securities Trading Act (*Wertpapierhandelsgesetz*, the Securities Trading Act"). These insider dealing rules are based on the EC Insider Dealing Directive (Dir 89/592 [1989] OJ L334/30). The new EC Directive on insider dealing and market manipulation (Dir 2003/6 [2003] OJ L96/16) will require certain adjustments to the German insider dealing rules which are in force today.

German insider dealing rules distinguish between so-called primary insiders and so-called secondary insiders and provide for the following offences depending on the status of the insider: (1) primary insiders are prohibited (a) from acquiring or disposing of insider securities by taking advantage of knowledge of "insider facts", (b) from disclosing "insider facts" if not authorised, or (c) from counselling a third party to acquire or dispose of "insider securities" on the basis of knowledge of "insider facts"; (2) secondary insiders are prohibited from acquiring or disposing of insider securities by taking advantage of knowledge of "insider facts".

Policing of insider trading is entrusted to the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, the "FFSA"). The FFSA also oversees the compliance by listed companies with their duty to immediately disclose all price-sensitive information.

Since the implementation of the German statutory insider rules in the Securities Trading Act in 1994 only very few cases have come to court. The new German statutory regulations on directors' dealings, implemented in 2002, pursuant to which directors have to publish their dealings in securities of the company they work for, strengthened the protection of the market from insider dealing. For the interpretation and understanding of the German insider dealing rules, there are two important documents: (1) the reasons for the specific terms stated by the German legislator during the legislation process (the "Legislative History"); and (2) the guidelines as to insider dealing and ad hoc disclosure published by the Deutsche Börse AG (as operator of the Frankfurt Stock Exchange) and the FFSA, dated April 1998 (*Insiderhandelsverbote und Ad Hoc Publizität nach dem Wertpapierhandelsgesetz*, the "Guidelines").

2 THE CRIMINAL LAW

2.1 Introduction

The criminalised prohibited insider dealings are regulated in Securities Trading Act, s14. These offences depend on the definitions of "primary insider" and "secondary insider", "insider securities" and "insider fact".

2.2 What Are "Insider Securities"?

For the purpose of the Securities Trading Act securities are defined as tradable securities, that is, securities that are tradeable on a market (Securities Trading Act, s2).

Table (1)

Definition of "tradable securities":

- Shares and certificates representing such shares, such as depositary receipts.
- Debt securities (*Schuldverschreibungen*) – these can be issued by any company, public body or state.
- Profit participating bonds (*Genußscheine*) – these entitle their holders to participate in profits (they normally rank ahead of equity capital but behind all other liabilities).
- Option certificates – such as warrants to buy or sell a tradable security.
- Other securities which are similar to shares or debt securities – these would include for example instruments conferring some, but not all, normal shareholder rights such as a right to participate in profits and/or a surplus of assets on liquidation but with no right to vote.

The above categories of investment only fall within the definition of "tradable securities" if they are capable of being dealt in (whether or not they are in fact dealt in) on a market which is regulated and supervised by a state recognised body and which operates regularly and is accessible directly or indirectly to the public. Such a market (described in Securities Trading Act, s2, para (5)) can be referred to as an "organised market".

Table (2)

Definition of "insider securities":

- Tradable securities which are: (1) admitted to trading on a German stock exchange; or (2) included in a regulated market or regulated unofficial market (*Freiverkehr*) on a German stock exchange; or (3) admitted to trading on an organised market in another state of the European Union or the European Economic Area.
- For this purpose a tradable security is deemed to be admitted to trading on an organised market, or included in a regulated market or a regulated unofficial market (*Freiverkehr*) in Germany, when the application for admission or inclusion has been made or publicly announced.

- Rights to subscribe for, acquire or dispose of tradable securities.
- Rights to payment of a difference by reference to a change in the value of tradable securities.
- Futures contracts on a share or bond index or interest rate futures agreements ("financial futures contracts") and rights to subscribe for acquisition or disposal of financial futures contracts in so far as their subject matter is tradable securities or relates to an index of which tradable securities form an element.
- Other futures contracts which give rise to a duty to acquire, or dispose of, tradable securities.

The rights or futures contracts referred to in the last four categories of Table (2) only fall within the definition of "insider securities" if:

- such right or future contracts as well as the underlying security are admitted to trading on an organised market in a member state of the EU or the European Economic Area or included in a regulated market or regulated unofficial market (*Freiverkehr*) in Germany;
- the application for admission or the publication notice thereof is sufficient.

It follows from the above that a necessary element in the definition of "insider securities" is a listing (or application for a listing) on an organised market in the EU or the European Economic Area and where the insider security concerned is a derivative, the underlying securities must also be so listed. Thus, an over-the-counter derivative which is not included in a regulated market or a regulated unofficial market (*Freiverkehr*) in Germany and which is based on a listed security escapes the net as does a listed derivative based on a security which is only listed, for example, in the United States of America.

2.3 What is an "Insider Fact"?

An insider fact, as defined in Securities Trading Act, s13(1) is:

- a fact which is not publicly known, which relates to one or more issuers of insider securities or to an insider security; and
- which, if it becomes publicly known, may significantly affect the market price of the insider security concerned.

2.3.1 Fact or opinion

Under Securities Trading Act, s13(2) an evaluation based exclusively on publicly known facts cannot itself be an insider fact even if it is capable of significantly affecting market price. Thus, the analyst's opinion, if based on publicly-available information, cannot be an insider fact.

In German legal literature facts are described as an event or a condition that can be perceived and therefore can be proven. For example, profit forecasts do not in most cases qualify as facts. This may, however, be different if such forecasts are based on substantial facts that are not publicly known. Opinions, views or value judgements do not come within the definition of the term "fact". Again, this may have to be assessed differently if such opinion etc. is based on non-public facts. Whether rumours qualify as facts is disputed among German legal authors.

2.3.2 Inter-relationship with Securities Trading Act, s15

With regard to insider dealing rules, the term "fact" has a broader meaning than with regard to Securities Trading Act, s15. Pursuant thereto a company listed on a German stock exchange must immediately disclose new "facts" which may significantly influence the stock exchange price due to their impact on the assets or on the financial or business situation of the company. The reason for this is that insider dealing rules also regulate circumstances where facts are not directly related to the issuer of insider securities.

For example, a change of a substantial holding in the issuer may constitute an insider fact but will not oblige the issuer to make a publication pursuant to Securities Trading Act, s18. The reason for this is that the fact does not occur within the sphere of the issuer. Depending on the size of the shareholding, the shareholder may, however, be obliged to notify the purchase or sale to the issuer. The issuer will then be obliged to publish such notification pursuant to Securities Trading Act, s25 et seq.

2.3.3 Publicly known

A fact is publicly known when an unspecified number of persons has gained knowledge thereof. Pursuant to the Legislative History it is, however, not necessary that the fact was published by the mass media. Moreover, pursuant to the Legislative History it is sufficient that market participants have the possibility to gain access to such fact. It is, in the prevailing view of German legal literature, sufficient, if such fact has been published via a universally accessible information system.

2.3.4 Significant effect on market price

It is noteworthy that the "fact" does not necessarily have to significantly influence the price. The mere possibility of such significant influence is sufficient. In order to determine in a specific case whether the act might significantly influence the price, the issuer will have to produce a forecast and assess the potential of the fact to significantly influence the price.

This calculation is influenced by a variety of factors depending on the specific insider security in question. Therefore, there is no fixed figure pursuant to which

a price influence is deemed to be significant. Such significance must rather be assessed on a case to case basis. Several questions in this regard are still open. For example, it is disputed whether the volatility of the share price has to be taken into consideration. Further, it is unclear whether exaggerated or economically non-justified market reactions (e.g. especially in an overheated market) can be discounted in determining the impact upon the price.

As part of the regulation of the German stock exchanges an expected significant price change must be indicated by a broker when he executes a trade by a "+" or an "–" (pursuant to the regulation an expected price change of 5 per cent or more is deemed to be significant). Market participants therefore deem a price move of 5 per cent or more to be significant. This view is also shared by the prevailing German legal literature. Nonetheless, even lower price changes may qualify as significant in specific circumstances.

2.4 Who Is an Insider?

As noted above, German insider dealing rules distinguish between a so-called primary insider and a so-called secondary insider to whom less restrictive rules apply.

By definition, primary insiders have direct access to insider information. The Securities Trading Act states three categories of primary insiders: (1) directors and supervisors; (2) certain shareholders; and (3) employees, advisers and contractors. In all cases the persons concerned must be aware that the information they know of is an insider fact or at least that it is not publicly known and is price-sensitive.

2.4.1 Directors and supervisors

This category includes members of the management board and supervisory board of the issuer of insider securities or of related companies. "Related companies" has a specific meaning under s15 of the German Stock Corporation Act (*Aktiengesetz*).

Table (3)

The term "related company" can include:

- parent and subsidiary companies;
- members of the same group of companies;
- controlled and controlling companies (i.e., where a relationship of actual management control exists irrespective of shareholdings);
- companies with cross shareholdings in excess of 25 per cent; and

- companies which are parties to an enterprise agreement (these are agreements under which one company has the right: (1) to control the management of another; and/or (2) to transfer profits from one company to another; or (3) to pool profits).

It should be noted that whilst the issuer of insider securities which are shares in a German company is likely to be a stock corporation (*Aktiengesellschaft*), the related companies could take any form including that of a company with limited liability (*Gesellschaft mit beschränkter Haftung* – GmbH) or a limited partnership.

2.4.2 Shareholders

Shareholders who acquire insider information because of their holding of shares in the issuer or a related company form the second category of primary insider. The shareholding must be the causal link between the person concerned and the possession of the information. The extent of the shareholding is irrelevant.

2.4.3 Advisers, employees, contractors

The third category of primary insider comprises persons that gained insider information because of their profession, their business or their function. This category covers such people as accountants, lawyers, notaries and management consultants and their employees. The contractual counterparty category covers any organisation (and its employees) which has access to insider information because of a contractual relationship with an undertaking. This can range from joint venture partners through major service providers such as banks to one-off contractors such as printers engaged to print a prospectus. According to the Guidelines, financial journalists or analysts who are "briefed" by an issuer might on an insider fact become primary insiders too.

The possession of the inside information must be – as in the case of a shareholder becoming a primary insider – because of a casual link, that is, on the basis of or by virtue of the relationship of adviser, employee or contractual counterparty. Additionally, the inside information must come into the possession of the person concerned within the scope of ("*bestimmungsgemäss*") his activity as adviser, employee or contractual counterpart. Persons who acquire insider information only by chance or by violation of the procured limited access to information, such as a secretary who "listens in" to a confidential conversation or reads confidential and sealed post, do not qualify as primary insider under this category.

The relationship of adviser, employee, etc does not have to be with the undertaking which is the issuer of the relevant insider securities, it can be more remote. The only requirement is that the insider fact is obtained by reason of and within the scope of the relevant relationship. Thus, for example, an employee of an investment bank advising a potential bidder can be an insider in relation to the insider securities of the target company.

2.5 What Are the Offences?

Securities Trading Act, s14(1) regulates three offences with regard to primary insiders and Securities Trading Act, s14(2) deals with one offence with regard to secondary insiders.

2.5.1 Dealing by a primary insider

It is an offence for a primary insider to take advantage of his knowledge of an insider fact, to acquire or dispose of insider securities for his own or another's account or on behalf of another.

Table (4)

The constituent elements for the dealing offence are:

- the person must be a primary insider (see 2.4);
- the person must have knowledge of an insider fact (see 2.3);
- the person must subjectively know that the information constitutes an insider fact;
- the person must acquire or dispose of insider securities (see 2.2) for his or another account or on behalf of another;
- the person must intend to take advantage of his knowledge of an insider fact by dealing.

The elements of this offence, apart from those implicit in the definitions of primary insider, insider fact and insider securities, are the following:

2.5.1.1 Primary insider must know relevant information as insider fact

The primary insider must be aware that the relevant information of which he has possession is an insider fact. Whether or not the fact was likely to have a significant effect on market price is an objective matter to be judged, ultimately, by the court but the primary insider must have believed that the fact was price sensitive. He also must believe that the information has not been made public.

2.5.1.2 Primary insider must take advantage of his knowledge

The primary insider must "take advantage" of his knowledge. He takes advantage of his inside knowledge if he makes use of his perceived early knowledge of inside information (i.e., before it becomes public) in the hope and with the intention that he will achieve some commercial advantage. He must, so to speak, intend to "steal a march" on the market or, as the Guidelines put it, he must intend to obtain a special

advantage by breaching the principle of equality of access to information by market participants. Actual achievement of a commercial advantage is not required.

It is the common view that the execution of one's own non-public business decision (that is not influenced by any insider information gained otherwise) does not qualify as taking advantage of one's knowledge and, hence, no offence is committed. For example, if a bidder decides to buy shares of a potential target company prior to taking the decision whether to make a take-over bid, the bidder acts on insider knowledge as to his own intention. However, when acquiring the shares the bidder is merely implementing his own intentions. His action is not driven by the knowledge of insider information. Furthermore, where, in the course of a due diligence exercise, the bidder receives insider information, the bidder is not prevented from implementing the transaction (e.g. to acquire shares of the target company) if the bidder's actions (e.g. the acquisition) is consistent with the original intention. The bidder is, however, not allowed to adjust his plan or action pursuant to the insider information he obtained from the due diligence. In particular, the bidder may, in the case of positive insider information, not acquire more shares in the target company than he initially planned and in case of negative insider information, the bidder may not sell any shares in the target company previously acquired, before the insider information becomes public.

2.5.2 Unauthorised disclosure of insider facts by primary insiders

Disclosure can be direct or indirect. Indirect disclosure is, for example, the disclosure to a third party of a password which enables the third party to access a databank containing insider facts.

Table (5)

The constituent elements for the disclosure offence are:

- the person must be a primary insider (see 2.4);
- the person must have knowledge of an insider fact (see 2.3);
- the person must subjectively know that the information constitutes an insider fact;
- the person must, without authorisation, inform another person of, or make available to another person an insider fact.

The prohibition of unauthorised disclosure is intended to ensure that the securities market operates in a fair and efficient manner. In particular, it is intended to prevent the spreading of insider information and subsequently the enlargement of the circle of insiders and the consequent risk of insider dealing. It is not entirely clear when a disclosure of insider fact is authorised and therefore permitted.

Pursuant to the general view in German legal literature such disclosure should be permitted if the disclosure is made in the normal course of the exercise of the insider's employment, profession or duties. The Guidelines state that any disclosure that is not made because of operational or legal reasons is unauthorised. Pursuant to the Guidelines the disclosure to external experts such as financial advisers, lawyers, banks, accountants and rating agencies as well as intragroup disclosure for operational reasons is permitted.

The prohibition of unauthorised disclosure of insider information must also be reflected in internal procedures of relevant companies. Companies are obliged to take organisational measures to ensure that only such persons have access to insider information who require it for the execution of their tasks. Persons in receipt of insider facts should be informed that they are insiders and the implications of being so qualified.

The Guidelines highlight the fact that the former German practice of providing journalists and financial analysts with selected and potentially price-sensitive information constitutes an offence if such information contains insider facts. Pursuant to the Guidelines special precautions are required to be put in place to ensure that background interviews to journalists and presentations on the company to financial analysts do not result in the disclosure of insider facts.

2.5.3 Recommending others to deal

It is an offence for a primary insider to make a recommendation to a third party to deal in insider securities on the basis of insider facts. The recommendation need not mention the insider fact. It is sufficient if the recommendation is made on the basis of the recommender's knowledge of the insider fact. If the insider in his recommendation mentions the insider fact, the third party to whom such recommendation is made may himself commit the dealing offence in 2.5.4.

Table (6)

The constituent elements for the recommendation offence are:

- the person recommending must be a primary insider (see 2.4);
- the person recommending must have knowledge of an insider fact (see 2.3);
- the person recommending must subjectively know that the information constitutes an insider fact;
- the person recommending must recommend another to acquire or dispose of insider securities (see 2.2) on the basis of his knowledge of an insider fact.

2.5.4 Dealing by a secondary insider

It is an offence for a secondary insider to deal in an insider security for his own account or on behalf of or for the account of another person by taking advantage of his knowledge of an insider fact. The source of the insider knowledge is irrelevant and no particular relationship is required between the secondary insider and any other undertaking or person.

Table (7)

The constituent elements for the secondary insider dealing offence are:

- the person must have knowledge of an insider fact;
- the person must subjectively know that it is an insider fact;
- the person must acquire or dispose of insider securities (see 2.2) for his own or another's account or on behalf of another;
- the person must intend to take advantage of his knowledge of an insider fact.

It should be noted that a secondary insider who is not a primary insider but has knowledge of an insider fact can recommend to anyone to deal in the insider security or disclose the insider fact to a third party without committing an offence. For example, the wife of a board member who overhears a telephone conversation of her husband thus learning of an insider fact can recommend to her son to buy insider securities without committing an insider offence.

2.6 What Is the Territorial Scope of the Securities Trading Act?

The territorial scope of the criminal sanctions in the Securities Trading Act is governed by German Criminal Code (*Strafgesetzbuch*), s3 et seq. Accordingly, the criminal sanctions in Securities Trading Act, s38 apply to:

(1) violations committed within Germany;
(2) violations committed abroad against a German victim, provided that the act constitutes a criminal offence at the place where committed (in a case of insider trading it would be difficult to identify a German victim);
(3) violations committed in a foreign country if the act also constitutes a criminal offence in that country:
    - by a German citizen; or
    - by a foreigner, who is seized in Germany and is not extradited.

As a German court will only apply German criminal law, Securities Trading Act, s38(2) provides that equivalent overseas offences to those contained in Securities Trading Act, s14 are to be treated in the same way as regards punishment. The purpose of this paragraph is said to be to get round the prohibition against extradition of German citizens contained in the German Constitution. It would thus permit equivalent offences perpetrated abroad by Germans or non-extraditable foreigners to be prosecuted and punished within Germany.

2.7 What Are the Defences?

There are no specific defences set out in the Securities Trading Act.

2.8 What Are the Penalties?

Section 38 Securities Trading Act provides that each of the offences may be punished by imprisonment for a term of up to five years or by fine. The amount of the fine would depend on the personal and commercial circumstances of the accused in accordance with the Criminal Code. No distinction is made as regards limits on punishment between primary insiders and secondary insiders.

Although German law does hold companies responsible for the act of its officers, this principle is not applicable where the officer acts on his own, rather than the company's interest. Therefore, if a person commits insider trading it is possibly safe to assume that the person acts purely in his own interest and that, accordingly, the corporate body of which he is the legal representative will not be subject to a fine.

Suspected offences are to be reported by the FFSA to the relevant public prosecutor who decides whether or not a prosecution should be brought.

3 AD HOC PUBLICITY PURSUANT TO SECTION 15 SECURITIES TRADING ACT

3.1 Introduction

Securities Trading Act, s15 requires companies listed on a German stock exchange to inform the public of new facts in its sphere of activity which might, by virtue of their effect on the company's assets, financial position or on the general business situation lead to a substantial change in its share price.

3.2 Which Companies are Covered?

Securities Trading Act, s15 applies to companies whose securities are admitted to trading on a German stock exchange (e.g. trading on the General or Prime Standard of the Frankfurt Stock Exchange). In contrast to the insider dealing rules, the provision does not apply to the inclusion of the shares in a regulated market or an official unregulated market (*Freiverkehr*) or pure OTC trading.

3.3 Information which Must be Published

The provision applies to "new facts" arising in the issuer's sphere of activity which are not publicly known and which, by reason of their effects on the assets, financial position or on the general business situation of the issuer, are apt to significantly change the stock exchange price of its listed securities. In case of listed debt securities the disclosure of a new fact must be made if, instead of being likely to affect the stock exchange price, it is apt to affect the ability of the issuer to comply with its obligations.

3.4 Timing of Disclosure

A particular problem with regard to the ad hoc disclosure is where decisions are taken in several steps. Certain decisions in a German stock corporation require, due to the dual board system: (1) a decision of the management board and subsequently; (2) the consent or approval of the supervisory board. Pursuant to the Guidelines a new fact need not, in substance, be immediately disclosed until it becomes a final fact. In the case where the approval of the supervisory board is required, the duty to disclose becomes effective only with such approval. The Guidelines reason that only with such approval does the fact become final and sufficiently determined. In practice, it is recommended to keep the period of time between the decision of the management board and the approval of the supervisory board as short as possible.

3.5 Which Facts are Relevant?

The Guidelines distinguish ad hoc disclosure from normal regular disclosure such as the publication of annual results and interim reports. The two categories of disclosure are not, however, mutually exclusive. Annual or interim financial statements may contain facts that must be disclosed immediately. The Guidelines take the disputed view that such facts must be published as soon as the management board has drawn up the financial statements and before the supervisory board has approved, as required by the German Stock Corporation Act, such financial statements.

Internal studies, analyses, plans, etc do not constitute facts within Securities Trading Act, s15 since they do not, by themselves, have any impact on the business of the issuer. Only if steps are taken to implement any such plan can any requirement to make an announcement arise.

Events, the consequences of which cannot be determined because their effects could be offset by other circumstances or positive countermeasures, are not new facts within the meaning of the Securities Trading Act because they do not have the required effect on assets or the financial or business situation of the issuer.

3.6 When Is a New Fact Likely to Affect the Share Price?

The disclosure duty becomes effective if, as with insider dealing rules, the new fact is merely likely to significantly move the share price. It is not necessary for the share price to have actually moved. To determine whether a new fact is apt to significantly move the share price is probably the most difficult question company boards are faced with. As stated above, the Guidelines suggest that a change of 5 per cent or more in the share price is deemed to be significant (see 2.3.4 above). This is not an absolute rule and the company board has to consider that even lower price changes may be deemed significant depending on the circumstances. Furthermore, any board will have to take a cautious approach given that its decision will be forward looking but will be judged retrospectively.

If a management board is uncertain whether a disclosure obligation has arisen it may well be sensible to seek advice from the company's brokers to understand the impact that the relevant disclosure would have on the share price. If there remains uncertainty, the prudent course would be to disclose the fact. If this were damaging to the company's interests, the management board may seek exemption from the disclosure requirement (see 3.7). Advice from an expert, such as a broker, that no announcement is required may help to establish that the board did not act recklessly in choosing not to announce.

3.7 Exemption from Disclosure

Upon application by the Issuer, the FFSA may exempt the issuer from its duty to disclose facts if it can show that disclosure would be likely to damage its legitimate interests. The issuer will not be in breach of its duty to disclose if application for exemption is filed without delay upon occurrence of the relevant fact – which otherwise would have triggered immediate disclosure – and the FFSA later refuses to grant an exemption.

The Guidelines suggest that an exemption should be granted if the board of directors would have the right to refuse to supply the relevant information in a shareholders' meeting, as set out in Table (8).

Table (8)

The board of directors has a right to refuse to supply information to shareholders under German Stock Corporation Act, s131:

- to the extent that, according to sound business judgement, provision of the information would be likely to cause material damage to the issuer or a connected company;
- if the information refers to valuations made for tax purposes or to the amount of individual taxes;
- if the information refers to the difference between the book value and the fair market value of assets, unless it is the shareholders' meeting that approves the annual financial statements;
- if the information refers to the accounting and valuation methods, provided that the notes to the annual financial statements provide sufficient information as to these methods to show a clear view of the financial position of the issuer, unless it is the shareholders' meeting that approves the annual financial statements;
- if supplying the information would constitute a criminal offence;
- in so far as, if the issuer is a bank, certain information about accounting and valuation methods or settlements of accounts need not be provided in the annual financial statements.

However, it should be noted that the exemption from disclosure will only be granted in exceptional cases. Pursuant to the Guidelines it is necessary for an exemption to demonstrate that there is sufficient evidence that the critical situation of the company applying for exemption will be removed or resolved at the end of the exemption period. For example, in the case of a restructuring of a company, an exemption could be granted where an early publication of such restructuring would jeopardise the prospects of success of such measures.

3.8 Method of Disclosure

Prior to public announcement of the new fact the company concerned must first disclose such fact to the FFSA and to the managing board of the stock exchange or exchanges on which the relevant securities are listed. Disclosure is required to EUREX, if a derivative that relates to a security of the issuer, is listed thereon. The purpose of this obligation is to enable the authorities to consider whether to suspend dealings in the securities concerned. The Guidelines suggest, however, that suspension of dealings is to be regarded as a last resort and avoided if at all possible. The Guidelines suggest that the prior notice required by the authorities will in normal cases be between 20 and 30 minutes.

Once prior notice has been given, the issuer must cause the new fact to be published either in a stock exchange-approved national newspaper or via an electronic information system widely used by market participants. Hence, a press release issued prior to publication in the approved manner will be an offence under the Securities Trading Act.

In principle, the publication must be in German. The FFSA has granted the general exception to foreign issuers listed on a German stock exchange to make the publication in English. According to the FFSA a German language announcement permits the market to be informed earlier than would otherwise be the case if a translation had to be prepared.

The issuer must be the author of the publication and a reader must be able to identify the issuer as the author. The issuer must publish all relevant facts. However, the FFSA may exempt the issuer from this requirement in suitable cases to the extent that the issuer may be allowed to publish a summary of the facts, provided complete information is available at the paying agents of the issuer and notice to that effect is given.

The issuer need not describe the (possible) effect of the new fact on its assets, financial position or business situation. It is sufficient that the issuer describes the new fact. No other matters (e.g., advertisements) may be included in the publication. Key figures used in an ad hoc disclosure must be common to business and must allow a comparison to previously used key figures. Published new facts that are incorrect must be immediately corrected in a new publication in the form required by Securities Trading Act, s15.

The announcement must be made without delay, that is, it may not be negligently or intentionally delayed. The issuer may take its time to examine carefully the effects of an event in order to determine whether there is a duty to disclose. However, since the likelihood of an effect on the price is a crucial element, examination time is limited.

3.9 Consequences of Failure to Immediately Disclose

If the issuer fails immediately to publish a new material fact or publishes untrue information in a disclosure pursuant to Securities Trading Act, s15 the issuer is liable to compensate a third party for the damage resulting from the omission or incurred by that party in reliance on the correctness of the information. However, the third party must have (1) bought the securities after the omission is made or publication occurs and still own the securities upon disclosure of the information that the information was incorrect; or (2) bought the securities before the relevant fact has occurred or before the publication is made and must have sold them after the omission/before disclosure of the fact that the information was incorrect. The German Federal Finance Department has proposed to extend this liability to include

members of the management and supervisory board who are responsible for the omission of a new fact or the publication of an untrue fact.

Further, criminal sanctions apply. A failure to pre-notify the authorities gives rise to a fine of up to EUR 250,000 and a failure to comply with the obligation to immediately disclose a new fact can result in a fine of up to EUR 1.5 million. The precondition for the fines is, that the failure was, in either case, because of intentional or reckless behaviour. Directors of the issuer may be personally liable.

3.10 Practical Examples of Facts Requiring Disclosure

The Guidelines make it clear that it is not possible to devise a generally binding catalogue of facts requiring disclosure. However, it has suggested some examples, listed in Table (9), where a management should consider whether in the given conditions such facts call for disclosure.

Table (9)

Examples of situations where disclosure is required:

(1) Changes to assets, liabilities and financial situation:
- sale of a key activity;
- merger contracts;
- acquisitions, disposals, changes of corporate status, demergers and other important structural changes;
- entry into a control and/or profit transfer contract (e.g. a contract between parent and subsidiary whereby the subsidiary agrees to transfer its profits and losses to the parent);
- acquisition or disposal of significant shareholdings;
- take-over offers and offers of compensation arising from entry into profit transfer contracts;
- capital changes (including capitalisation of reserves);
- change in dividend rate;
- imminent suspension of payments/insolvency;
- reporting of losses pursuant to Stock Corporation Act, s92;
- significant extraordinary measures (e.g. following serious damage or discovery of criminal activities) or significant extraordinary profits.

(2) Changes in the general course of business:
- withdrawal from or adoption of new corporate activities;
- entry into, change or termination of particularly important contractual relationships (including co-operation agreements);

- important discoveries, filing of important patents and the grant (whether as grantor or grantee) of important licences;
- significant product liability or environmental liability developments;
- litigation and cartel proceedings of a special significance;
- changes in key personnel in the undertaking.

CASE STUDY

Sunburn AG, a company listed on the Prime Standard of the Frankfurt Stock Exchange, manufactures sun protection lotion. Fabian, a professional meteorologist discovered upon analysing the latest weather data that the summer season will start this year six weeks earlier than in previous years. Since Fabian knows that the public is aware of the dangers of extensive sun exposure he instructs his bank to buy shares in Sunburn AG. Meanwhile, Berthold, an analyst of shares, is told by Carl, a member of the supervisory board of Sunburn AG, that the company will retain Peter as Chairman of the Management Board. Peter has a reputation in the sun lotion industry as being highly successful in generating extraordinary profits. Berthold cancels instructions which he had previously given to his bank to sell his Sunburn AG shares. Berthold also tells his friend Eva that Sunburn AG "is a great buy". Eva subsequently buys shares in the name of her mother from an old friend of hers as a private transaction. Alex, Carl's private chauffeur, listens in on a telephone conversation Carl had in the back seat of the car, where he discussed the latest profits with another board member, overhearing Carl saying "if this becomes known, our share price will go through the roof". Alex immediately buys shares in Sunburn AG.

Fabian

The first issue is whether knowledge of the early summer constitutes an insider fact. To qualify as an insider fact, the fact must relate to the security or the issuer. It is the common view expressed in the Legislative History and by the legal literature that the fact must only relate to the security or the issuer in a sense that the information is likely to cause a significant change in the market price of the security. Thus, even market data of a general nature, such as the knowledge of an early summer, can be sufficiently specific if that data, if made public, could cause a significant price change in the relevant securities.

A further requirement for the fact to qualify as an insider fact is, that the information is not publicly known. For a fact to be public knowledge it is, pursuant to the Legislative History, sufficient that market participants have the possibility to gain access to such information. It is not necessary that

the information is published in the mass media. Thus, if the facts on which Fabian's conclusion is based were publicly available, his knowledge of the early summer does not constitute an insider fact and Fabian is not guilty of insider dealing. If, however, Fabian's conclusion was based on information that could only be obtained by making use of a database available only to subscribers or specialist knowledge, courts may conclude that such information is not publicly known. In this case, Fabian would qualify as an insider by purchasing shares in Sunburn AG would commit an insider dealing offence. It is not clear, whether Fabian qualifies as primary or secondary insider. As Fabian has gained his information by reasons of his profession it could be argued that Fabian is a primary insider, as it is not required that he has, when gaining the information, any relationship at all with Sunburn AG.

Carl

Carl, as a member of the supervisory board, is a primary insider. As a primary insider, Carl must refrain from disclosing insider facts to third parties without being authorised to do so. Whether Carl has committed an offence will depend on whether the fact that the company will retain Peter as Chairman of the managing board will significantly influence the price of Sunburn AG shares if this information becomes publicly known. This question is a matter of fact and will, in practice, be judged retrospectively once it is announced. An actual change in the share price of more than 5 per cent will indicate a "significant influence" on the price of the shares. It is irrelevant whether Carl expected Berthold to trade on the information. Disclosure of inside information to analysts and journalists is generally not considered to be authorised.

Carl may also be guilty of unauthorised disclosure with regard to Alex. A mere opinion does not constitute an insider fact. However, if an opinion is based on, or goes hand in hand with, hard facts it may be treated as a fact. If a member of the managing board makes a statement that the share price of his company will rise if some undisclosed facts become publicly known, such an opinion clearly is an insider fact, because it is based on insider facts. Carl was not authorised to disclose the insider fact to Alex, as Alex need not know of the insider facts to perform his duties. Whether Carl committed an insider offence depends on whether he acted intentionally. Negligent behaviour in this respect would not be sufficient. In order to determine whether Carl acted intentionally, a court would apply the test whether Carl: (1) knew of the possibility; and (2) accepted that Alex could hear what he was saying. If that were the case, Carl would be guilty of unauthorised disclosure of insider facts.

Berthold

As regards the cancellation of his order Berthold did not commit an insider dealing offence since only the sale or purchase of insider securities is

prohibited. Where a person refrains from acquiring or disposing of insider securities, a crucial element of the offence is lacking. Further, where Berthold placed an order to buy, then learns of an insider fact and refrains from cancelling his order, Berthold would not be guilty of insider dealing for lack of taking advantage of his inside knowledge.

Berthold may, however, be guilty of recommending to Eva the purchase of Sunburn AG shares. Recommendation is any unilateral declaration with the intent to influence another person that expresses the advice that certain conduct would be to the addressee's benefit. It is irrelevant whether Eva knew that the recommendation was based thereon. However, only primary insiders must refrain from such recommendations while secondary insiders are merely prohibited from buying and selling. Berthold will most likely qualify as primary insider because he obtained his knowledge by reason of his profession.

Eva

Eva would be guilty of insider trading if Berthold's tip was insider information. Again, an opinion is only considered an insider fact when it is based on, or goes hand in hand, with hard facts. Therefore, if Eva knew that Berthold's tip was based on hard insider information, Eva is guilty of insider trading since the insider rules also apply in off-market transactions. It is further irrelevant that Eva did not acquire the shares in her own name rather than in that of her mother's since insider trading includes any dealings in the name or on behalf of third parties. In practice, however, it will not be easy to prove that Eva knew that the information was an insider fact where the tip is of such a general nature.

Alex

As a chauffeur, the listening in on telephone conversations is not specifically related to Alex's profession so that Alex does not qualify as primary insider. Nonetheless, Alex is guilty of insider dealing because any person who has knowledge of inside information, even if obtained occasionally or by chance, must refrain from acquiring and disposing of insider securities. Had Alex merely recommended the inside information to another person or had he disclosed his inside knowledge to a third person, Alex would not have committed insider dealing. In that case, however, he may be guilty for solicitation or aiding and abetting.