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The Insider Trading in the European Union Law

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Abstract- Insider trading is the negotiation in stock market misusing privileged information by people who are in exclusive position to access to such information, should be informed the market as a "relevant fact", except in an ongoing operation, on which a legitimate interest to keep reserved is held. They are called corporate insiders. The determination of the legal system of the international financial operations with privileged information presents certain difficulties, due the absence of a common regulation, also in the European Union.

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The Insider Trading in the European Union Law

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I. Insider Trading Regulation in the European Union

Stock markets in the European Union have seen significant changes, fundamentally arising out of the strong competition from foreign markets and, in particular, from New York and Tokyo stock exchanges (1) (2). This has created interest in carrying out a process of deregulation and neo-regulation, at a moment when a competition between markets has been created to attract the negotiation of the same values (3).

The Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse directive) is part of the process of preparing new rules in financial matters for the stock market, proposed by the Committee of Wise Men which is chaired by Alexander Lamfalussy, also assumed for banking and insurance sectors (4). Regarding its scope of application, this includes operations about financial instruments that are quoted in at least a regulated market of a member State of the European Union (5).

However, the MAD is hereby repealed after the entry into force of the Regulation (EU) nº 596/2014 of the European Parliament and of the Council, of 16 April 2014, on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (6). The Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) has also been approved.

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II. The Insider Trading in European Private International Law

a) International competence of stock market authorities

Article 10 of the MAD uses two criteria to indicate the jurisdiction of the administrative authorities (5). Under the activity criterion, Spanish authorities monitor behaviors that are against the market integrity which take place in the Spanish territory, despite the fact that the securities are not quoted in a Spanish market. According to the effect criterion, Spanish authorities have jurisdiction to monitor behaviors that are against the market integrity which take place in the Spanish territory, in the case of financial instruments which are admitted to quotation in a Spanish market (7).

This same pattern is followed by the art. 22 of the Regulation 596/2014, but it is also applied when the action of the insider takes place in the territory of a member State of the EU, leaving open the possibility that judicial authorities take part.

b) Market protected from the behavior of the insider

The anti-insider trading legislation seeks to avoid that the insider operates with (informative) advantage (8). If the execution of financial operations with advantage is avoided, it has an —indirect— impact in the achievement of information symmetry. What it is achieved through the "rules of conduct", which should not be confused with codes of ethics, by making (the first ones) authentic duties whose non-compliance implies a set of sanctions (administrative and criminal).

The anti-insider trading legislation aims to safeguard the stock market integrity and therefore the damage occurs on the market (and not to a particular investor who operates in such market). Therefore, anti-insider trading rules are applied territorially in accordance with an unilateral criterion of stock market regulation, but they are modified with the concrete and specific (material) objective that fulfill (8).

c) Civil liability through the use of privileged information: International competence

Art. 7, 2º of the Regulation (EU) nº 1215/2012 of the European Parliament and of the Council, of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, contains a special competition forum in the area of civil liability ("*as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those*

proceedings, to the extent that court has jurisdiction under its own law to entertain civil proceedings").

Its interpretation by the Judgment of the CJEC has allowed to consider two different places: causal event and causing damage (9) (10). However, the Judgment of the CJEC has made additional considerations when it is a financial tort. And, in particular, it is included the Judgment of the CJEC of 10 June 2014 (As. C-168/02, Rudolf Kronhofer v. Marianne Maier, Christian Möller, Wirich Hofius and Zeki Karan)

In insiders' tort, the criterion of jurisdiction must take into account the preventive purpose of anti-insider trading rules of conduct. The quotation market is the place where the investor tailors his/her decisions and therefore it is not an unknown place (to the effects of having to go to litigation in such territory to their authorities).

d) Civil liability through the use of privileged information and lack of disclosure of information: Applicable Law

It is regulated by the Regulation (EU) nº 864/2007, of 11 July 2007, of the European Parliament and of the Council, on the law applicable to non-contractual obligations (Rome II). Art. 4, 1º states that, in the absence of choice (art. 14), the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

Nevertheless, in any case, if it is demonstrated that the damage is manifestly more closely connected with another country, the law of that other country shall apply (escape clause). Finally, Regulation Rome II contains in the art. 17 the canon that can be seen to assess the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

However, the doctrine makes a set of considerations on the problems presented in Regulation Rome II when dealing with the response to the —increasingly frequent— financial torts that cause a damage, and therefore arising out of civil liability that, moreover, have been aggravated after the entry into force of such community law, despite those issues had been previously anticipated.

And, in particular, the "*regulation through litigation*", used in USA, to organize the stock market, is not allowed (8). The German Council for Private International Law has made a proposal for amendment, which is to include a new art. 6 *bis* for financial torts. The quotation of the financial instrument is the cornerstone for its regulation. In any case, it is stressed the attractive force that the stock market exerts to determine the applicable law to the legal relationship when these are operations with privileged information. Finally, the rules of behavior of the quotation market are recognized as "mandatory laws", and the Private International Law must have a special connecting criterion for its application.

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