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***Insider trading:* criminal intervention in the white-collar stock market.**

Insider trading: criminal intervention in white-collar crime in the securities market

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Summary

Brazilian criminal law is constantly evolving to keep pace with the ever-changing needs of our society. Given this, there is undeniable social concern regarding the need to toughen the fight against crime, especially so-called "crimes of blood." However, not only do these crimes deserve greater attention from the penal system, but especially so-called "white-collar crimes." One way to combat such offenses is through criminal sanctions for conduct against the financial market, such as *insider trading.* While insider trading is already punished in administrative and civil areas, the need for sanctions in the criminal sphere is being debated. Criminal sanctions are also necessary given the serious damage that *insider trading* can cause to the financial system, potentially generating severe economic crises that directly affect the population. It is therefore urgent to severely combat the practice of *insider trading* in the context of the Brazilian securities market, so that, in addition to providing security for investors by protecting their assets, it directly impacts the economic security of the State.

Keywords: Insider trading. Need for criminal repression. Capital markets. Economic security.

Abstract

The Brazilian criminal law doctrine has been undergoing continuous transformation in order to keep pace with the evolving demands of society. In recent years, public concern has increasingly focused on the intensification of punitive measures, particularly in relation to violent crimes. However, equal—if not greater—attention must be directed toward so-called white-collar crimes, especially those committed within the financial market. Among these, insider trading stands out as a particularly harmful practice. Although it is already subject to administrative and civil sanctions, there remains an ongoing debate regarding the necessity of criminal enforcement. The imposition of criminal sanctions for insider trading is justified by the significant harm such conduct may inflict upon the financial system, potentially triggering severe economic crises with widespread social consequences.

Strengthening criminal repression in this context is therefore essential not only to ensure investor protection and safeguard private assets, but also to preserve market integrity and promote the economic security of the State. In this regard, a robust criminal response to insider trading within the Brazilian securities market constitutes a necessary instrument for maintaining public trust and financial stability.

Keywords: Insider trading. Capital markets. Economic crimes.

1. Introduction

In the mid-19th century, the practice of *insider trading* was not considered a crime, being only known as an advantage acquired by a few. Thus, obtaining information privileged positions were considered legal, and the leaders of business corporations used them with habitual practice. Given this scenario, those holding important positions in the company, who had

They gained access to information about their future direction in the economic market, enriching themselves at the expense of...

own company and other external participants.

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However, in the 20th century, there was intolerance towards the practice of *insider trading.* due to numerous allegations regarding the enrichment of *insiders* at the expense of others . components of the securities market. This change in the judgment of disapproval of such a practice occurred, First in the United States and then in Europe.

Thus, the first devices, which aimed to protect investors against the practice Insider *trading* emerged in the US shortly after the 1929 crisis, through the *Securities Act* of 1933. and the *Securities Act* of 1934. These rules regulated the securities market. Later, in 1942, it was published by the regulatory body of the American capital market, Rule *10b* -5, which regulated the practice of *insider trading,* also inspired the creation of rules around the world1 .

In Brazil, the issue in question is much more recent, having only been regulated by Law. Law 4.728/1965, in its article 3, item X, stipulated that it was the responsibility of the Central Bank to oversee the use of... privileged information obtained by *insiders* for their own benefit or that of a third party. However, such The device does not define what constitutes privileged information, which made oversight difficult. Furthermore, The prohibition against *insider trading* was not very clear or objective in that provision.

It was only with the advent of the Corporations Law of 1976 that the conduct studied was It is defined. In its article 155, it was determined that administrators, their subordinates, and third parties are subject to the provisions of this law. due to your trust, the confidentiality regarding company information, which could influence the market of capitals and that have not yet been disclosed. The same provision also prohibits the use of Relevant and undisclosed information, by those who have access, in securities trading in capital markets. Such a practice constitutes a civil offense, which can be committed by anyone. A person who obtains privileged information.

Nowadays, the CVM (Securities and Exchange Commission) is the body responsible for Oversight and regulation of the capital market. Therefore, it is the main source for the study. from *insider trading,* considering its normative quality, which, through its instructions, It provides the necessary concepts for analyzing the topic.

2 *Insider trading:* basic legal outlines

First, it is necessary to identify the perpetrator of this illegal practice known as *insider trading.* *trading ,* which in turn can be punished in the administrative, civil, and criminal spheres. cumulative. Therefore, an *insider* is defined as someone who, by virtue of the position they hold in the company, obtains privileged information about it, such as, for example, the administrators and their

1MACIEL, Karina Tereza da Silva. MARTIN Antônio. **Effectiveness of the repression of Insider Trading.** Available at: http://www.publicadireito.com.br/artigos/?cod=40a65e5a692bf1f5. Accessed on 15/02/2015.

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direct employees, the controlling shareholder, the supervisory board and its direct employees, or third parties trusted members of the business community, such as lawyers and accountants.

This group of people has a duty to maintain confidentiality regarding relevant information that is still available. They were not disclosed. Failure to comply with such conduct will constitute an unlawful act, and, Consequently, the repressive action of the State is necessary to protect the legally protected interest. Therefore, The perpetrator of this crime is precisely the *insider* who uses this information to acquire economic advantages for him or for third parties.

According to the authors José de Faria Costa and Maria Elisabete Ramos[2], the legal good Those protected are the members of the economic community. Therefore, the illegal act does not harm only one. not a specific individual, but rather the diffuse interests of society. Therefore, it is unequivocal that... The need for parity in information so that everyone can have equal opportunities. in the economic market.

Another important aspect to be studied is the understanding of the term *"insider information."* This concept needs to be made explicit, because without it, the application of [the law/method] is not possible. sanction, since the elements that constitute it must be characterized as objectively as possible. crime.

Law 6404/1976[3], Article 157 and Article 2 of CVM Instruction No. 358/2002 explicitly state What constitutes "insider information" or "relevant information"?

> In any decision by the controlling shareholder, resolution of the General Meeting or of the administrative bodies of the publicly traded company, or any other act or fact of a public nature. political-administrative, technical, business, or economic-financial event that occurred or is related to your business that could significantly influence it:
>
> I- In the quotation of securities issued by the publicly traded company, or referenced to them;
>
> II- In the investors' decision to buy, sell or hold those securities; III- or to exercise any rights inherent to the status of holder of securities issued by the company or referenced to them.

Therefore, it is understood that privileged information is that which is capable of influencing the actions of investors, being the act of buying or selling their shares or exercising some right of their own. Such information may imply potential enrichment at the expense of those who do not have it. They have.

It is also necessary to inquire at what point information is constituted. privileged, to identify the birth of the duty of confidentiality of those who are in positions relevant to the company. According to the provisions transcribed above, it is possible to identify such

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2COSTA, José de Faria and RAMOS, Maria Elisabete. **The crime of** *insider trading :* information as a legal-penal problem. Coimbra: Coimbra, 2006.
Law 6404/1976. Law of corporations.

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moments, such as, for example, from the decision-making or guiding act of the general assembly of

It is a publicly traded company. Thus, the duty of confidentiality arises.

It is also noted that, from the decision to seek modern equipment or new economic explorations, the obligation of

confidentiality arises. It is important to emphasize that such information

These privileged details are private in nature, given that they have not yet been disclosed to the public.

Thus, it is evident that, in order to characterize the crime (which will be discussed later), it is necessary that

there is a violation of the confidentiality of the information.

Another important aspect is the timing of the commission of the offense, characterized as *insider trading.*

Trading, which occurs during the exploration of the economic market, is based on information.

relevant and confidential.

It is also permissible to assert the existence of moral damages arising from *insider* trading practices.

Trading, since it generates distrust and a lack of credibility in the financial market. Furthermore,

It is evident that this conduct negatively influences even those who do not participate in the exploitation.

from the real estate market, since it discourages new investors.

Since the legally protected interest is diffuse in nature, moral damages are also diffuse.

due to the impossibility of measuring the number of people harmed by the illegal act. Thus,

The possibility of filing a public civil action seeking compensation for the damage is being considered.

morality in relation to the community.

Finally, in order for there to be compensation for the financial damage, it is necessary that the investors

Those harmed must prove the abuse and quantify the value of the losses suffered in the negotiation.

Furthermore, it is necessary to provide proof that the negotiation was carried out directly with the

insider. Thus, once all the requirements studied in this article have been identified, it is our duty

The state must punish those involved.

2.1 On the repression of *insider trading* in the Brazilian legal system

The so-called threefold repression of *insider trading,* which exists in the Brazilian legal system,

This can be understood through civil, criminal, and administrative repression, the nuances of which will be presented, as well.

how to analyze whether there are relationships between the decisions made in each of these spheres. It is important to emphasize

that this is an offense protected by different legal areas, and therefore, the interest in taking action of each...

One could be assigned based on different grounds.

2.1.1 Regarding administrative

offenses : The CVM (Securities and Exchange Commission) is responsible for carrying out administrative repression.

Securities), the body responsible for regulating and overseeing the securities market[1],

having, as its guiding principle, the state's interest in maintaining a fair, transparent and...

an unsuitable environment, in which investors have the security to act without fear of the existence of...

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flaws that could harm them.

Administrative offenses are regulated under the so-called Corporations Law.
(Law 6.404/1976), which, in its article 155, paragraphs 1, 2, 3 and 4, assigns to the administrator, as well as to
employees or trusted third parties have an obligation to maintain confidentiality regarding relevant information.
These figures have not yet been disclosed to the capital market, and it prohibits their use for trading securities.
furniture, whether directly or indirectly. To establish an administrative offense, it is necessary to
proof of the causal link between the act of one of those people (disclosure of non-disclosure of information)
(disclosed), the buyer's action and the benefit obtained.

Thus, with the wording of paragraph 3 of article 155, the prohibition of *insider* trading is broadened to include...
all those who gain access to privileged information, concluding that the practice is possible.
From *insiders* to any and all participants in the capital markets.

This regulation stems from the duty of loyalty inherent in administrators, as follows: “the
Article 9, V, VI, of Law 6385/76, assigns to the CVM (Brazilian Securities and Exchange Commission) the responsibility of investigating and punishing fraudulent conduct or
"Illegal and unfair practices that cause harm to people residing in the national territory."

The practice of *insider trading* constitutes a serious offense, according to the provisions of Article 18 of the...
CVM Instruction 358/024 In addition to the fine mentioned, the possibility of imposing a suspension may also arise.
or temporary disqualification for up to 20 years from holding the position of administrator or fiscal council member.
of a publicly traded company or another company that requires authorization from the CVM.

It is important to emphasize that the US-inspired national legislation allows for fines,
which may be imposed alone or in combination with another sanction, and may be in addition to
The value of the damages caused to the market and/or the profit earned by the *insider.*

The administrative sanction, foreseen for the practice of *insider trading,* should be aimed at reprimanding...
Its practice is imposed to prevent such an act from happening again, and it has a punitive character.

2.1.2 Civil wrongdoing

The legal interest related to civil protection is the asset protection of investors, that is, the
damages suffered by individuals as a result of *insider trading,* such as the devaluation of their assets.
actions resulting from this practice, which can be either positive or negative.

The injured investor is considered the party entitled to bring this action, without
to disregard the possibility of a public civil action, spearheaded by investor associations or,
even by the Public Prosecutor's Office, in cases of collective moral damages.

Regarding solidarity in civil law, this arises from the law or from a contractual obligation.
Law 6.404/2004, in its aforementioned article 155, assigns joint and several liability to the administrator and his employees.

[4] CVM Instruction No. 358/2002

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employees and trusted third parties, that is, the list already *mentioned above,* exemplified by the compensation of damages caused to individuals, who are liable with their respective assets.

The actions should be brought in the ordinary courts, which have jurisdiction to hear the case. said individual action or public civil action, so that the injured party's assets may be repaired. through the practice of *insider trading,* thus characterizing the protected asset in the civil sphere.

2.1.3 Of the criminal offense

The practice of *insider trading* as a criminal offense was regulated late in Brazil, through Law 10.303/2001, which inserted Article 27-D into Law 6.404/1979, defining as a crime the referred to as "Insider Misuse":

> Using relevant information not yet disclosed to the market, of which one is aware and which one is obligated to keep confidential, capable of providing, for oneself or for another, an undue advantage, through trading, in one's own name or on behalf of a third party, in securities:
> Penalty - imprisonment, from 1 (one) to 5 (five) years, and a fine of up to 3 (three) times the amount of the illicit gain obtained as a result of the crime.

The aforementioned provision characterizes a heterogeneous blank criminal law, since... one of its normative elements – “relevant information not yet disclosed to the market” This requires interpretation, through the provision of article 157, § 4, of Law 6.404/1979:

> Article 157. The administrator of a publicly traded company must declare, upon signing the term of office, the number of shares, subscription warrants, stock purchase options, and debentures convertible into shares, issued by the company and by controlled companies or companies within the same group, that he/she holds. [...]
> § 4. The directors of a publicly traded company are required to immediately notify the stock exchange and disclose in the press any resolution of the general meeting or the company's administrative bodies, or any relevant fact occurring in its business, that may significantly influence the decision of market investors to sell or buy securities issued by the company.

It is important to emphasize that, for the purposes of establishing a criminal offense, authorship must be determined. to those who have a legal duty to maintain confidentiality regarding privileged information, understood as Thus, administrators and others who have special trust in the company, such as the lawyer, have a duty, according to the regulations contained in the Code of Ethics and Statute of the Brazilian Bar Association (OAB). of secrecy.

> In Brazil, crimes are generally prosecuted by public authorities, with the public prosecutor being the holder of the right to prosecute.

The Public Prosecutor's Office has established a rule that applies to *insider trading.* However, this is a subject of discussion. The Federal or State Public Prosecutor's Office has jurisdiction to initiate such action.

This topic was discussed in Ruling 8433/2013, issued by the Regional Court. Federal Court of the 3rd Region, responsible for judging, in the appeal instance, the practice of *insider trading,* by administrators of the Sadia/Perdigão companies, the famous "Sadia/Perdigão" case. The collegiate body This is how the jurisdictional issue was resolved:

> The Federal Court has jurisdiction to prosecute and judge the crime of misuse of information.

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> This is a privileged position, considering that Article 109, VI, of the 1988 Constitution must be interpreted systematically with other constitutional provisions, as well as extensively, due to the legal interest of the Union. Consequently, although the term "market of
> Even if "capitals" were not foreseen in the constitutional provisions (articles 21, VIII, and 192), the direct interest of the Union lies in the soundness of the National Financial System, especially in the supervisory role of the Union in order to ensure confidence and legal certainty in the correct functioning of the securities market5 .

Within the field of criminal law, another topic worthy of attention is the classification of unlawful acts.
since this is indispensable for verifying the moment of its consummation, it is well known that the
The crime of *insider trading* is doctrinally classified as a crime of abstract danger, and therefore, there is
Important voices questioning the merit of its imposition as a criminal offense.

It is important to point out that the Federal Constitution, in its article 170, determines as follows: *"The order*
An economy founded on the value of human labor and free enterprise aims to ensure
"to all dignified existences, according to the dictates of social justice." In this way, it is unequivocal to care-
if it is a constitutionally enshrined right, such as the asset protected by *insider trading.* It emphasizes-
This is a broad protection mandate, as highlighted in the Supreme Federal Court's ruling in the judgment of HC 104.410.
Rio Grande do Sul:

> The 1988 Constitution contains a significant set of norms that, in principle, do not grant rights, but rather determine the criminalization of conduct (CF, art. 5, XLI, XLII, XLIII, XLIV; art. 7, X; art. 227, § 4). In all these norms, it is possible to identify an express mandate for criminalization, considering the goods and values involved. Fundamental rights cannot be considered merely as prohibitions of intervention *(Eingriffsverbote),* but also express a postulate of protection *(Schutzgebote).* It can be said that fundamental rights express not only a prohibition of excess *(Übermassverbote),* but can also be translated as prohibitions of insufficient protection or imperatives of guardianship *(Untermassverbote).* The constitutional mandates for criminalization, therefore, impose on the legislator, for their proper fulfillment, the duty to observe the principle of proportionality as a prohibition of excess and as a prohibition of insufficient protection.6

Insider trading is highly damaging to the state's economic landscape and, therefore, should be...
to be punished under criminal law, setting aside the application of the principle of minimum intervention, in order to
that its practice should not be tolerated. This is because the principle of minimum intervention must be analyzed.
from its various perspectives, since a legal framework must be constructed that seeks to
proportionality in punishing the violation of their property, and the absence of such punishment, is evident.
Violation of the constitutional mandate set forth in Article 170.

5Judgment 8433/2013, Criminal Appeal No. 000512326.2009.4.03.6181/SP. Electronic Journal of the Federal Court of the 3rd Region. Edition No. 29/2013 - São Paulo, Thursday, February 14, 2013.

[11]BARROS, Flávio Augusto Monteiro. *Criminal Law – General Part.* São Paulo: Saraiva, 2006, p. 440

6 BRAZIL, Supreme Federal Court, HABEAS CORPUS. ILLEGAL POSSESSION OF AN UNLOADED FIREARM. (A)TYPICALITY OF THE CONDUCT. CONSTITUTIONAL REVIEW OF CRIMINAL LAWS. CONSTITUTIONAL MANDATES FOR CRIMINALIZATION AND DEMANDING MODEL OF CONSTITUTIONAL REVIEW OF LAWS IN CRIMINAL MATTERS. CRIMES OF ABSTRACT DANGER IN LIGHT OF THE PRINCIPLE OF PROPORTIONALITY. LEGITIMACY OF CRIMINALIZING THE CARRYING OF AN UNLOADED FIREARM. ORDER DENIED, Habeas Corpus 104.410 RS, Aldori de Lima or Aldori Lima and Public Defender's Office of the Union, Rapporteur: Min. Gilmar Mendes, DJe 03/27/2012;

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Finally, it is concluded that the same Federal Constitution ensures protection against harm, as well as...
as a threat to this, as provided for in article 5, XXXV. In this sense, Natália Silva Teixeira Rodrigues
de Oliveira states that:

> Despite strong criticism of the presence of abstract endangerment crimes in criminal law, due to the apparent absence of harm, this is a highly debatable issue, since certain crimes considered to be abstract endangerment crimes, such as the crime of illicit drug trafficking, actually constitute one of the conducts most potentially capable of causing harm to public health.7

3. *Insider trading* in Brazilian jurisprudence

3.1. The Perdigão-Sadia Case

The well-known "Sadia-Perdigão" case is a criminal action, for which charges have been filed.
by the Federal Public Prosecutor's Office, against Luiz Gonzaga Murat Filho, Romano Anselmo Fontana
Filho and Alexandre Ponzio de Azevedo, both accused of the crime of *insider trading,*
as defined in Article 27-D of Law 6.385/1976.

This was the first conviction in Brazil for *insider trading.*
issued in the proceedings of case number 0005123-26.2009.403.6181, of the 6th Specialized Federal Court in
Crimes Against the National Financial System and Money Laundering.

According to the ruling, the complaint describes that:

> The three defendants allegedly traded securities, using relevant information not yet disclosed to the market, which they were aware of and were obligated to keep secret.
> This information consisted of a public takeover bid (OPA) to be made by the company SADIA SA for the shares of its main competitor, PERDIGÃO SA. The accused LUIZ allegedly acted in this way twice; the accused ROMANO four times; and the accused ALEXANDRE only once .

The court records indicate that the three defendants allegedly negotiated real estate values based on...
relevant information, not yet public, that they obtained due to the position each one held,
without respecting the duty of confidentiality inherent to them.

Thus, Luiz Gonzaga Murat Filho held the position of Director of Finance and Relations with
Investors in SADIA SA, after learning of the privileged information, bought shares.
In successive installments, between April 7 and June 29, 2006, 35,700 ADRs *(American Depositary Receipts)*
Representatives of shares issued by PERDIGÃO SA on the New York Stock Exchange.

Romano Anselmo Fontana Filho, who has already been accused, served as a member of the council and
According to the complaint, the SADIA SA management allegedly acquired, based on information...

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7 OLIVEIRA, Natália Silva Teixeira Rodrigues, Insider Trading: A Reality in Light of Criminal Law. *Rev. Fac. Direito UFMG,* Belo Horizonte, no. 60, pp. 365-390, Jan./Jun. 2012.

8CAVALI, Marcelo Costenaro. Substitute Federal Judge of the 6th Criminal Court of São Paulo, **Sentence type D, Case No. 0005123-26.2009.403.6181 (2009.61.81.005123-4),** 6th Federal Court Specialized in Crimes Against the Financial System, dated February 16, 2011.

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privileged, repeatedly (July 5, 7, and 12, 2006) a total of 18,000 ADRs representing shares issued by PERDIGÃO SA on the New York Stock Exchange, having sold them on July 21 of the same year, after becoming aware of other privileged information, namely, the revocation of The takeover bid described by SADIA SA: In this negotiation, Romano Anselmo gained an advantage... Profit of US$139,145.00.

The accused Alexandre Ponzio de Azevedo held the position of Executive Superintendent of Structured loans and portfolio management of Banco ABN AMRO REAL SA According to the document According to the accusation, after becoming aware of the privileged information, he allegedly purchased, on June 20, 2006, 14,000 ADRs representing shares issued by PERDIGÃO SA on the Stock Exchange. From New York.

The Federal Court had jurisdiction to process and judge the case, and CVM expressed interest in joining the case as an assistant prosecutor.

All the defendants obtained exorbitant profits from the transactions, due to the information allegedly obtained as a result of their positions.

Luiz Gonzaga was sentenced, in the first instance, to a prison term of 1 year. and 9 months of imprisonment, initially under an open regime, replaced by custodial sentences, in addition to A fine of R$349,711.53 was imposed. Alexandre Ponzio managed to reach an agreement with the Federal Public Prosecutor's Office. and was excluded from criminal proceedings in exchange for performing community service, 4 hours per week, for six months. Romano Anselmo was sentenced to a prison term of 1 year, 5 months and 15 days. days of imprisonment, under an initial open regime, replaced by custodial sentences, in addition to prohibition against holding the position of director and/or fiscal council member of a publicly traded company. applied by the CVM to both convicted individuals.

On appeal, Luiz Gonzaga had his sentence increased to 2 years, 6 months and 10 days. days of imprisonment, in addition to the duty to compensate for damages suffered as collective moral damages, in The minimum value is R$254,335.66. Romano Anselmo, however, had his sentence increased to 2 years and 1 month. of imprisonment, combined with the duty to compensate for the damages suffered as collective moral damages, with a minimum value of R$305,036.36.

3.2. The “Eike Batista” Case

Businessman Eike Batista is accused, in 14 lawsuits, of possible manipulation, deception, and irregularities committed in the capital markets. The lawsuits were filed by the CVM (Brazilian Securities and Exchange Commission), which is investigating measures adopted by the businessman in the negotiations of his EBX group company, where there is suspicion of market manipulation and deception, as well as the suppression of relevant information to shareholders and the practice of *insider trading.*

At the time of the events, Eike Batista was the controlling shareholder and chairman of the board of directors of the companies OGX, OSX, and LLX.

> The Federal Public Prosecutor's Office found that, after discovering that the oil company OGX would not be able to honor its contracts because oil exploration in the targeted wells would no longer be viable, Eike Batista, upon learning this information, sold a large portion of his shares.

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> of this company, aiming to reduce its losses. On the other hand, the lack of disclosure of this information by the other shareholders prevented the company's other investors from having an equal opportunity, and such conduct violated CVM Instruction No. 480, of December 7, 2009 .

Article 6 of Normative Instruction No. 358/2002 addresses the duty to disclose relevant facts that may pose risks to the company.

> **Article 6.** Except as provided in the sole paragraph, relevant acts or facts may, exceptionally, not be disclosed if the controlling shareholders or administrators believe that their disclosure would jeopardize a legitimate interest of the company.
>
> **Sole paragraph.** The persons mentioned in the heading are obliged to, directly or through the Investor Relations Director, immediately disclose the relevant act or fact, in the event that the information escapes control or if an atypical fluctuation occurs in the quotation, price or quantity traded of the securities issued by the publicly traded company or referenced to them.

Eike Batista was accused of selling off nearly 10 million shares of the company OSW.
OGX's main supplier, using the same practice of omitting relevant facts,
price manipulation (of stocks) and unfair practice, having been criminally charged, with
Based on Article 27-D of Law 6.385/1976, that is, for the practice of *insider trading.*

4. *Insider trading* from the perspective of US law

The United States is a benchmark in the applicability of legislation regarding *insider* trading.
trading, in addition to being the country with the highest number of cases judged involving liability
of the *insiders* involved in this crime, obtaining illicit advantages through privileged information, directly or
indirectly, related to the position held by the agent.

In Brazil, the CVM (Securities and Exchange Commission) is responsible for overseeing the Brazilian market,
while in the US, this analogous function belongs to the *Securities and Exchange Commission* (SEC)10 .
which, unlike Brazilian doctrine, applies an extremely broad subjective interpretation to the concept.
Contrary to the understanding in the United States, in Brazil, to characterize the conduct of *insider trading,*
It is not enough to simply use privileged information to one's advantage; the agent must have some functional link.
or a professional relationship with the company, where confidentiality and a duty of loyalty will be mandatory.

American regulations cracking down on insider trading are found in the *Securities and Exchange Act* –
SEC of 1934, Sections 16a and 16b, and *Rule* 10 b-5 of 1942. The corresponding standard to the North American one,
In Brazil, Law 6.385/1976 has already been cited.

Section 16a establishes the obligation for directors, administrators, and any other
Individuals who directly or indirectly hold more than 10% of a company's shares must submit to

[9]**CVM Instruction No. 480,** of December 7, 2009.

10BLOK, Marcela. **Breach of the duty of loyalty through the use of privileged information.** Available at: <http://thelegal.me/wp-content/uploads/2013/10/Insider_trading-Artigo-Marcella-Blok.pdf>. Accessed on 16/02/2015.

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SEC monthly reports, notifying any change in the number of shares it owns in that company.

company.

Section 16b stipulates that any person holding 10% of the shares of a company must return to her the profit obtained from the purchase and sale or sale and purchase transactions of this same company, within 6 months.

According to the article published in the Commercial Law Review, No. 34 – The use Unfair insider trading in Brazil and the United States, authored by Francisco Mussnich:11

> Section 16b, commonly known as *the Rule of Trumb* or *Short-swing Profit Prohibition Provision,* establishes a presumption of unfair use of insider information if certain conditions are met, disregarding the intentions or expectations of the individuals involved. The section establishes the liability for wrongful acts of directors or direct or indirect controllers of more than 10% of any class of securities registered in accordance with Section 12 of the aforementioned *act,* obligating these individuals to reimburse the company for any and all profits realized from the purchase and sale or sale and purchase of any securities of this company, if such transactions were carried out within a period of less than six months.
> months.
>
> The judicial enforcement of section 16b is carried out through a liability lawsuit filed against the violators of the legal norm by the securities company, or, in the event of its refusal or impossibility, after a period of 60 days has elapsed following the request to file said lawsuit, or in the case of a controlling shareholder (in which case no request to file the lawsuit is necessary) by the shareholders of the issuing company, acting as their procedural representatives.

The statute of limitations for filing the lawsuit is two years, counted from the date on which the Profit was realized, however, it will not accrue from this date if the violators of the rule do not have notified the *Securities and Exchange Commission* of the transaction.

Therefore, in order to have greater oversight control, the SEC imposes the following on administrators. to notify them of the number of shares they own before assuming the position of administrator, and the same must be done within six months of leaving the company.

Another interesting fact is that, according to the SEC, anyone who... can be considered an *insider .* gain an advantage from insider information, an example of this is the case of *Whiting v. Dow Chemical Company12,* in which the wife of an executive was convicted of *insider* trading. *trading,* because she was considered the indirect controller of her spouse's shares, and for this reason, she was punished based on the provisions of section 16b.

The US court confirmed the aforementioned, arguing that if the result of the disadvantage Infidelity is enjoyed by both spouses, therefore, in the eyes of the Court, the SEC, and the Court of Justice.

11MUSSNICH, Francisco Antunes Maciel. **The unfair use of privileged information – "Insider Trading" – in Brazil and the United States.** Revista de Direito Mercantil, Industrial, Econômico e Financeiro, nº 34, São Paulo: Revista dos Tribunais, 1979.

12Whiting Company case. http://www.leagle.com/decision/19741516388FSupp1130_11336.xml/ Available in: WHITING%20v.%20DOW%20CHEMICAL%20CO MPANY. Accessed on 08/07/2015.

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In North America, it is only fair that both be held accountable for the crime.

The American interpretation regarding strict liability in cases of *insider trading,* therefore, it is unnecessary to prove that the author did not act in bad faith, or did not have The intention to cause harm to third parties or undue profits is sufficient, since, being an abstract crime, it is enough to demonstrate intent to cause harm to third parties or undue profits. Only the agent's conduct is sufficient to be considered incriminating in this case.

This is evidenced in *Rule 10 b-5,* which establishes that it is illegal for any person, directly or indirectly, trading stocks using false information or omitting relevant facts.

According to Nelson Eizirik13, US case law14 has interpreted *Rule 10 b-5* in the sense that whoever obtains relevant information should bring it into the public domain and not Therefore, it can refrain from trading in that company's shares or even from... recommend to third parties that they do so, until this information is properly disclosed to The public was disseminated through mass media, specifically via Dow Jones *broadcast tape .* This refers to the principle of *"disclose refrain from trading".*

Another relevant fact concerns the American position on who the People barred from trading on the stock exchange. A notorious example is the *case of* Cady Roberts, a partner in a... brokerage firm, which sold the shares of *Curtiss-Whigth Corporation,* owned by its wife, at the New York Stock Exchange, after he obtained information through the director of The company had announced it would be reducing its quarterly dividends, but the news only came out later. disclosed by newspapers many days after the transaction. In this case, *Rule 10 b-5* a was applied. third parties linked to the administrators, the so-called *tippees* (unrelated persons) functionally employed by the company, but who obtained information or privileges from certain (confidential information).

If it is proven that there was no personal advantage or gain, it would not be considered a crime. Violation of the duty to inform, exempting both the *tipper* and the *tippee from liability.*

The discussion centered on whether the law should prohibit *insider information .* This would also encompass *information marketing,* as there is no mutual understanding between the doctrine and the... American case law on this difference between the two, as one understood that the source of *Insider information* originated from within the company, whereas in *marketing information ...* The information came from outside the company. Another understood that *insider information* was based on the nature of the information. of information (earnings, profits, dividends, etc.), while *marketing information* was based on

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13 EIZIRIK, Nelson. ***"Insider trading* and the Responsibility of the Administrator of a Publicly Held Company".** Article published in the Journal of Commercial Law, No. 50, April/June 1983.

14US Insider Trading Laws. Securities Exchange Act of 1934, rules, regulations, and penalties. Available at: <http:/insidertrading.procon.org/view.resource.php?resourceID=1516&print=true>. Accessed on April 8, 2015.

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Information about the future behavior of a company's stock.

Another curious case is that of Vincent Chiarella15, a mere employee of a printing company. specialized in printing financial documents, which analyzed several documents from a company, regarding the public offering to purchase shares. And before the disclosure of *tender offer,* the employee bought shares of that company and later sold them after the advertisement, resulting in a reasonable profit.

Vincent was convicted of practicing *misinformation marketing* in the First and Second [conventions]. Instance, under allegations that he had regular access to relevant market information of capital, thus prohibiting trading on the ball, as referred to in *Rule 10 b-5.*

The Supreme Court, however, overturned the decision, arguing that *insider marketing* would not have the same duties of confidentiality apply, and simply having access to confidential information does not serve as... sufficient legal basis for a criminal conviction.

In response to the Supreme Court, the SEC issued *Rule 14e-3 of 1982,* stipulating that *tipping* Regarding a public offering, which has not yet been disclosed, it is illegal, regardless of whether it results from negotiations. carried out by *tippers.* Because until then, only *tipping* based on information provided was illegal. by *tippee.* Therefore, the SEC broadened the application of the "report or refrain from reporting" principle. negotiate".

This decree imposed liability on any person who, directly or indirectly, possession of relevant information regarding a *tender offer* (public offer to acquire) control) and negotiate an undisclosed public offering, regardless of whether it results in *tipping* in Transactions carried out by *tippers* will be classified as the illegal activity of *insider trading.*

Therefore, anyone who possesses unpublished information relating to In the securities market, there is a duty to disclose this information or to refrain from trading while If such information is not public,

Given the importance of the stock market's impact on today's fully globalized economy, The Principle of Transparency is imperative in the negotiation of any security. or derivative, to avoid typical *insider trading practices,* such as speculation and manipulation in The real estate market, thus maintaining the reliability and credibility of the market. And if that happens... If such conduct is committed, the perpetrator will be punished in the civil, administrative, and criminal spheres, without further ado. *bis in idem.*

Because American law is clearly much more advanced than Brazilian law. Regarding the Brazilian definition of the crime of *insider trading,* we should look to the following as a model.

15 **Case of Vincent Chiarella,** available at: http://www.investopedia.com/articles/financial-theory/09/defining-insider-trading.asp. Accessed on 08/07/2015

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The US experience, but always keeping in mind the differences in each country's systems, such as the complexity of each country's capital markets.

In European countries, such as France and England16, legislation concerning *insider trading* is They are similar in some aspects, for example, both countries already consider the practice of *insider trading.*

In England, the *Companies Act,* 1980, stipulates a penalty for offenders of this conduct. This applies to directors, company employees, and anyone else who maintains relationships with the company. professionals with the company and for this reason have access to privileged information.

In France, the classification occurred a decade before the British standard, through Law 70-1-208 of 1970, art. 10-1, which provides for the obligation of directors, senior officials, and spouses and dependent on those who have easy access to information that has not yet been disclosed. publicly.

5. Conclusion

In times when violence, caused by so-called *bloody crimes* and portrayed in The terrified eyes of the population provoke great debates about the hardening of treatment and such crimes, with the consequent increase in penalties, the investigations of the crimes known as "White-collar" criminals stand in contrast to that instantaneous and fleeting reaction. Exposed daily in the media, especially after the investigations by the Federal Police, known as "Mensalão" and "Operation Despite the "Lava Jato" scandal, these crimes are still far from facing the same level of repression as violent crimes. In this context, the question arises as to the importance of criminalizing *insider trading* in the territory. Tupiniquim.

The principles of subsidiarity and minimal intervention are always invoked, since the The unlawful act, as demonstrated, is subject to administrative and civil sanctions. Therefore, for analysis Given the need for criminal repression, the threefold purpose of punishment is enumerated, classically invoked in Brazilian law:

> 1) General prevention acts even before the commission of any criminal offense, since the mere threat of punishment makes the community aware of the value that the law attributes to the protected legal right.
>
> 2) Special prevention and retributive character operate during the imposition and execution of the sentence.
>
> 3) Finally, the re-educative aspect only acts during the execution phase. At this stage, the goal is not only to enforce the provisions of the sentence (to carry out punishment and prevention), but, above all, the resocialization of the convicted person, that is, to re-educate them so that, in the future, they can...

16 ANDRADE, Pedro Frade de. **INSIDER TRADING: Before and after the reform of the Corporations Law.** Available at: http://blog.newtonpaiva.br/direito/wp-content/uploads/2012/08/PDF-D6-18.pdf. Accessed on 08/07/2015.

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to reintegrate into social life.[17]

Thus, it is clear that the established general prevention measures will not be met.
only through administrative and civil sanctions, since these are included in the *"business risk".*
And, depending on the moral compass to prevent harm to others, this discussion wouldn't even be necessary.
started, since the prohibition of its practice aims to curb recurring practices and
harmful. Therefore, only restraint through punishment can give substance to the commandment not to...
to practice the conduct.

Regarding special prevention and retributive measures, with due respect to the great legal scholars, and
Make way for the great poets and composers. The verses below perfectly illustrate this point.
the difference between the repression of violent crimes and those of "white-collar" crimes, in the legal scenario-
Brazilian criminal law:

While the real thief wears a suit and tie.
He does not handle rifles or shotguns.
He kills millions of Brazilians with just a pen.
He gets away with it, he won't go to jail.
He is not poor (no) he is not black
If convicted, he will be placed in a separate cell.
With television, mini-fridge, and chilled water.
Criminal with a higher education level
It finances war, hatred, and resentment.
The bourgeoisie insists on not understanding.[18]

The questioning of the harmfulness of *insider trading* conduct must go back to...
The consequences of so-called white-collar crimes, as already outlined, affect the
The reliability of the financial market will inevitably affect that of the country. This, ultimately,
It affects the entire population, as it ultimately contributes to increased inequality, unemployment, and...
Violence manifested in bloody crimes.

It is therefore urgent that *"our will be done here on earth,"* so that *"The"* can be analyzed .
"System" as a whole, so that criminal law can help society by severely punishing crimes.
that cause serious harm to everyone, among which *insider trading* is certainly a conduct
It is harmful and deserves to be punished as a *last resort.*

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[17] BARROS, Flávio Augusto Monteiro, **Criminal Law, General Part: Volume** 1. São Paulo: Saraiva 1999, p. 435.

[18] A song titled "Just Another Crazy Guy" by MV Bill.

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