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ENFORCING INSIDER TRADING LAW: THE BRAZILIAN EXPERIENCE

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I. INTRODUCTION

Insider trading is a source of many controversies. Some authors argue that the market would be more efficient if trading based on insider information was allowed.[1] On the other hand, empirical studies suggest that the consequences of effectively banning insider trading are lower capital costs, higher liquidity, and investor protection.[2]

This Article starts with the assumption that insider trading rules are important for markets. But to have positive results, it is not enough that a particular legal system sets a rule banning trading on material, nonpublic information. Studies suggest that to be effective in deterring illegal trading the rules must be clear and comprehensive, sanctions significant,[3] and enforcement effective.[4]

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1. Henry G. Manne, in a study published in 1966, argued that insider trading should not be considered illegal, and he pointed out its benefits as being translated into more efficient markets, as well as in viewing the use of information as an instrument of company managers' compensation. (Henry Manne. *Insider Trading and the Stock market*. New York: The Free Press, 1966, p. 456-461). For more recent thoughts of this author, see: Henry Manne. Keynote Address. *Journal of Law, Economics & Policy*, v. 4, n. 2, p. 225-232, 2008. For a summary of the debate in the U.S. academia and court precedents, see: Stephan M. Bainbridge *Insider Trading: An Overview*, 2000. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=132529>.

2. Utpal Bhattacharya; Hazem Daouk. The World Price of Insider Trading. *The Journal of Finance*, v. 5, 1. ed., p. 75-108, 2002. Laura Nyantung Beny. Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence. *William Davidson Institute Working Paper*, n. 741, 2005

3. Laura Beny, 2005. Arturo Bris. Do insider trading laws work? *European Financial Management,* vol. 11, n. 3, 2005, p. 267-312. Bart Frijns, Aaron Gilbert, Alizera Tourani-Rad. Do criminal sanctions deter insider trading? *The Financial Review* 48, 2013, p. 205-232. Bart Frijns, Aaron Gilbert, Alizera Tourani-Rad. Elements of effective insider trading laws, available at http://ssrn.com/abstract=1443597

4. Utpal Bhattacharya and Hazem Daouk, 2002. John C. Coffee Jr. Law and the Markets: The Impact of Enforcement. *Columbia Law and Economics Working Paper*, n. 304, 2007; Howell Jackson; Mark J. Roe. Public and private enforcement of securities

This Article is a contribution to comparative studies of the effectiveness of insider trading law. There have been several comparative studies that assessed enforcement using simplified proxies, such as the frequency of prosecution,[5] as is done in the enforcement index created by World Bank-funded research studies. These studies have tended to suggest that emerging countries do not have effective systems for deterring illegal trading, either because of weakness in rules and sanctions, deficiencies in enforcement, or both. For example, there are generic claims, such as "developed countries have a better record of prosecution than emerging markets;"[6] "like 70% of emerging markets who have the insider trading law, did not enforce the law" [7] or "[i]n Latin and Asian countries, insider trading scandals usually display linkages to political power."[8]

While such studies often use very simplified—and possibly misleading—metrics, others dig more deeply into system operations describing enforcement outcomes in detail and providing more nuanced insights. Some papers organize results by comparing different countries,[9] and others describe countries in isolation.[10] With the exception of China, however, most of these more detailed and useful studies deal with developed countries.[11]

This Article seeks to fill that gap through a detailed study about the enforcement of insider trading laws in Brazil. The country is one of the world's ten largest economies. It has a very large and active capital market with 328public companies in the stock market and USD 1, 232 million in market value.[12] Yet, in the international debate about insider trading law, very little is known about Brazil except for a few poorly documented

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laws: Resource-based evidence. *Journal of Financial Economics*, v. 93, n. 2, p. 207-238, 2009.

5. E.g. Utpal Bhattacharya and Hazem Daouk, 2002.

6. Utpal Bhattacharya and Hazem Daouk, 2002, p. 104;

7. Utpal Bhattacharya; Hazem Daouk, When no law is better than a good law, Review of Finance (2009) 13, p. 578

8. Arturo Bris, 2005, p. 280.

9. Lev Bromberg, George Gilligan, Jasper Hedges, Ian Ramsay, Sanctions imposed for insider trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom and the United States: An empirical study, Research Working Paper Series, Center for International Finance and Regulation – CIFR, June 2016, available at: http://ssrn.com/abstract=2817172

10. Hui Huang. The regulation of insider trading in China: law and enforcement, 2013, available at http://ssrn.com/abstract=2378842

11. No reference was found on more detailed studies with information on India, Russia, and Brazil.

12. See the B3 (the current only Stock Exchange in Brazil) data in 12/19/2019, available at: http://www.b3.com.br/pt_br/market-data-e-indices/servicos-de-dados/market-data/consultas/mercado-a-vista/valor-de-mercado-das-empresas-listadas/bolsa-de-valores/

studies offering a negative understanding of the Brazilian insider trading enforcement system.[13] This Article shows that the reality is different and fills a gap of knowledge about Brazil's role in the battle against insider trading. Through empirical research on the enforcement institutions´ outcomes, it is possible to show the complexity and the relative effectiveness of the Brazilian system. The data gathered suggests that, regarding its enforcement regime, Brazil has advanced far beyond those countries that have formal insider trading laws but fails to enforce them.[14]

Brazilian insider trading law goes back to 1976, following the postulate of equity of treatment for all investors in stock market. While the substantial law goes back decades, it is in recent years that enforcement has stepped up and additional sanctions have been added. In 2001, criminal sanctions were enacted for those required to keep information confidential, imposing a fine of up to three times the amount earned and a prison sentence. In 2017, all kinds of trading based on material, nonpublic information was criminalized.[15]

In conducting the study of enforcement, in addition to considering the possibility of prosecution, we looked at institutional design and the various legal tools used by the enforcers. The study looked at the choice of regulatory tools and at the cooperation between institutions which may affect effectiveness, mainly on a criminal level. This broad description reveals mechanisms of the current system and points to challenging features that need specific enhancements in order to further improve enforcement.[16]

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13. James H. Thompson, A Global Comparison of insider trading regulations, International Journal of Accounting and Financial Reporting, 2013, vol. 3, N.1, available at: http://www.macrothink.org/journal/index.php/ijafr/article/viewFile/3269/2976 (arguing that "Insider trading is currently in Brazil and will likely continue until the government steps up its enforcement activities"); Otavio R. de Medeiros, Insider trading in the Brazilian Stock Market, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457444 (concluding that "although an institutional framework exists in Brazil to fight insider-trading practices in the stock market, the actual success and willingness of the authorities with respects to this form of corruption is inefficient").

14. See Utpal Bhattaharya, Hazem Daouk, 2009.. Based on their empirical research, the authors presented data about countries that have insider trading rules, but do not enforce them.

15. It is worth noting that in Brazil administrative punishment and criminal prosecution can coexist.

16. For other securities regulation enforcement perspective, for example, there is the private or public enforcement debate. For this perspective, see, e.g.: LaPorta, Rafael, Florencio Lopez-de-Silanes, and Andrei Shleifer. 2006. "What Works in Securities Laws?" Journal of Finance 61 (1): 1-32. (defending the private enforcement as most efficient); Jackson, Howell Edmunds and Roe, Mark J., Public and Private Enforcement of Securities Laws: Resource-Based Evidence (March 16, 2009). Journal of

This Article sheds light on the importance of understanding the alternative regulation tools available to a single institution, as well as the coordination, competition, or conflict among the various institutions that participate in the enforcement system.

Following this Introduction, the remainder of the Article is divided into five sections. The first and second sections describe the Brazilian insider trading laws and the regulatory framework. The third section presents enforcement empirical data. The fourth section consolidates and provides a critical assessment of the main findings. Finally, a conclusion is presented.

II. BRAZILIAN INSIDER TRADING LAWS

The objective of the Brazilian insider trading regulation is to guarantee a fair market with the equitable treatment of investors.[17] For this purpose, since 1976, the legal system has prohibited trade based on material, nonpublic information. [18]

The Corporation Law proscribed the use of information that has not yet been revealed to the market. In origin, this legal provision was only applicable to directors and officers and outlined their duty of loyalty and, more specifically, their duty to maintain the integrity of any information not yet disclosed.[19] The law expressly granted the right of the investor to be

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Financial Economics (JFE), Vol. 93, 2009 (criticizing the idea that private enforcing is necessarily more efficient than public enforcement).

17. Nelson Eizirik, Insider trading in Brazil: Recent developments, https://www.pifsinternational.org/wp-content/uploads/2018/05/Latin-America-2008-Symposium.pdf.

18. The first rule-prohibiting insider trading dates to 1965, in the article 3o. n. X of Law 4,728/1965 [http://www.planalto.gov.br/ccivil_03/leis/L4728.htm] . However, there was no explicit outlawing of the use of nonpublic information. This rule only delineated the jurisdiction of the capital market regulator, which was the Central Bank. For a critical position on this rule, see Luís Gastão Paes de Barros Leães, Mercado de Capitais e "insider trading", São Paulo: Revista dos Tribunais, 1982, p. 173 (arguing that not even the elements of insider trading were defined by the law); Fábio Konder Comparato, 'Insider trading:' sugestões para uma moralização do nosso mercado de capitais, Revista de Direito Mercantil, Industrial, Econômico e Finaceiro, n. 2, 1971, p. 46-47.

19. According to Article 155, § 1 of the Law 6, 404/1976, the directors and officers of a publicly traded company are also responsible for maintaining the integrity of any piece of information not yet disclosed to the public that was obtained due to the individual's position within the company and with the significance to influence the company's share value. It is illegal for such individual to use such information to gain any advantage via the purchase or sale of company stocks. Under Article 155, § 2 of the Law 6,404/1976, the manager must ensure his or her subordinates, or third parties linked to them through a relationship of trust, neither divulge nor use privileged information.

compensated by directors or managers who violated the disclosure rules, either by providing false information, not maintaining confidentiality, or using privileged information for his or her own benefit.[20]

The prohibition of trading on material, nonpublic information has been extended to other market players through administrative regulation. In 1979, CVM enacted an administrative provision forbidding non-equitable practices and acts that yield "a treatment to any of the parties in securities transaction, directly or indirectly, effectively or potentially, that puts that party in an unequal position with respect to the remaining participants of the transaction."[21] With this rule as a baseline, the CVM began to punish people, beyond just director and managers, for the use of material, nonpublic information.[22]

Later in 1984, and also by means of a CVM administrative provision related to the obligation to disclose material facts, there was a broader rule forbidding trade based on nonpublic information by people other than directors and managers.[23] In addition, controlling shareholders were included on the list of people forbidden to trade based on nonpublic information.[24] The prohibition was extended in order to reach all of those who had directly accessed information due to their professional position, function, or in collaboration with the corporation, even if indirectly.[25]

The 2001 Capital Market Law reform brought other references to the use of material, nonpublic information. The legal prerogatives of the regulator were strengthened, and the CVM was expressively assigned the duty of protecting investors against the use of nonpublic information.[26] This

20. Article 156, § 3, of Law 6,404/1976 states that, "Any person harmed by the purchase or sale of shares determined illegal by paragraphs 1 and 2 have the right to be compensated by the guilty party for all losses."

21. CVM Rule 08/1979, II, d. [http://www.cvm.gov.br/legislacao/instrucoes/inst008.html]

22. Alexandre Pinheiro dos Santos, Fábio Medina Osório, Julya Sotto Mayor Wellisch, Mercado de capitais. Regime Sancionador, São Paulo, Saraiva, 2012, p. 127; Nelson Eizirik, A Instrução CVM 31/84 e a regulamentação do 'insider trading', Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n. 55, 1984 p. 170-175. All authors describing the use of CVM Rule 08/1979 in insider trading cases.

23. Regarding CVM Rule 31/1984 [http://www.cvm.gov.br/legislacao/instrucoes/inst031.html], in addition to the CVM Explanatory Note 28/1984 [http://www.cvm.gov.br/export/sites/cvm/legislacao/notas-explicativas/anexos/nota028.pdf], see Nelson Eizirik, A Instrução CVM 31/84 e a regulamentação do 'insider trading', Revista de Direito Mercantil, , Industrial, Econômico e Financeiro n. 55, 1984, p. 170-175.

24. CVM Rule 31/1984, Articles 9 and 10.

25. CVM Rule 31/1984, Articles 10 and 11.

26. Article 155, § 4, of Law 6,404/1976 (Corporation Law), as included in the Law 10,303/2001 [http://www.planalto.gov.br/ccivil_03/Leis/LEIS_2001/L10303.htm]. This comes via section sub-item c of item IV in Article 4 of the Law 6,385/1976, which

power was also reinforced by a provision that made the use of nonpublic information illegal by any person that had access to it, not just director, managers and shareholders.[27] In the following year, the CVM edited a provision to strengthen compliance regarding the prohibition of using material, nonpublic information. This provision outlawed trading by insiders both before and after announcement of material information for the market (*fato relavante*). [28]

In 2001, amid a movement to improve investor protection in the Brazilian capital markets, insider trading was criminalized for people who were charged with the obligation of maintaining informational secrecy (the duty of confidentiality). In 2017, the criminal consequences were extended to any person undertaking transactions based on material, nonpublic information. [29] Disclosure of confidential information by those with access to it by virtue of their professional position has also been criminalized. [30] The criminal penalty established is a one to five year prison term and a fine of up to three times the amount resulting from the undue advantage that resulted from use of confidential information.[31] For those trading with nonpublic information that is supposed to be kept confidential, like

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expressly states that the CVM will be responsible for "(...) IV. protecting shareholders and investors against: (...) c) the use of relevant information not previously disclosed to the market."

27. This comes from Article 155, § 4, Law 6.404, 1976. This rule clarifies the CVM's administrative rule already provided in CVM Rule 31/1984.

28. The new rule is as follows: "Art. 13. Before trading company stocks, the company must reveal any material facts to the company's transactions." (CVM Rule 358/2002) [http://www.cvm.gov.br/legislacao/instrucoes/inst358.html

29. Art. 27-D, Law 6.385/1976 [http://www.planalto.gov.br/ccivil_03/LEIS/L6385.htm], as amended by Law 13.506/2017 [http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/L13506.htm]: "Art. 27-D. Using any relevant non-disclosed information that may result, to oneself or to a third party, in unfair advantage, by trading securities on one's or on third party's behalf."

30. Art. 27-D, § 1o., Law 6.385/1976, as amended by Law 13.506/2017: "Art. 27-D § 1o. Those who disclose any confidential information related to a material fact to which this person has had access due to their job or position in an issuing company or by virtue of a commercial or professional relationship or for having a trusting relationship with the issuing company are subject to the same penalty."

31. Law 6, 385/1976, as amended by Law 10, 303/2001, article 27-D. Criminalization in the terms of article 27-D, of Law 6,385/1976, in accordance with the Law 10, 303/2001, which includes the following provision: "Art. 27-D. Using relevant information not previously disclosed to the market, of which the parties in question are aware and which they were required to maintain secrecy, and which they were in a position to use for their own advantage or for the advantage of others through the negotiation of securities. The penalty will include between 1 to 5 years of imprisonment and a fine of up to 3 times to value illegal obtained from the transaction."

shareholders, directors and managers, the penalty is increased by 1/3 (one third).[32]

III. THE REGULATORY FRAMEWORK TO ENFORCE BRAZILIAN INSIDER TRADING LAWS

Enforcement of the insider trading laws may take place at the administrative, civil or criminal levels, and may involve different institutions using different legal tools.

A. Administrative Level

The CVM [33] is the Brazilian securities market regulator and a key enforcing institution of insider trading laws. In order to deal with the use of nonpublic information, the CVM has the duties to monitor the market and, if suspected insider trading practices are found, to institute a punitive administrative sanctioning proceeding (*processo administrativo sancionador*) to investigate illegal practices in the securities market. At the end, it must decide whether to punish or acquit the defendants.

Punishment may include warning, fine, suspension, temporary disqualification to hold positions in publicly traded corporations or intermediaries, suspension or revocation of the authorization to perform any activity on such market, or prohibition to transect directly or indirectly in the market.[34] In a single case, these penalties can be in isolation or cumulatively. To set the fine cap, the law has four yardsticks: (1) fifty million Brazilian reais,[35] (2) double the amount of the irregular transaction, (3) three times the amount of the economic advantage gained or loss avoided due to the violation, or (4) double the investors' damage. [36] Since

32. Art. 27-D, § 2o., Law 6.385/1976, as amended by Law 13.506/2017. "Art. 27-D (…) §2o.: The penalty is increased by 1/3 (one third) if the agent commits the crime set out in the heading of this article using any relevant information they have had access to but was supposed to keep it confidential."

33. CVM was established by Law 6,385/1976 as the specialized authority regulating the securities market, thus replacing the Central Bank of Brazil. The laws 10,303/2001 and 10,411/2002 [http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10411.htm] delegated further administrative power to the CVM as a regulatory and supervisory agency with jurisdiction over the securities market, similar to the regulatory agencies created during the 1990s' in Brazil.

34. Art. 11, Law 6.385/1976, as amended by Law 13.506/2017 [http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/L13506.htm].

35. This amount is equal to approximately USD 13,600,000 (1 USD = BRL 3.97 as of 05/30/19 according to Brazilian Central Bank).

36. Art. 11, § 1o., Law 6.385/1976, as amended by Law 13.506/2017.

2017, with the reform of the capital market law, the CVM can still enter into leniency agreements (*acordo de leniência*) with regulated parties to seek reduction of penalties.

The punitive decision of the CVM may be made more severe, attenuated, or ruled to be unenforceable by the second level administrative court (*Conselho de Recursos do Sistema Financeiro Nacional*) ("CRSFN"). The CRSFN was created in 1985 and is linked to the Ministry of Finance.[37] It is an institution consisting of eight members, half of whom are chosen by government authorities and half by the private sector.[38] CRSFN decisions can still be re-examined by courts.

At the administrative level, the regulated parties investigated for wrongdoing are allowed to enter into a settlement (*termo de compromisso*) with the CVM.[39] Through this regulatory tool, in a consensual way, the CVM suspends the administrative sanctioning proceeding. In turn, the regulated party is required to end the investigated practice and correct any irregularities in addition to providing compensation for incurred injuries. This legal tool is a "neither-admit-nor deny" instrument.[40] It is important to highlight that settlements do not rule out the possibility for a criminal case.

The decision to reach a settlement is made by the CVM "at its sole discretion, if the public interest allows."[41] The law does not set strict parameters for the decision. It only establishes that the "opportunity and convenience of the settlement and appropriateness of the proposal"[42] should be assessed, and the nature and gravity of the violations, the records of the accused, and the effective possibility of punishment in the actual case should be considered.[43] There is neither review by the courts in this administrative decision, nor participation by the CRSFN.

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37. CRSFN was created by Decree 19,152/1985 [http://planalto.gov.br/ccivil_03/decreto/1980-1989/D91152.htm]. For empirical analysis of the CRSFN's activity regarding capital market issues, see Juliana Bonocorsi de Palma, Viviane Muller Prado, Estudos avançados de mercado de capitais. Conselho de Recurso do Sistema Financeiro Nacional, São Paulo, Elsevier, 2014.

38. The Ministry of Finance, the Central Bank, and the CVM) and half who are appointed by market entities (ANBIMA- Brazilian Financial and Capital Markets Association, FEBRABAN – Brazilian Banks Association, ANCORD – Brazilian Broker Association, and ABRASCA – Public Companies Association).

39. Article 11, §§ 5 to 8, of the Law 6,385/1976, as writing in Law 9, 457/1997 [http://www.planalto.gov.br/ccivil_03/Leis/L9457.htm].

40. Article 11, § 6 and Article 4, CVM Decision (*Deliberação*) 390, 2001 [http://www.cvm.gov.br/legislacao/deliberacoes/deli0300/deli390.html].

41. Expressions used in Article 11, § 5, Law 6, 385/1976, as amended by Law 9,457/1997.

42. Article 8, CVM Decision 390/2001, as amended by CVM Decision 486, 2005. [http://www.cvm.gov.br/legislacao/deliberacoes/deli0400/deli486.html]

43. Article 9, CVM Decision 390/2001, as amended by CVM Decision 486, 2005.

B. Criminal Level

For criminal consequences, the CVM is obliged to communicate the insider trading case to the Federal Public Prosecutor's Office (*Ministério Público Federal*) ("MPF") at the very beginning of the punitive administrative proceeding or after a settlement decision. The public prosecutors have two options: file a criminal lawsuit or dismiss the case if there is not sufficient evidence of a crime wrongdoing. In the first option, criminal courts thus have the final decision. In the second, courts must agree with the dismissal. In the criminal judicial sphere, the CVM can only act jointly with the MPF assisting it. The market regulator has no standing to sue in the criminal sphere.

C. Civil Level

Insider trading has potential liability consequences at the civil level. A lawsuit can be filed in order to compensate for losses caused by the use of material, nonpublic information to the market or to individual investors. The compensation can be sought individually or collectively through lawsuits brought by those who have been harmed.

The collective instrument to seek compensation is a public-interest civil lawsuit (*Ação Civil Pública*) filed by the Public Prosecutor's Office and/or by the CVM. Since 1989, the law has expressly provided legal standing to the public prosecutor, by means of a CVM decision or based on its own prerogative, to pursue judicial measures in order to avoid losses or obtain compensations for losses to protect investors.

It is possible to consensually end the litigation in a public-interest civil lawsuit by signing another kind of settlement, a consent decree (*Termo de compromisso e ajustamento de conduta*) ("TAC"). The judiciary must approve this decision. However, as in the case of a settlement, criminal charges may still be brought against the defendant.[44] Signing the settlement or consent decree does not imply a confession per se, nor an explicit recognition of the unlawful act.

44. Article 5, § 6., of the Law 7,347/1985 (Public Civil Action Law) [http://www.planalto.gov.br/ccivil_03/LEIS/L7347orig.htm], according to the Law 8,078/1990 [http://www.planalto.gov.br/ccivil_03/LEIS/L8078.htm]; Article art. 11, § 5 of Law 6,385/1976; Article 7, CVM Decision 390, 2001; and Article 5, § 6. of Law 7,347/1985.

D. The Regulatory Enforcement Framework

The following table (Table 1) summarizes the instruments and institutions that may participate in the enforcement system regarding the prohibition of trading based on material, nonpublic information in the Brazilian capital market.

Table 01. Institutions and Regulatory Tools of Insider Trading Laws Enforcement

Level	**Regulatory tools**	**Generated by**	**Decision**	**Goal/Effect**
Administrative	Punitive administrative proceeding	CVM	CVM/CRSFN/ Courts	Administrative punishment
	Settlement	Regulated party	CVM	Obligation to payment of value, correct wrongdoing practices, and indemnification
	Leniency Agreement	Regulated party	CVM	Reduce penalties
Civil liability	Public-interest civil lawsuit	Public Prosecutors´ Office/CVM	Courts	Payment of compensation for losses
	Consent decree	Regulated party/ Public Prosecutors´ Office /CVM	CVM/ Public Prosecutors´ Office/ Courts	Payment of compensation and/or exit the market position
	Individual or collective civil lawsuit	Investor or association of investors	Courts	Payment of compensation for losses
Criminal	Criminal lawsuit	Federal Public Prosecutor's Office	Courts	Criminal punishment

IV. ENFORCEMENT OF INSIDER TRADING LAW IN NUMBERS FROM 2008 TO 2018

A. Research Methodology

The empirical data gathering mechanisms come from a variety of sources and follow a few routines which are described above. For all the researched legal institutions (CVM, CRSFN, Courts), we were comfortable to use keywords as regular expressions in a python environment. The patterns we used were: 'infor.{,10}privi.*?\W', 'insider', 'infor.{,8}relev.*?\W', 'oscila.{,8}at.p.*?\W', '08/79', '31/84', '358/02', '(fat.{,8}rele.*?)\W' and '\D(155)\D'. When handling judicial decisions, this was not possible, mainly due to the large quantity of documents. So, we used a more traditional approach for the federal courts of the second[45] and third[46] regions (*Tribunais Federais da Segunda e Terceira Região*). On those websites and for criminal purpose, we used the keywords "penal" e "insider trading", "art. 27-D" and "penal" e "informação privilegiada".

To find CVM decisions on punitive administrative proceedings, the first route possible is the search tool presented on their website, which is intended to apply criteria in documents within the procedures.[47] However, this tool does not allow for a deep search, and its parameters are very limited. Our solution was to map the procedures through another part of the website.[48] After inserting all the possible combinations for the parameters (around 240,000), we ended up with all the existing proceedings, along with a brief description of its object, purpose, and acts. Finally, we ran the above-mentioned keywords to find possible matches, and then we manually read the decisions.

We found a total of 401 CVM rulings and selected 65 specific cases about insider trading wrongdoing in the period of 2008-2018. The data was organized with the following categories of information: (i) number of cases per year; (ii) number of defendants per year; (iii) CVM final ruling (number of defendants punished and number of defendants acquitted per year); (iv) defendant's position (internal, external, or market agent); (v) type of material, nonpublic information (merger and acquisitions transactions,

45. Link used for the research: http://www10.trf2.jus.br/consultas/?entqr=3&lr=lang_pt&ie=UTF-8&oe=UTF-8&adv=1&ulang=&access=p&entqrm=0&wc=200&wc_mc=0&ud=1&filter=0&getfields=*&q=&client=v2_index&proxystylesheet=v2_index&site=v2_jurisprudencia&sort=date:D:S:d1&base=JP-TRF

46. Link used for the research: http://web.trf3.jus.br/base-textual

47. Link used for the research: http://www.cvm.gov.br/sancionadores/index.html

48. Link used for the research: http://sistemas.cvm.gov.br/?PAS

change in the corporation control, financial information, or corporate business information); (v) type of CVM penalty (fine, warning, or suspension; (vi) ratio between profit based on the use of insider information and the amount of the fine.

For the decisions on CVM's settlement decisions (*Termos de Compromisso*), the website offered similar problems regarding text filtering.[49] Here, we collected all the decisions by searching for all the possible dates between 2008 and 2018. Afterward, we ran all the above-mentioned keywords and read the matching results. We found a total of 507 CVM settlement decisions and selected only 57 specific cases about insider trading wrongdoing. The data was organized with the following categories of information: (i) number of settlement proposals and cases per year; (ii) number of accepted settlement proposal per year; (iii) number of denied settlement proposal per year; and (iv) ratio between suspected profit based on the use of insider information and the amount of the pecuniary obligation on the settlement.

Regarding the CRSFN's decisions, we faced a different problem: this institution deals with appeals from different administrative branches, such as the Brazilian Central Bank, CVM, money laundering control, and insurance regulator. However, we were only interested in appeals facing CVM decisions. Our solution was to filter in the website[50] for the term "CVM." This resulted in approximately 1,000 decisions. Afterward, we ran keywords and read the matching results. We found a total of 228 CRSFN judgments and selected 37. The data was organized with the following categories of information: (i) number of cases per year; (ii) CRSFN's decision to review or uphold the CVM's ruling; and (iii) if CRSFN's decision review the ruling resulted in a better or worse outcome for the defendant.

B. Enforcement in Numbers: An Overview

In Brazil, from 2008 to 2018, [51] there were 54 punitive administrative cases ruled on by the CVM related to insider trading. These

49. Link used for the research: http://www.cvm.gov.br/decisoes/index.html

50. Link used for the research: https://www.bcb.gov.br/crsfn/ementasacordaos.html

51. Por a previous time, see Nora Rachman, O princípio do full disclosure no mercado de capitais, 1999 (University of São Paulo's master dissertation not published). According to Nora Rachman's research project, which considers the period between 1976 and 1988, the administrative process of penalizing after insider trading became more constant at the CVM. There was a total of "29 administrative inquiries into the subject of insider trading, aiming at investigating the occurrence of irregularities and applying sanctions, having acquitted the defendant in 10 cases and finding substantial

cases involved 158 defendants and resulted mostly in fines corresponding in two or three times the value of profit from the transaction. During the same period, there were 42 settlement agreements signed involving 72 persons and three consent decrees involving three persons. Most of the settlements and consent decrees establish a payment of an amount usually equal to two or three times the gain value. At the criminal level, there were only two final court decisions, both involving previous cases tried by the CVM, but just one imprisonment (later replaced by community service), along with a fine of three times the amount of the profit and a ban on future participation in trading in the securities market.

The table below (Table 2) shows the big picture of the insider trading enforcement system outcome.

Table 02. Insider trading laws enforcement in numbers (2008 - 2018)

Level	Regulatory tools	Number of cases	Number of defendants or parties	Result	Most common sanction or consequences
Administrative	Punitive administrative proceeding	54	158	66 punishments	Fine (two or three times the profits)
	Settlement	57	112	50 individual settlements	Payment of two or three times the profits
	Leniency Agreement	0	0	0	-
Civil liability	Public-interest civil lawsuit	0	0	0	-

evidence of insider trading in the remaining 19." From the 19 adjudicated cases, 19 of the indicted parties were acquitted and 23 convicted. The punishments handed out included fines (11 indicted), warnings (9), and suspension (3). It is interesting to note that the 1990s were a period in which few investigations into illicit activities were initiated, with only five insider trading cases adjudicated in a 10-year period.

	Consent decree	3	3	3 individual consent decrees	Payment of three times the profits and prohibition to be on the market player for 3 years
	Individual or collective civil lawsuit	0	0	0	-
Criminal	Criminal lawsuit	2	9	01 criminal punishment	Fine (three times the gain value), community service, and trading prohibition

C. Enforcement in Detail

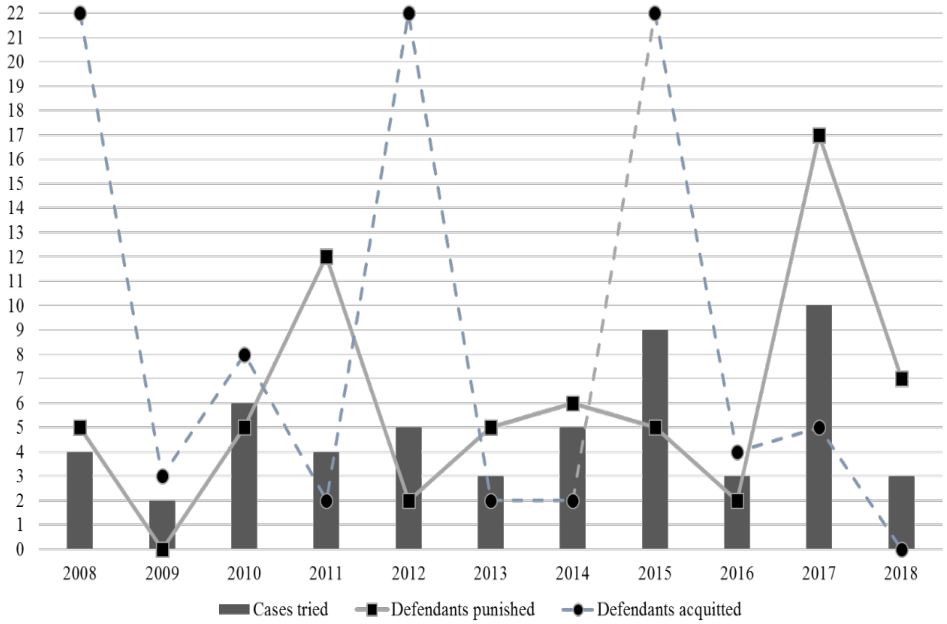
1. Administrative Level

a) Data on Punitive Administrative Proceedings (*Processo Administrativo Sancionador*)

From the outset, pursuing punitive action in cases of insider trading was on the CVM's enforcement agenda. It is worth noting that the first CVM trial was in 1978 and involved punishment for the use of material, nonpublic information. [52] From 2008 to 2018, the CVM ruled on 54 administrative cases related to insider trading. From 2010 on, the number of cases ranged from three to ten per year (Graph 01). This piece of information suggests that the illegal use of material, nonpublic information is a constant focus of the CVM's enforcement, but varies over the years.

52. To access the CVM's decision on the SERVIX case, see Inquéritos Administrativos julgados pela CVM, vol. 1, 1979, p. 11-43.

Graph 01 – Punishment and acquittal of insider trading defendants and cases tried by CVM (per year) – (2008-2018)



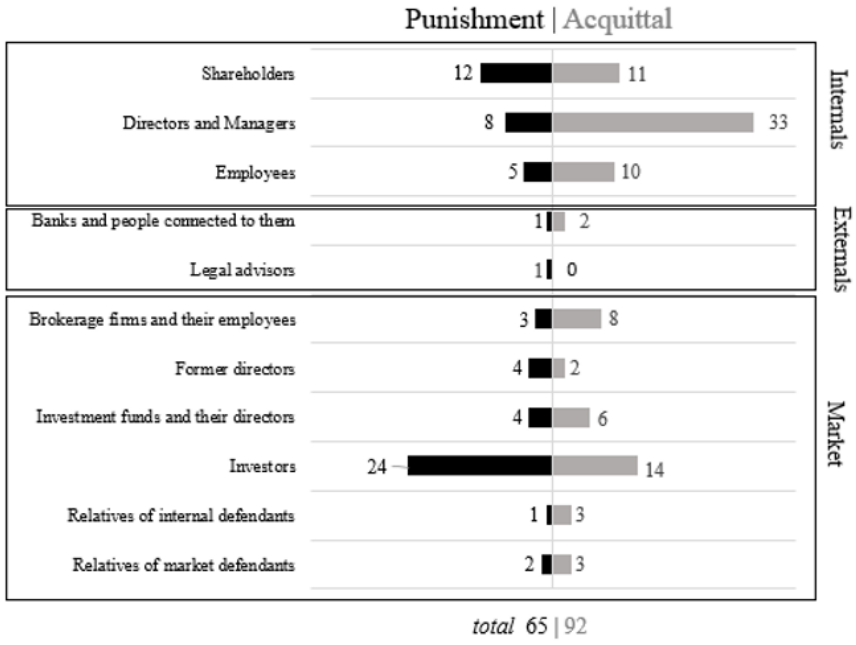
The 54 cases involved 158 defendants. Regarding punishments, 66 defendants were convicted, and 92 were acquitted at the administrative level. The number of cases and convicted parties vary over the year. In 2008 and in 2012, respectively, the four and five cases judged resulted in 22 defendants punished each year. But, in 2017, only five defendants were punished in ten cases. A possible explanation of the change in numbers is, not that CVM was lenient in punishing suspicious acts regarding the use of nonpublic information but, that there were some errors in the monitoring of the market, or there were decisions made in going further with difficult or "bad" cases.

As the Brazilian law includes anyone using nonpublic information as an illegal transaction, the position of those defendants, as well as whether they have been convicted or acquitted, is a relevant piece of information to assess the effectiveness of the insider trading laws in all extensions. To collect this information properly, the research used three categories to classify the defendants: internal, external, and market agents. Internal includes those who have a direct and permanent link with the issuer, including shareholders, board of directors members, managers, and employees. External are those who have a direct link with the issuer through their professional position and access to the material and confidential information, such as lawyers or financial agents that work as consultants on a merger or an acquisition transaction. The market group is residual and

includes those who are neither internal nor external, such as individual investors, relatives of internal agents, investment funds, and brokers.

Using this classification of defendants, the result was: 79 internal, three external, and 74 market agents and investors.[53] This data deserves two comments. First, the extension of the rule regarding the use of nonpublic information to include people beyond shareholders, directors, and managers is covered by the CVM's enforcement. [54] Second, knowing that the market intermediaries and investors represented almost 50% of all of defendants causes us to reflect on the instruments capable of mitigating the effects of information leaking outside of the issuing company. In addition, it is relevant to cross-reference the positions of the defendants with the judgement decisions in order to assess the extent of effective enforcement, mainly for those other than corporation agents. This information can be easily visualized in the graph (Graph 02) below.

Graph 02 - Punishment and acquittal and defendant positions in CVM cases (2008-2018)



53. For another way of classifying primary and secondary actors see: Nelson Eizirik, Insider trading in Brazil: Recent developments, https://www.pifsinternational.org/wp-content/uploads/2018/05/Latin-America-2008-Symposium.pdf

54. CVM Rule 08, 1979, changed by CVM Rule 31, 1984; Article 155, § 4, Law 6,404/1976.

This data mainly points out the high number of punishments of market investors, despite the theoretical difficulty in demonstrating that the origin of a trade resulted directly from access and use of nonpublic information. Another piece of relevant information is related to internal defendants: shareholders were the most punished actor in this category. This result points to a strong hypothesis of insider trading as a private benefit of controlling positions that needs to be tested. Board of directors' members and managers (agents very close to the confidential information) have been frequently indicted, but not necessarily punished.

To better assess the Brazilian insider trading law enforcement, knowing what kind of material, nonpublic information gives rise to an insider trading case is important. The results reveal that a large amount of the information involves mergers and acquisitions transitions (27 cases), mainly changes in corporate control. Also, financial information (15 cases) and information about corporate business (10 cases) gives rise to insider trading cases. A small part is private decision information (two cases).

Another relevant piece of data is the type of penalty in CVM rulings. The research reveals that a fine is the most common penalty used by the regulator, representing almost 95% of the penalties, followed by, in small number, warnings and suspensions. For 47 of the CVM rulings that the defendant was punished with a fine, the profit or loss avoided was expressly mentioned to set the amount of the pecuniary sanction. The CVM tends to calculate its fines by multiplying the profit earned or the loss avoided by either two or three times the amount as shown in the table below (Table 03).

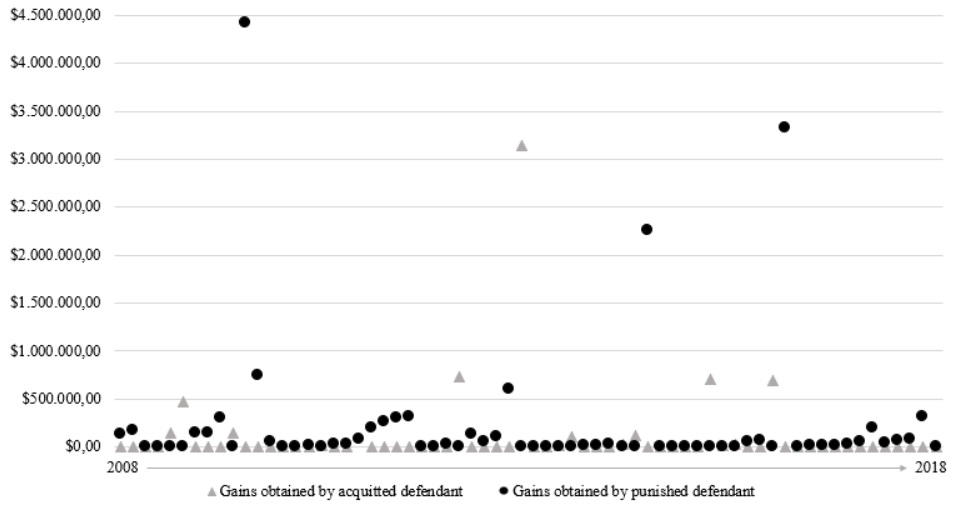
Table 03. Ratio between the profit/loss avoided and the amount of the fine (2008-2018)

Pecuniary penalty value criterion	**Times applied**
Twice the value of the profit	22
Three times the value of the profit	13
One and a half times the value of the profit	8
Once the value of the profit	2
Maximum standard of BRL 500,000	2
Total	47

It is worth noting that the vast majority of insider trading cases ruled on by the CVM do not include large volumes of gains. As shown in the chart below, the research results suggest that the transactions analyzed by the CVM do not involve huge monetary gains, most being less than USD

500,000.[55] There were only a few cases involving gains above USD 2 million, and in half of them, the defendants were acquitted.

Graph 03. Volume of gain or loss avoided in insider cases X acquitted or punished defendants (2008-2018)



Considering that the CVM's punishment decisions can be reviewed by the CRSFN, which is the second administrative instance, it is worth determining whether the CVM's decisions to punish the use of insider trading are upheld or reviewed by the CRSFN. See Table 04 below.

Table 04: CRSFN decisions to uphold or review CVM rulings (2008-2018)

Year	**Individual judged**	**Upheld**	**Reviewed**
2008	57	55	2
2009	5	4	1
2010	4	4	0
2011	0	0	0
2012	25	22	3
2013	3	3	0
2014	13	13	0
2015	14	5	9

55. To convert BRL in USD, see: https://www.bcb.gov.br/estabilidadefinanceira/historicocotacoes.

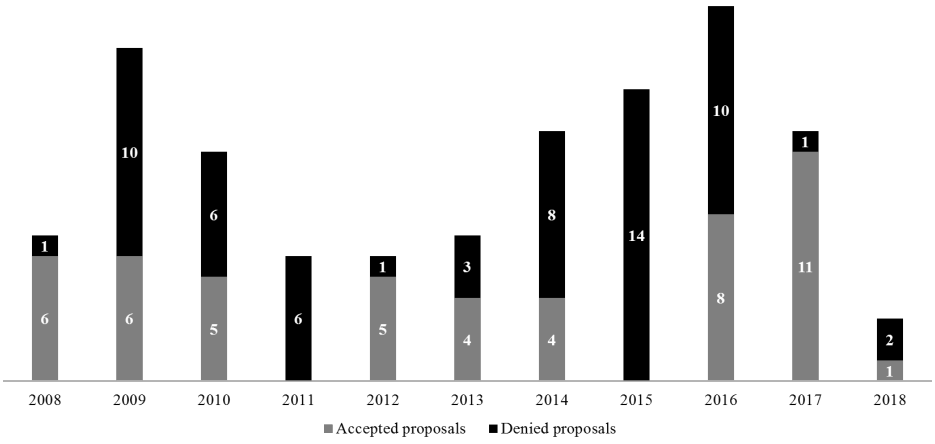
2016	13	12	1
2017	29	20	9
2018	18	15	3
Total	181	153	28

According to the research findings in the same period, 2008 to 2018, the CRSFN decided 37 cases related to insider trading wrongdoing involving 281 individuals. The CRSFN upheld the CVM's decision for 153 individuals and reviewed for just 28. For 11 individuals, the CRSFN reviewed the case and increased the fine amount. For the others 17 individuals, the CRSFN reversed the CVM's judgment either by acquitting the convicted defendants or decreasing the fine.

b) Data on Settlements (*Termo de Compromisso*)

The following data was found regarding the use of settlements in cases of insider trading from 2008 to 2018. See Graph 04 below.

Graph 04 – Total number of proposals for settlements related to insider trading accepted and rejected by the CVM (per year) – (2008-2018)



This data suggests that proposals for settlements in cases of insider trading constantly appear for the CVM's consideration, and the rate of acceptance varies. From 2008 to 2018, 57 cases involving 112 persons (individual and legal persons) with suspicions of insider trading were considered by the CVM for a settlement decision. The regulator accepted 50 and denied 62 persons suspected of trading based on material, nonpublic information.

All settlement proposals involved an obligation of a pecuniary amount to be payed to the government. When the settlement delineated how much was gained in the transaction or how much loss was avoided, the method used to establish the value of the obligation, with few exceptions, was to double the measured benefit. The fine criteria and whether the proposal was accepted or denied is shown in the table below (Table 05).

Table 05. Ratio between the profit/loss avoided and the amount of the pecuniary obligation (2008-2018)

Proposed value criterion	**Accepted**	**Denied**
No relation with the conduct	24	10
Minimum standard of BRL 150,000	11	12
Once the value of the profit	10	4
Twice the value of the profit	10	13
Three times the value of the profit	2	8
Other types of criteria related to the conduct	5	3
Total	62	50

The argument may be put forward that, according to the law, the value in question is not the only criteria for making a decision regarding whether the use of a settlement is convenient and opportune. However, the basis of the regulator's decision whether to accept a settlement or not often revolves around whether the "value being offered is sufficient to dissuade similar actions by the accused and by third parties," "if the value being offered is adequate," and "if the proposal is proportional to the graveness of the wrongdoing in question." Besides these bases, the final decision is often supported by words such as "convenient and opportune" and "a win for the public administration that was quickly processed with minimum cost." This vague reasoning creates doubts as to the real causes behind these decisions and opens the possibility for inequity in the treatment of regulated parties.

2. Criminal Level

Insider trading was criminalized in 2001,[56] but the first criminal case was brought just in 2009. The initiative can be explained as the result

56. With the amendment of Law 6,385/1976 for the Law 10,303/2001 (which including the addition of Article 27-D).

of the signing in 2008 of a cooperation agreement between the CVM and the Federal Public Prosecutor in which the two institutions agreed to exchange information and collaborate in response to crimes against the capital market.

Until 2018, the Brazilian enforcement system had only produced two final decisions on the criminal level involving insider trading cases. The first criminal case was a transaction in which Sadia launched an offer for a voluntary acquisition of Perdigão's stocks in the market.[57] Sadia's managers traded Perdigão's American Depository Receipts (ADRs) on the New York Stock Exchange (NYSE) using information that had yet to be disclosed to the market. The case was first investigated by the Securities Exchange Commission (SEC), which accused the Investor Relationship Officer, a member of the board of directors, and an employee at the financial institution that had participated in the offer (ABN Amron) of insider trading. In 2007, the parties under investigation arrived at a cooperation agreement with the SEC which barred them from participating in market activities for a certain period of time and required them to pay a fine.

The case was also analyzed in the administrative sphere by the CVM which decided to suspend the individuals from holding a position in publicly traded companies[58]. This was also the first case in which the defendant was prosecuted criminally for insider trading. In 2008, the CVM communicated the incident to the Federal Public Prosecutor which filed the case in 2009. One defendant was indeed found guilty in the higher court (*Superior Tribunal de Justiça*), with the conviction including a fine and suspension from all trading activities in 2016. [59] The other indicted party's investigation ended with a settlement.

The second case involved Randon S.A., a company in the cargo transportation field. [60] The controlling shareholder, his family (wife and son), and some other managers traded shares two months before the announcement of a new partner in August 2002, an American company

57. S.T.J. Recurso Especial n. 1.569.171. São Paulo, Relator: Min. Gurgel de Faria, 16/02/2016, R.T. 967, p. 477

58. C.V.M., Processo Administrativo Sancionador SP n. 2007/0117, Relator: Dir. Eli Loria, 26/02/2008, available at http://www.cvm.gov.br/export/sites/cvm/sancionadores/sancionador/anexos/2008/20080226_PAS_SP20070117.pdf ; C.V.M. Processo Administrativo Sancionador n. 2007/0118, Relator: Dir. Marcos Barbosa Pinto, 26/02/2008, available at http://www.cvm.gov.br/export/sites/cvm/sancionadores/sancionador/anexos/2008/20080226_PAS_SP20070118.pdf

59. S.T.J. Recurso Especial n. 1.569.171. São Paulo, Relator: Min. Gurgel de Faria, 16/02/2016, R.T. 967, p. 477

60. Justiça Federal, 6ª Vara Criminal - São Paulo. Ação Penal nº 123 0009474-42.2009.4.03.6181,17/12/2012, D.O. 10/01/2013.

named ArvinMerit. During the interim period, the company's stock value increased by 120%. The lawsuit filed by the Federal Public Prosecutor of Rio Grande do Sul against six accused agents occurred at the beginning of 2010. After discussions regarding jurisdiction, the case ended up in the Criminal Branch of Sao Paulo, which specializes in financial crimes and money laundering.[61] In July 2012, the process was suspended when the Federal Public Prosecutor accepted a settlement in which the accused agents paid individual fines to the CVM, in addition to completing community service and making an appearance in front of the court. For two of the accused agents, the penalty was diminished due to age.

In the two criminal processes, the CVM appears as an assistant party to the denouncement. As the CVM and the Federal Public Prosecutor have said, these cases are the "result of an effort for integrated work between the attorney's office and the CVM, which have acted together to inhibit and combat illicit practices in the capital market."

3. Civil Liability Sphere

The Corporation Law included a direct reference to the right of investors to seek compensation from the directors and managers that trade on nondisclosed information, in addition to the possibility of applying the general rule of civil liability embodied in the Civil Code. Just a few cases in which an investor sought compensation for losses due to insider trading have been found.

The first case dates to 1977 and is the first insider trading case judged by the CVM. In that case, a group of investors were seeking indemnification after having purchased SERVIX stock during the period immediately preceding the divulging of facts relevant to the business of the company.[62] Two suits were brought, but neither were successful. The second case involved ITAP and took place in 1981.[63] In that case, the company's stocks experienced significant oscillation immediately preceding the announcement of a buy back scheme in an attempt to go private. The investors in that case were also unsuccessful.

However, there are some public initiatives in filing public-interest lawsuits by the public prosecutor and CVM. Since 1990, the public

61. Justiça Federal, 6ª Vara Criminal - São Paulo. Ação Penal nº 123 0009474-42.2009.4.03.6181, 17/12/2012, D.O. 10/01/2013.

62. T.J.S.P., Ap. Civ. n. 12.145-1, São Paulo Relator: Des. Galvão Coelho, 27/10/1981, Decision published at Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n.109, 1998, p. 173-177

63. T.J.R.J., Ap. Civ. 27.882-1, Rio de Janeiro, Relator: Des. Penalva Santos, 27/12/1983, Decision published at Nelson Eizirik, Aurélio W Bastos, Mercado de Capitais e S.A. – Jurisprudência, CNBV, vol. 1, 1987, p. 295.

prosecutor and the CVM are authorized to execute consent decrees whereby they effectively suspend administrative proceedings and civil liability lawsuits. There is judicial supervision as the courts must approve the administrative decision.[64] So far, the CVM and the federal public prosecutor have only signed four consent decrees,[65] three of which refer to insider trading cases. In two of the three consent decrees, the criteria to establish the value of the pecuniary obligation was three times the profit. The money was paid to the Fund for the Defense of Diffuse Interests (*Fundo de Defesa de Direitos Difusos*) in both cases, and in one, they agreed to pay the investors' counterpart in the operation of buying or selling. In two of the three, they agreed to non-pecuniary obligations: they were not allowed to occupy a position of public listed companies or intermediaries in the capital market for three years.

The first consent decree was signed in 2008 in a case that involved insider trading and established the possibility of investor compensation.[66] The foreign company, Vailly S.A., supposedly bought preferred stock from Suzano before the announcement of a material fact reporting the transfer of the company's controlling block of stock. Vailly S.A. then sold these shares on the market shortly after the announcement and earned more than 500,000 BRL in the process. The CVM and the Federal Prosecutor's Office filed a public-interest civil action seeking "payment of compensation for the diffuse damage that it allegedly caused to the securities market and to society" in an amount three times the net gain that the company derived from Suzano's stock sales. They also sought "indemnification for individual homogeneous damage caused to investors who negotiated with Vailly before the announcement of the material fact." A consent decree was signed to settle the suit and the administrative proceeding, and Vailly was ordered to pay 2,000,000 BRL. This amount was required to be paid ten days after the Consent Decree was approved in court.

As stated in the court decision that ratified this agreement, a portion of the amount (1,425,600 BRL) would be assigned to the Fund for the Defense of Diffuse Rights (*Fundo de Defesa de Dirietos Difusos*), and the remainder (551,450 BRL) would compensate individual investors. The

64. Article 5 o, § 6 o, the Law of Public-Interest Civil Action, as restated by Law 8,078/1990.

65. For information about the consent decree, see CVM document available at: http://www.cvm.gov.br/export/sites/cvm/noticias/anexos/2018/20180508_atuacoes_conjuntas_CVM_MPF.pdf Apart from the three mentioned settlements, there are also the settlements in the case of Aracruz, which were signed in 2012 and 2013. These established payment to the CVM and to the Fund for Defense of Diffuse Interests.

66. CVM, Termo de Compromisso e Ajustamento de Conduta Proc. RJ 2007/12231, 04/03/2008, available at: http://www.cvm.gov.br/decisoes/2008/20080304_R1/20080304_D01.html.

judge's reasoning was that the investors should be entitled to the net income that Vailly earned in the trade carried out based on the insider information. The amount would be left in a savings account for twelve months. Any amount not claimed by investors would be credited back to the Fund for the Defense of Diffuse Interests. The CVM advised the counterparties in the transactions that the amount was available to be claimed.

The second consent decree involving insider trading was signed in 2009.[67] As in the first case, stocks were traded prior to disclosure of a material fact announcing the transfer of a controlling block of shares and the subsequent sale by someone that was part of the controlling group as well as a member of the board of directors of the company Tenda. The buyer was ordered to resign from the director position for three years and to pay 200,000 BRL to the Fund for the Defense of Diffuse Interests.

The third consent decree involving insider trading was signed in 2010.[68] As in the cases above, someone (an executive manager of Petrobrás) traded Ipiranga stock before the announcement of a material fact reporting the transfer of Ipiranga's controlling stake to Petrobras, Ultra, and Braskem. Also, as in the case above, the consent decree suspended the sanctioning administrative proceeding in the CVM and extinguished the public-interest civil action and the Innominate Provisional Remedy. The amount, as in the other case, was three times higher than the earnings derived in the illegal trading, which totaled 360,202.75 BRL. Since no third parties were identified, the CVM decided that the money should be paid to the Fund for the Defense of Diffuse Interests. In addition to the payment, the executive was prohibited from trading stocks for three years.

It is interesting to observe the use of consent decree concerning three issues: (1) non-pecuniary obligation, (2) criterion for the determination of the settlement value, (3) and the recipient of the values paid in the consent decree.

There are three concerns arising from these cases. The first is related to the existence of non-pecuniary obligations of the investigated party. Not being allowed to participate in the market is understood as the most onerous measure for a capital market participant. However, this measure does not appear frequently in other regulatory instruments, including administrative processes and settlements.

The second is related to the criterion used to establish the value of the

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67. CVM, Termo de Compromisso e Ajustamento de Conduta, Proc. RJ 2009/0428, 03/02/2009, available at: http://www.cvm.gov.br/decisoes/2009/20090203_R1/20090203_D13.html

68. CVM, Termo de Compromisso e Ajustamento de Conduta, Proc. RJ 2010/0963, 22/06/2010, available at: http://www.cvm.gov.br/decisoes/2010/20100622_R1/20100622_D01.html

pecuniary penalty. The criterion was set at three times the gain or the avoided loss. This is the same criterion that has been utilized in past sanctioning processes and is the highest possible pecuniary penalty. Indeed, it is higher than the criterion used in settlements. Since decrees have the goal of ending a public civil action that aims to compensate the losses caused, it is interesting to ask how close this value comes to the value used in pecuniary penalties handed down by the regulator, especially since there is often little attempt to verify the damage caused to the market or to investors.

The third observation seems to be the most problematic. It is related to the recipients of the money paid by the investigated party. In the first case (Vailly), part of the money went to a Fund for the Defense of Diffuse Interests and another part went to investors. In both of the following cases (Tenda and Ipiranga), the money went only to the Fund. Despite recognizing that the decision to pay the counterpart investors does not seem to be the most adequate way forward, sending the whole of this money to the Fund seems to be an even worse solution. This opinion is based on the fact that there is no benefit accrued to the capital market, especially for the improvement of oversight or the market supervision to verify the frankness and strength of the enforcement of the administrative sanction processes.

V. ENFORCEMENT OF INSIDER TRADING LAWS IN PERSPECTIVE

A. Local Challenges

The results of the quantitative empirical research suggest that the CVM is the main enforcer of insider trading laws, since there are more criminal than civil cases to ban the use of nonpublic information in the Brazilian stock market. Another research finding is that cases receive very different responses from the enforcement system, and that is not necessarily a consequence of burden of proof difficulties, the position of the defendants, or of any case details. The different consequences might be related to the tools that were triggered and the enforcer that participated in the enforcement process.

Recently, comparative literature showed that countries with similar rules may have different enforcement procedures and outcomes.[69] How about the different results within just one legal system? It is exactly what we observe in the numbers in Brazil: the existing cases reached different outcomes depending on which regulatory tools were applied and which institutions had been proactive in verifying the insider trade.

69. Mathias Siems, The EU Market Abuse Directive: A Case-Based Analysis. Available at SSRN: https://ssrn.com/abstract=1066603

The vast majority of the insider trading cases have only been assessed at the administrative level, whether by final decision in a punitive administrative proceeding or by settlement, mostly resulting in the party paying two or three times the profit or loss avoided. In just one case with criminal consequences, the first criminal insider trading case (Sadia/Perdigão), the manager agreed to pay a certain amount to the U.S. regulator and, in Brazil, combining administrative and criminal punitive decisions, was fined six times the gain (three times in the administrative and three in the criminal). The manager was also prohibited from being manager in a public corporation.

Another example is a case that ended up at the administrative level with a consent decree in the Irpiranga/Petrobras case.[70] The consent decree suspended the sanctioning administrative proceeding in the CVM and extinguished the public-interest civil lawsuit. The manager agreed to pay three times the earnings derived from the illegal trading and paid it to the Fund for the Defense of Diffuse Interests to repair losses by the market. In addition to the payment, the executive was prohibited from trading stocks for three years.

These results suggest three preliminary conclusions that could improve the insider trading ban in a market. First, reforms in the substantial law, such as criminalizing the insider trading or a higher the penalty, may be the starting point to combat the use of nonpublic information, but is never the final stop. Second, the regulatory framework and legal tools are important features in the enforcement outcomes. Third, analyze deeply the complexity of the enforcement system is needed to identify the pros and con of the multi-institutional model.

In order to better understand the local challenges to improve the effectiveness of insider trading laws, analysis of the various cases may be divided into two perspectives. The first one is internal and by the CVM. This perspective sheds light on use, by the regulator, of a range of regulatory instruments to deal with the trading based in nonpublic information (namely, the administrative sanctioning process, consent decrees, settlements, and leniency agreements). The second perspective analyzes the relationship among the institutions assigned to confront the unlawful practice of insider trading in the administrative, criminal, and civil spheres (namely, the CVM, CRSFN, Federal Public Prosecutor's Office, and courts).

70. The Board of Commissioners decision is available at: http://www.cvm.gov.br/decisoes/2010/20100622_R1/20100622_D01.html

B. The CVM's Internal Perspective

In the administrative enforcement system side, the first important decision is whether the CVM will pursue the punitive route or if the party will propose a settlement agreement, consent decree, or leniency agreement to use a consensual process to end the case. By looking at the quantitative data, it is relevant to understand how and when different legal tools and regulatory choices are used with regards to the regulator's perspective or the regulated party's interests.

If the number of administrative sanction proceedings adjudicated for insider trading and the number of settlements in 2008, 2009, 2013, 2016, and 2017 are compared, we note that the number of proposed settlements is very near the number of the punitive proceedings. This information suggests that settlements are relevant to the sanction process for understanding the CVM's enforcement. If we compare the value of the penalty with the pecuniary obligation of the settlement decree, it can be seen that the instruments are very similar because, in most cases, they establish the penalty in question as twice the value of the gain attained from using insider information.

Since the consensual path is followed quite frequently, does this suggest that the system's deterrent effect is quite limited? At first glance, it might seem so. After all, when cases are resolved consensually, there is no recognition that unlawful practices occurred, and this might seem to weaken the deterrent effect of the CVM's actions. However, on close analysis, it seems that the consensual route may be as effective as the punitive one once we take into account the actual operation of the punitive process.

From the regulated party's perspective, the advantage in signing a settlement is clear: there is no recognition of guilt nor is there wide exposure in the media or a possible future conviction that accompanies recognition of guilt. Such effects could cause an individual's reputation to take a significant hit. On the other hand, in a settlement, the payment must be carried out in ten days, and there is no chance for appeal to the courts.

From the enforcement system point of view, the punitive process is long and drawn out with uncertain results, while a settlement that includes a substantial cash payment that is swift and certain. The CVM's decision to apply punitive measures can be revised by the CRSFN. This at the least would extend the date of a final decision. Even after the administrative appellate court decision, it is possible to challenge its legality in the judiciary.

However, even before the final judgment, the path to a decision's execution can be a long one. Even if the decision of the CVM, CRSFN, or judiciary is to pursue a punitive action, if there is no voluntary payment by

the defendant, the value of the penalty will be added to the rolling debt to be charged through the judgment of a compensation action. This part of the process does not occur at the CVM, it can take years for the process to be fully effective.

In this context, having a consensual instrument that obliges the regulated party to pay in ten days has a certain value that the regulator understands to be significant and would not seem to be contrary to the punishment strategy. In contrast, the settlement and consent decree reveal themselves to be extremely effective instruments to manage the unlawful practices of the market, including insider trading. In addition, they represent an alternative to processes with instruction and instrument deficiencies and would allow for better human and financial resource allocation by the regulator.[71] The legislation grants discretionary power for the regulator to choose which instruments to use based on opportunity, convenience, and grounds on public interest. Discretionary power is a valid pathway to give some sort of flexibility for the public administration.

If only a comparison of the amounts proposed in the settlements is taken into account, it is not possible to understand the minimum parameters for using consent decrees and settlements that can compromise the regulator's consistent action and, thus, its ability to achieve a deterrence goal. Other factors may explain the choice of whether or not to establish settlement agreements. But considering the lack of grounds for the decision, these other factors are not seen in empirical research based on the available documents.

However, it was relevant to understand what these terms mean and concluded that vague terms such as "convenience" and "opportunity" often appeared in the arguments used to sustain acceptance of a consent decrees. This is a challenge that the CVM must address in a rational way: it should better substantiate its decisions. Effective communication keeps away any suspicions of privilege given to some but not others. This bears on the guarantee of legal security and sends a message to the market about how illicit activities are handled.

C. Intra-Institutional Perspective

Beyond the administrative sphere, the legal prohibition of insider trading can reach the criminal and civil spheres with the participation of the CVM, Federal Public Prosecutor's Office, and judiciary.

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71. Kevin E. Davis, Maira Machado, Guilhermo Jorge. Coordination the enforcement of anti-corruption law: South American experiences, September, p. 7, 2014 (forthcoming)

Even though Brazil has a dual enforcement model for punitive purposes, the criminal sphere seems very ineffective as suggested by the very low number of criminal cases compared to the administrative level. The data about the CVM's punitive activity reveals that there are potential insider trading acts that should be in the criminal sphere but were punished at the administrative level instead. As discussed above, there are just two criminal decisions involving nine persons. There are, however, a few other cases with no judgment yet. [72] The nonuse of criminal consequences is not just a characteristic of the Brazilian enforcement system,[73] but what feature of the Brazilian legal system could explain this result?

In Brazil, at the criminal level, the main actor would necessarily be the Public Prosecutor's Office, the only institution that has standing to file a criminal lawsuit before courts in cases of insider trading. Knowledge of the facts depends greatly, but not exclusively, on the CVM's communication to the Public Prosecutors Office of its suspicions of use of nonpublic information. Our empirical research suggests that there is a stockpile of potential cases judged in the administrative sphere that should be analyzed in the criminal sphere, but criminal lawsuits seem not to have been filed.[74] The next question is why does this happen? Unfortunately, it is not easy to determine this from official documents.

In Brazil, according to the legality principle, the Public Prosecutor's Office has no discretion and is obligated to prosecute every criminal offence that comes to its attention or suggest to the judiciary a justified termination of the proceeding.[75] If the criminal judge does not agree with the termination, the Head of the Public Prosecutors must decide whether to end the case, investigate further, or immediately file the law suit. All of

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72. Other cases: MUNDIAL (https://www2.trf4.jus.br/trf4/controlador.php?acao=consulta_processual_resultado_pesquisa&txtValor=50670961820124047100&selOrigem=TRF&chkMostrarBaixados=&todaspartes=S&selForma=NU&todasfases=&hdnRefId=c2da632eac749b8769f00db01b1b14d3&txtPalavraGerada=Gvaj&txtChave=&numPagina=0.); MAEDA (T.R.F.-3. Ap. Crim. nº 0008358-25.2014.4.03.6181, São Paulo); KLABIN (T.R.F-3. Ap. Crim. nº 0002511-03.2018.4.03.6181, São Paulo); OGX (Juízo Federal, 3ª Vara Criminal, Rio de Janeiro. Ação Penal nº 0029174- 94.2014.4.02.5101); JBS (Juízo Federal, 3ª Vara Criminal, Rio de Janeiro. Ação Penal nº 0006243-26.2017.403.6181)

73. For a comparative empirical finding regarding insider trading enforcement in Australia, Canada (Ontario), Hong Kong, Singapore, United Kingdom and United States, see: Lev Bromberg, George Gilligan, Ian Ramsay. The extent and intensity of insider trading enforcement – an international comparison, Journal of Corporate Law Studies, vol. 17, n. 1, 2017, p. 73-110.

74. For data before 2008, see Eduardo Ribeiro Faria de Oliveira, Tiago Bottino, Seletividade do sistema penal dos crimes contra o mercado de capitais (Lei n. 6.385/76), available at http://www.conpedi.org.br/manaus/arquivos/anais/fortaleza/3244.pdf (showing that there is a selective criminal system for the capital markets crimes).

75. Art. 24 e 28, Brazilian Criminal Code.

these decisions must be transparent. According to the law, there is no space for unjustified decisions or a nontransparent system. The question that arises with regard to whether this divergence of numbers is a consequence of a communication problem with the CVM and the prosecutor or is linked to internal issues of the Public Prosecutor's Office which could hypothetically argue that criminal issues related to the capital market are not on the Public Prosecutor's agenda.

As revealed by Davis, Machado, and Jorge "strict compliance with this principle is practically impossible."[76] The authors point out that the legality principle reduces discretionary powers, but does not totally eliminate them, while also potentially making it difficult to implement enforcement strategies.[77] The impossibility of being accountable for enforcement strategies makes more difficult the task of understanding the ineffectiveness of the criminal consequences of insider trading and suggesting improvements.

The first criminal case (Sadia/Perdigão) showed that the legal provision alone was insufficient to truly criminalize insider trading. It was first necessary to improve communication between the CVM and the Public Prosecutor through cooperative agreement. However, the information flow from the CVM to the Public Prosecutor is not publicly available. Nor, for that matter, are the criteria for the actions of the Public Prosecutor accessible from an analysis of the final results.

The decision to give the Public Prosecutor jurisdiction, depending in certain ways on the CVM's actions, reveals greater institutional complexity that impacts the achievement of the strategy. Communication is a precondition for institutions to work by exchanging information and having clarity about the role that each one plays in the institutional design. In the design that has been chosen, the administrative and criminal processes seem to be complementary, as they should be, acting collaboratively way so that the final result of the punishment message may be achieved.[78]

In this relationship, it is necessary to consider the timing and strategy of the actions of both institutions. In addition, it should be questioned whether they should be working together or separately. In the available cases, their joint action appears in different forms. In the Sadia/Perdigão case, the criminal lawsuit came after the administrative decision and counted on a joint effort by the CVM and the Public Prosecutor. In two more recent cases (Mundial, OGX, and JBS) the criminal lawsuit began before the administrative action and in an independent form.

76. Davis, Machado and Jorge, 2014, p. 7.
77. Davis, Machado and Jorge, 2014, p. 7.
78. Davis, Machado and Jorge, 2014.

The goal here is not to attack the principle of independence between the two spheres, but to point out that closer collaboration or more independent action may impact the institutional design and the final result.

Despite the fact that it seems that only time will tell what the best design is, this action may still be the object of better understanding and eventual improvement. It may also be possible for us to better understand the role of each level. As an exercise of comparison in studies on the enforcement system of anti-corruption laws in Brazil, the multi-institutional model[79] or the modular institutional design is often deemed favorable to the punishment system. [80]

Based on the available information, it can be established that a pre-condition of good communication of penalization is the existence of a flow of information along with transparency in the act of communicating. In effect, there must be systemic control and, more importantly, effective communication relating to the punishment strategy.

D. Civil Liability Sphere

The least effective of all the tools are direct suits by investors under the Corporation Law or general principles of civil liability. We located just one case[81] over a period of 10 years, but none with a final decision.

Despite the fact that it is almost impossible to specify the victims of insider trading and sue for compensation, the Public Prosecutor's Office and CVM filed two lawsuits jointly seeking compensation for losses caused to the market.[82] The cases ended with a consent decree that ordered the payment of three times the gained value to the CVM and Fund for Defense of Diffuse Interests, without any benefits to investors or Brazilian capital markets. The agreement also prohibited the defendant from holding the position of public listed companies or intermediaries in the capital market for three years.

It is questionable whether this compensation instrument, processed through a trial of public civil action, is necessary. In the context of the enforcement system and the deterrence strategy, it is difficult to access the real function of this action.

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79. Mariana Mota Prado, Lindsey Carson. Brazilian anti-corruption legislation and its enforcement: potential lessons for institutional design, IRIBA Working paper 09, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497936.

80. Davis, Machado and Jorge, 2014, p. 2.

81. T.J.R.T. Ap. Civ. 0085670-76.2015.8.19.0001, Rio de Janeiro, Relatora: Des. Valéria Dacheux Nascimento, 25.06.2019, decision available at: http://www1.tjrj.jus.br/gedcacheweb/default.aspx?UZIP=1&GEDID=0004B9DA6837CDA16F05729C2BE2EE95F687C50A3E1F535E

82. See note 68 and 70 supra.

VI. CONCLUSION

The Brazilian legal system has rules that forbid the use of nonpublic information and provides sanctions through the administrative and criminal punishment systems, in addition to creating civil liabilities. The data presented suggests that the rule is enforced.

However, an overview of institutional design and its various instruments reveals the complexity of the system and sheds light on the importance of understanding the alternative legal tools available to institutions, as well as the coordination, competition, or conflict among the institutions responsible for enforcement of insider trading laws.

The main empirical finding is that Brazil is actively enforcing its insider trading laws, and this undoubtedly is having a deterrent effect. However, we have observed that the existing cases reached different outcomes depending on which regulatory instruments were applied and which institutions had been proactive in verifying the illicit activity. While there may be benefits from this multi-institutional model, the existence of a diversity of results may affect the deterrent effect of enforcement.