

## THE SANCTIONING OF INSIDER TRADING IN BRAZIL AND IN THE EUROPEAN UNION AND THE PROTECTION OF RIGHTS: A COMPARATIVE ANALYSIS

### O SANCIONAMENTO DO INSIDER TRADING NO BRASIL E NA UNIÃO EUROPEIA E A PROTEÇÃO DE DIREITOS: UMA ANÁLISE COMPARATIVA

### LA SANCIÓN DEL INSIDER TRADING EN BRASIL Y LA UNIÓN EUROPEA Y LA PROTECCIÓN DE DERECHOS: UN ANÁLISIS COMPARATIVO

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#### ABSTRACT

Our purpose here is to compare the protection against insider trading in Brazil and the European Union law, specifically the way insider trading is sanctioned in these two jurisdictions. We highlight the different compositions between administrative and criminal sanctions found in the two systems and their implications for the fundamental rights and personal rights (in case of Brazil) of those held liable for the practice of insider trading. The possible cumulation of punishments imposed by criminal courts and administrative regulatory bodies raise the question whether there might be a violation of the *ne bis in idem* principle. The response to that question is different in each system. We will start by briefly taking stock of the genesis and evolution of anti-insider trading regulation in Brazil and in the EU in order to comprehend the different rationales for the prohibition of insider trading in the two jurisdiction, so as to understand the reasons behind their divergencies and convergencies.

**Keywords:** Insider Trading; Sanctions; *Ne bis in idem*; Human Rights; Personal Rights.

#### RESUMO

Nosso objetivo aqui é comparar a proteção contra insider trading no Brasil e na União Europeia, especificamente a maneira como o insider trading é sancionado nessas duas jurisdições. Destacaremos as diferentes combinações entre sanções administrativas e criminais encontradas nos dois sistemas e suas implicações para os direitos fundamentais e da personalidade (no caso do Brasil) dos responsáveis pela prática de abuso de informação privilegiada. A possível acumulação de punições impostas por tribunais criminais e órgãos reguladores administrativos levanta a questão de saber se pode haver uma violação do princípio *ne bis in idem*. A resposta a essa pergunta será diferente em cada sistema. Começaremos fazendo um breve balanço da gênese e da evolução da regulamentação sobre uso de informações privilegiadas no Brasil e na UE, a fim de compreender as diferentes razões para a proibição do insider trading nas duas jurisdições de forma a entender os motivos por trás de suas divergências e convergências.

**Palavras-chave:** Insider Trading; Sanções; *Ne bis in idem*; Direitos Humanos; Direitos da Personalidade.

#### RESUMEN

Nuestro propósito aquí es comparar la protección contra el uso de información privilegiada en Brasil y la ley de la Unión Europea, específicamente la forma en que se sanciona el uso de información privilegiada en estas dos jurisdicciones. Destacamos las diferentes composiciones entre sanciones administrativas y penales encontradas en los

dos sistemas y sus implicaciones para los derechos fundamentales y los derechos de la personalidad (en el caso de Brasil) de los responsables por la práctica del uso de información privilegiada. La posible acumulación de sanciones impuestas por los tribunales penales y los órganos reguladores administrativos plantea la cuestión de si podría haber una violación del principio *ne bis in idem*. La respuesta a esa pregunta es diferente en cada sistema. Comenzaremos revisando brevemente la génesis y evolución de la regulación sobre el uso de información privilegiada en Brasil y en la UE con el fin de comprender las diferentes razones de la prohibición del uso de información privilegiada en ambas jurisdicciones con el fin de comprender las razones detrás de sus diferencias y convergencias.

**Palabras clave:** Insider Trading; Sanciones; *Ne bis in idem*; Derechos humanos; Derechos de la personalidad.

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## INTRODUCTION

The outlawing of insider trading dates back to the 1930's in the United States. In the aftermath of the 1929 New York Stock Exchange crash, the US Congress enacted a set of regulations for the primary and the second market of securities that became the basis for the current legal treatment of capital market information in the US<sup>1</sup>. In Europe, France banned insider trading already in 1967<sup>2</sup>. But it was only in the 80's and thereafter that the other big national economies in western Europe started paying attention to the issue: among these, England (1980)<sup>3</sup>, Spain (in 1984 and 1988)<sup>4</sup>, and Italy (1991)<sup>5</sup> were the first to outlaw insider trading. Germany waited until 1994 to follow<sup>6</sup>. On the EU level, the main milestone on the matter was the Council Directive 89/592/EEC of 13 November 1989, coordinating regulations on insider dealing<sup>7</sup>.

<sup>1</sup> An excellent summary of both acts and their context is available in MICHIE, Randal C. *The Global Securities Market: A History*. Oxford: Oxford, 2006. pp. 155-204.

<sup>2</sup> IRVING, Robert B. French Insider Trading Law: A Survey. *The University of Miami Inter-American Law Review*. Vol. 22, n. 1, pp. 41-73, Fall/1990, pp. 46-48.

<sup>3</sup> CHITIMIRA, Howard. A Historical Overview of Market Abuse Prohibition in the United Kingdom. *Mediterranean Journal of Social Sciences*. Vol. 5, n. 20, pp. 49-61, September 2014. p. 50.

<sup>4</sup> ZAPATERO, Luis Arroyo. El abuso de información privilegiada en el derecho español. In: ZAPATERO, Luis Arroyo; TIEDEMANN, Klaus. *Estudios de derecho penal económico*. Cuenca: Servicio de Publicaciones de la Universidad de Castilla-La Mancha, 1994, pp. 61-74. pp. 61-2.

<sup>5</sup> MALAVENDA, Caterina; D'ERIL, Carlo Melzi. *Abuso di mercato e informazione economica: i giornalisti e le nuove regole*. Padova: Cedam, 2007. p. 65.

<sup>6</sup> WEBER, Klaus-Peter. *Insiderrecht und Kapitalmarktschutz: Haftungstheorien im U.S.-amerikanischen, europäischen und deutschen Recht*. Berlin: Duncker & Humblot, 1999. p 21.

<sup>7</sup> In the EU, the denomination "insider dealing" is preferred to the tradition "insider trading".

It might come as a surprise that most countries in the European Union (and elsewhere) did not outlaw insider trading as of the early 1990's<sup>8</sup>. But, in fact, at the time it was not even very well established that it should be outlawed at all, given that a number of relevant economists saw significant disadvantages in doing so<sup>9</sup>. Today, however, most experts agree that the case for insider trading prohibition is strong. Especially after 2001, when the Nobel Prize in economics was awarded to Joseph Stiglitz, Michael Spence and George Akerlof for their work on information asymmetries, policymakers have mostly been convinced about the inconveniences of information asymmetries for the markets, acknowledging that it makes them less efficient and faulty. As a result, while the European Union continued to seek uniformity among its member states, the prohibition of insider trading gained momentum around the world.

In Brazil, on the other hand, the anti-insider trading regulations date back to the mid-70's and was initially under the influence of the American system. Over the years, however, important changes and improvements have been made in the regulations, setting it apart from its initial inspirations. Most of these improvements were introduced roughly at the same time the EU regulations on insider trading were enacted. This alone justifies a comparative study on the two anti-insider trading systems. Furthermore, the relative novelty of both systems in their most up-to-date version gives them a certain experimentation-like imprint, which makes it even more useful to juxtapose them and highlight their differences and similarities.

Therefore, our purpose here is to compare the protection against insider trading in Brazil and the European Union (hereinafter called EU) law. Among the many aspects that are up for comparison, here we chose to focus specifically on the way insider trading is sanctioned in these two jurisdictions. One key element that draws attention in the comparative analysis is the different compositions between administrative and criminal sanctions found in the two systems and their implications for the fundamental rights of those held liable for the practice of insider trading. In other words, the possible cumulation of punishments imposed by criminal courts and administrative regulatory bodies raise the question whether there might be a violation of the *ne bis in idem* principle. As we are going to see, the response to that question is different in each

<sup>8</sup> BHATTACHARYA, Utpal; DAOUK, Hazem. The world price of insider trading. In: CLAESSENS, Stijn; LAEVEN, Luc (Ed.). *A Reader in International Corporate Finance*. Vol. 2. Washington DC: World Bank Publications, 2006, pp. 91-124. p. 91.

<sup>9</sup> A good summary of arguments in favor and against the criminalization of insider trading is provided by BAINBRIDGE, Stephen M. Insider trading: an overview. In: *Encyclopedia of Law and Economics III*. Cheltenham, U.K.: Edward Elgar Publishing, 2000, pp. 772-812. The opposition to outlawing insider trading dates back to many decades earlier. One classic of this stance is Henry G. Manne. Vide MANNE, Henry G. *Insider Trading and the Stock Market*. Free Press, 1966; MANNE, Henry G. In *Defense of Insider Trading*. *Harvard Business Review*. Boston, vol. 44, n. 6, 113-122, Nov./Dec. 1966.

system. In order to carry out the comparative analysis, we will start by briefly taking stock of the genesis and evolution of anti-insider trading regulation in Brazil and in the EU. By doing so, we can better comprehend the different rationales for the prohibition of insider trading in the two jurisdictions, which - in turn - helps us understand the reasons behind their divergencies and convergencies.

On the other hand, the differences and similarities of the definition of insider trading and its different component elements in Brazil and in the EU will remain outside the scope of our analysis.

## 1 INSIDER TRADING IN BRAZIL

### 1.1 The genesis of the Brazilian legislation on insider trading

If we consider non-criminal legislation, insider trading has been on the radar in Brazil as early as 1965, when the first explicit reference to the “utilization of information non-disclosed to the public” was made. In the Law 4.728 of 1965 - which served as the main securities regulatory statute for eleven years - the article 3º, X, provided that “it behooves the Central Bank: [...] X- to investigate the utilization of information non-disclosed to the public for one’s own benefit or the benefit of a third party, by shareholders or persons that have access to them due to the positions that they hold”<sup>10</sup>. But this attribution of oversight responsibilities regarding possible insider trading practices to the central bank was not followed by the granting of specific powers that would allow them to be carried out. And, likewise, no punishments or legal consequences were prescribed in case instances of insider trading were to be detected.<sup>11</sup>

All in all, this first regulatory attempt did not do much to curb the practice. Strictly speaking, this provision did not even make insider trading illegal. But it did send an important signal to the market, one that communicated in a resolute way the path that regulatory agencies

<sup>10</sup> BRAZIL, 1965. **Lei nº 4.728, de 14 de julho de 1965**. Disciplina o mercado de capitais e estabelece medidas para o seu desenvolvimento. Available at: [http://www.planalto.gov.br/ccivil\\_03/leis/L4728.htm](http://www.planalto.gov.br/ccivil_03/leis/L4728.htm). Accessed: 22 June 2019.

<sup>11</sup> COMPARATO, Fábio Konder. Insider Trading: sugestões para uma moralização do nosso mercado de capitais. *Revista de direito mercantil, industrial, econômico e financeiro*. São Paulo, v. 2, p. 46, 1971.

were to pursue in the coming decades. This was not trivial, in a time that renowned economists still argued for the legitimacy and even for the advantages of tolerating insider trading<sup>12</sup>.

In 1971, a major crisis hit the Brazilian stock market. The crash consisted in a busting bubble, which was caused by a combination of weak regulation and a massive input of resources due to government incentives aimed at promoting the stock market. In the wake of the crisis, the investigations revealed widespread market manipulation and extensive use of inside information. The harm to the confidence in the market was especially severe due to the fact that the boom years were fueled, to a large extent, by the entrance in the market of big contingents of small investors, who ended up being the greatest losers of the crash. The perception of unfairness and immorality by the public threatened to scare away this kind of investor for a long time, which could result in a major setback in the development of the Brazilian capital market. In order to minimize the damages, the government proceeded to a reform of capital markets regulation. The reform was introduced mainly by two laws.

One of them was the Law 6.404 of 1976, or the *Statute of Joint-Stock Companies (Lei das Sociedades por Ações)*, which contains the rules governing public companies and regulates civil aspects of insider trading. But the most consequential was certainly the Law 6.385 of 1976, which provided for the general rules governing securities markets in the country, including the treatment of information relevant to their price, and created the so-called *Securities Commission (Comissão de Valores Mobiliários)*, or CVM for short. Structured as an independent agency, the *Securities Commission* was tasked with the regulation of securities market by enforcing the federal securities laws, proposing new securities legislation, and enacting its own rules within its legally defined attributions.

The Law 6.385 of 1976 has been reformed a couple of times since its enactment to keep up both with market innovations and with new regulatory trends. One of these reforms introduced the crime of insider trading in 2001, more precisely with article 27-D. And in 2017, within a new general reform, the legal definition of the crime of insider trading was altered. As a result, over the years the Brazilian insider trading regulation system came to encompass civil, penal and administrative aspects and a rather strong oversighting body.

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<sup>12</sup> For instance, the abovementioned MANNE, Henry G. *Insider Trading and the Stock Market*. Free Press, 1966; MANNE, Henry G. In Defense of Insider Trading. *Harvard Business Review*. Boston, vol. 44, n. 6, 113-122, Nov./Dec. 1966.

## 1.2 Sanctions

Initially, insider trading was thought of as fundamentally a civil infraction. And as such, it gives rise to a civil liability for those that engage in it, which allows those who bear losses to seek compensation in court through damages, providing - of course - that all the other elements of civil liability are present (namely, a loss and a causal link between it and the illicit act). This follows automatically from the principles of civil liability, but if there should be any doubts, art. 155 § 3º of the *Statute of Joint-Stock Companies* states that “the injured person in the purchasing and selling of securities contracted with breach of the provisions in §§ 1º e 2º has the right to receive from the violator damages for losses and injury, unless they already know the piece of information when contracting”<sup>13</sup>.

To pair up with the civil consequences of insider trading, administrative provisions had been introduced as well. The Law 6.385 of 1976, in its article 9º V and VI combined with article 11, allowed the *Securities Commission* to impose administrative punishments on insider traders. The punishments that the *Commission* was authorized to apply were of four kinds: 1) reprimands; 2) fines; 3) suspension from the position of administrator, and; 4) revocation of the license to hold the position of administrator in public companies<sup>14</sup>.

The complement of administrative punishments was crucial for the efficacy of the outlawing of insider trading. The system of insider trading as a mere civil violation based on the breach of fiduciary duties of the administrator would surely be insufficient as a means of protecting the trust in the securities market. For one reason, because the very structure of civil liability itself appears not to be dissuasive enough to prevent the dissemination of the practice. Given that punitive damages are not part of the classical civil liability theory in the civil law

<sup>13</sup> BRAZIL, 1975. **Lei n. 6.404, de 15 de dezembro de 1976**. Dispõe sobre as Sociedades por Ações. Available at: [http://www.planalto.gov.br/ccivil\\_03/leis/l6404consol.htm](http://www.planalto.gov.br/ccivil_03/leis/l6404consol.htm). Accessed: 22 June 2019.

<sup>14</sup> The mentioned provisions are, in the original language: “Art. 9º A Comissão de Valores Mobiliários terá jurisdição em todo o território nacional e no exercício de suas atribuições, observado o disposto no Art. 15, § 2º, poderá: [...] V - apurar, mediante inquérito administrativo, atos ilegais e práticas não equitativas de administradores e acionistas de companhias abertas, dos intermediários e dos demais participantes do mercado; VI - aplicar aos autores das infrações indicadas no inciso anterior as penalidades previstas no Art. 11, sem prejuízo da responsabilidade civil ou penal.”; and “Art 11. A Comissão de Valores Mobiliários poderá impor aos infratores das normas desta Lei, da lei de sociedades por ações, das suas resoluções, bem como de outras normas legais cujo cumprimento lhe incumba fiscalizar, as seguintes penalidades: I - advertência; II - multa; III - suspensão do exercício de cargo de administrador de companhia aberta ou de entidade do sistema de distribuição de valores; IV - inabilitação para o exercício dos cargos referidos no inciso anterior;” BRAZIL, 1976. **Lei nº 6.385, de 7 de dezembro de 1976**. Dispõe sobre o mercado de valores mobiliários e cria a Comissão de Valores Mobiliários. Available at: [http://www.planalto.gov.br/ccivil\\_03/LEIS/L6385original.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L6385original.htm). Accessed: 22 June 2019.

system, the consequence of being found guilty is merely the obligation to pay compensation for losses inflicted on third parties, which are generally proportional to the profits earned from the illicit act of insider trading. In other words, civil liability alone could only compel the offender to pay the amount they had illicitly earned, which would make insider trading a bet worth taking. The administrative sanctions added to the amount that the offender would lose, one way or the other.

On the criminal front, article 27-D of the Law 6.385 of 1976 prescribed two punishments for the crime of insider trading: 1) imprisonment from a minimum of one year to a maximum of five years, and; 2) fine up to three times the amount of the illicit gains obtained through the offense. Those punishments are to be applied together. And, according to paragraph 2º of the same article, both punishments could be raised by one third in case the offender has the obligation to keep secrecy. No threshold of financial harm is required to fulfill the definition of insider trading<sup>15</sup>. This paragraph was added in the 2017 reform, when the obligation to keep secrecy was removed from the definition of the crime.

## 2 INSIDER TRADING IN THE EUROPEAN UNION

### 2.1 The genesis of the European Union legislation on insider trading

The very idea of the European Union (EU) is based on the concept of common market that evolved into the concept of internal (single) market<sup>16</sup>. A genuine internal market for

<sup>15</sup> However, under the doctrine of the insignificance principle, generally accepted in Brazil, small amounts of losses cause by insider trading could be disregarded as a criminal offense. For a criticism of this doctrine, see DE CASTRO, Alexander. O princípio da insignificância e suas vicissitudes entre Alemanha e Brasil: análise de um caso de inadvertida criatividade jurídica (1964-2016). *Revista da faculdade de direito da Universidade Federal de Minas Gerais*, Belo Horizonte, n. 74, pp. 39-64, jan./jun. 2019. DOI: <http://dx.doi.org/10.12818/P.0304-2340.2019v74p39>. Available at: <https://www.direito.ufmg.br/revista/index.php/revista/article/view/1976>. Accessed: 08 February 2020; DE CASTRO, Alexander; MACRÌ, Francesco. Il problema dei delitti di bagatella nell'emergenza dello stato costituzionale: breve analisi dell'evoluzione del suo trattamento tecnico-dogmatico in Brasile e in Italia. *Revista direitos sociais e políticas públicas - UNIFAFIBE*, Bebedouro, v. 6, n. 2, pp. 538-579, 2018. DOI: <http://dx.doi.org/10.25245/rdspp.v6i2.486>. Available at: <https://www.unifafibe.com.br/revista/index.php/direitos-sociais-politicas-pub/article/view/486/0>. Accessed: 08 February 2020, and DE CASTRO, Alexander; MACRÌ, Francesco. Insignificância e tenuidade do fato enquanto excludentes de tipicidade: uma análise da escassa lesividade da conduta nos sistemas penais brasileiro e italiano. *Revista da faculdade de direito da UFRGS*, Porto Alegre, v. 39, pp. 49-64, 2018. DOI: <https://doi.org/10.22456/0104-6594.88511>. Available at: <https://seer.ufrgs.br/revfacdir/article/view/88511>. Accessed: 08 February 2020.

<sup>16</sup> It was one of the main political and economic EU Communities' purpose. See more in HANF, D. Legal

financial services is considered to be crucial for the economic growth of the EU member states<sup>17</sup>. However, the accomplishment of an integrated market requires public confidence in markets. To increase the confidence, a common legal and regulatory framework was needed. Because of the wide differences between the EU countries regarding the functioning of their capital markets, the EU legislator decided to introduce a set of directives harmonizing national legislation in this area: the Capital Adequacy Directive,<sup>18</sup> the Public Offer Prospectus Directive,<sup>19</sup> the Insider Dealing Directive<sup>20</sup>. However, the endeavors to approximate national regulations met resistance and the pace of market integration was slow<sup>21</sup>.

Moreover, big financial scandals like the cases of Enron and World Com shocked public opinion. The idea of uniform rules against market abuses emerged as the solution to the problem of unsatisfactory level of capital market protection<sup>22</sup>. On 28 January 2003, the European Parliament and the Council adopted Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (hereinafter called MAD)<sup>23</sup> which defines in a uniform way the two most dangerous threats to capital markets: insider trading and market manipulation. This directive obligates national legislators to introduce effective, proportionate and dissuasive measures (art. 14 MAD). Although the act could not impose the obligation to criminalize insider trading and market manipulation, according to art. 14 par. 1 MAD there was no prejudice to the

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Concept and Meaning of the Internal Market. In: PELKMANS, J.; HANF, D.; CHANG, M. (eds.). **The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analysis**. P.I.E. Peter Lang. Brussels: 2008. p. 71.

<sup>17</sup> Point 1 of the preamble to the EUROPEAN UNION, 2003. Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). **Official Journal of the European Union**. L 96/16, p. 16-25, 12.4.2003. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0025:EN:PDF>. Accessed: 22 June 2019.

<sup>18</sup> EUROPEAN UNION, 1993. Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions. **Official Journal of the European Union**. L126/1, pp. 1-26, 11.6.1993. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0006>. Accessed: 1 March 2020.

<sup>19</sup> EUROPEAN UNION, 1989. Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public. **Official Journal of the European Union**. L124/8, pp 8-15, 17.04.1989. Available at: [http://www.legislation.gov.uk/eudr/1989/298/pdfs/eudr\\_19890298\\_adopted\\_en.pdf](http://www.legislation.gov.uk/eudr/1989/298/pdfs/eudr_19890298_adopted_en.pdf). Accessed: 1 March 2020.

<sup>20</sup> EUROPEAN UNION, 1989. Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing. **Official Journal of the European Union**. L334/30. pp. 30-2, 18.11.1989. Available at: [https://www.legislation.gov.uk/eudr/1989/592/pdfs/eudr\\_19890592\\_adopted\\_en.pdf](https://www.legislation.gov.uk/eudr/1989/592/pdfs/eudr_19890592_adopted_en.pdf). Accessed: 1 March 2020.

<sup>21</sup> AVGOULEAS, E. **The Mechanics and Regulation of Market Abuse**. Oxford: Oxford University Press, 2005. p. 244.

<sup>22</sup> MALONEY, N. New Frontiers in EC Capital Markets Law: From Market Construction to Market Regulation. **Common Market Law Review**, vol. 40, pp. 811-813, 2003.

<sup>23</sup> (2003) OJ L 96/16.

right of Member States to impose criminal sanctions.

Therefore, the EU Commission, after the review of the Market Abuse Directive, prepared in 2011 an assessment of contemporary regulations against market manipulation<sup>24</sup>. The differences between the way the Member States implemented MAD were the ground for potential regulatory arbitrage among trading venues. To avoid the use of forum shopping by perpetrators of market manipulation and insider dealing, the authorities of the European Union decided on the establishment of more uniform and stronger framework. Moreover, market and technological developments required new legislation.<sup>25</sup>

To meet the aforementioned expectations, the EU legislator decided to introduce double-track protection against insider dealing and market manipulation: administrative and criminal. First of all, the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing the Directive 2003/6/EC of the European Parliament and of the Council and the Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (hereinafter called MAR)<sup>26</sup> was introduced. The system of protection introduced by the regulation has administrative character. On the same day, the Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse (market abuse directive) (hereinafter called MAD II)<sup>27</sup> was adopted.

The directive has been grounded on art. 83 par. 2 of the Treaty on the Functioning of the European Union.<sup>28</sup> According to the provision, directives may establish minimum rules with regard to the definition of criminal offences and sanctions, if the approximation of criminal laws

<sup>24</sup> BLACHNIO-PARZYCH, A. The Concept of Defining and Combating Market Manipulation in Existing and Proposed EU Legislation. In: BRODOWSKI, D. et al. (eds.). **Regulating Corporate Criminal Liability**. Cham Heidelberg New York Dordrecht London: Springer, 2014, pp. 154-155.

<sup>25</sup> VENTORUZZO, M. Comparing Insider Trading in the United States and in the European Union: History and Recent Developments. **European Company and Financial Law Review**, vol. 4, pp. 582-586, 2019.

<sup>26</sup> EUROPEAN UNION. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. **Official Journal of the European Union**. L 173/1, p. 1-61, 12.6.2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>. Accessed: 1 March 2020.

<sup>27</sup> EUROPEAN UNION, 2014. Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive). **Official Journal of the European Union**. L 173, 12.6.2014, p. 179-189. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0057>. Accessed: 1 March 2020.

<sup>28</sup> EUROPEAN UNION, 2012. Consolidated version of the Treaty on the Functioning of the European Union. **Official Journal of the European Union**. C 326/47, pp. 47-390, 26.10.2012. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF>. Accessed: 1 March 2020.

and regulations of the Member States is essential to ensure the effective implementation of a Union policy in an area.<sup>29</sup>

As a result, all kinds of behavior described and forbidden in MAR are sanctioned at least by the use of administrative measures. All of them may constitute crimes, if the Member State decides on the criminalization of the respective behavior (art. 30 par. 1 MAR). However, national legislators are obligated to criminalize at least some of them, according to the MAD II.

Before the solutions adopted in the EU are presented, a reservation should be made. The subject of the regulation are not only transferable securities (shares), but also units in collective investment undertakings, options, futures, forwards, derivative contracts and even emission allowances.<sup>30</sup> The EU legislation differentiates the definition of inside information and other important elements of the regulation depending on the kinds of market instruments. To achieve a clear picture of the legislation, we will refer to the rules regarding financial instruments.

## 2.2 Sanctions

As mentioned before, MAR and MAD II introduced parallel systems of protection against insider dealing. The EU authorities decided that at least serious cases of insider dealing, when committed intentionally, should constitute crimes in the legislation of the Member States. All other kinds of market abuse should be penalized as administrative offences.

The administrative sanctions prescribed in art. 30 par. 2 MAR have non-pecuniary and pecuniary character. Among non-pecuniary sanctions the EU legislator stipulated: an order requiring the person responsible for the infringement to cease the conduct and to desist from repeating that conduct; the disgorgement of the profits gained or losses avoided due to

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<sup>29</sup> It is worth mentioning that before art. 83 TFEU was changed, the authorities of the European Union could not issue acts that obligated Member States to criminalize specific behaviors. They could only obligate them to ensure that the adopted measures are effective, proportionate and dissuasive. The national legislator decided which kinds of sanctions are appropriate to realize the goals. Vide LUCHTMAN, M.; VERVALE, J. Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union? *New Journal of European Criminal Law*, vol. 2(5), pp. 192-220, 2014. pp. 202-206; ÖBERG, J. *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law*. Oxford and Portland: Hart Publishing, 2017. pp. 1-3, 8-9.

<sup>30</sup> Vide Section C Annex A of the Directive 2014/65/EU EUROPEAN UNION, 2014. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. *Official Journal of the European Union*. L 173/349, p. 349-496, 12.6.2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>. Accessed: 1 March 2020.

infringements; a public warning; withdrawal or suspension of the authorization of an investment firm; a temporary ban of any person discharging managerial responsibilities from exercising management functions in investment firms; in the event of repeated infringement of the prohibition of insider trading, a permanent ban of any person discharging managerial responsibilities from exercising management functions in investment firms; a temporary ban of a person discharging managerial responsibilities from dealing on own account.

The severity of administrative pecuniary sanctions depends on the character of the person. In respect of natural person, the maximum administrative pecuniary sanction is at least EUR 5 million or the corresponding value in the national currency on 2nd July 2014 in the Member States whose currency is not the euro. The maximum administrative pecuniary sanctions prescribed for legal person is three times higher. It is at least EUR 15 million or 15 % of the total annual turnover of the legal person, or the corresponding value in the national currency on 2 July 2014 in the Member States whose currency is not the euro. The administrative authority can also impose on natural or legal persons administrative pecuniary sanctions that depend on the amount of the profits gained or losses avoided because of the infringement. The maximum administrative pecuniary sanction is then at least three times of the profits or the losses avoided.

As regards criminal sanctions, first of all it should be also underlined that national legislators may decide on the criminalization of all behaviors defined in MAR as insider dealing (art. 30 par. 1 MAR). According to art. 7 and art. 9 MAD II, Member States shall take the necessary measures to ensure that insider dealing is punishable by effective, proportionate and dissuasive criminal penalties. The maximum term of imprisonment should be at least 4 years. On the other hand, the maximum term of imprisonment for unlawful disclosure of inside information should be at least 2 years. As regards legal persons, they should be subject to sanctions that include criminal or non-criminal fines and may include other sanctions, such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision, judicial winding-up and temporary or permanent closure of establishments that have been used for committing the offence.

The EU legislation analyzed above do not concern civil liability for insider trading, but only its administrative and criminal consequences. However, the provisions of MAR have importance for civil liability in frame of domestic regimes of civil liability of the EU Member States. The infringements of the duties provided for in the EU legislation on insider trading can

be treated as torts by domestic courts. Although MAR and MAD II do not refer to this issue, the possible effects of the EU legislation on private law have been considered in the literature<sup>31</sup>.

### 3 THE DOUBLE-TRACK SYSTEM IN LIGHT OF HUMAN AND PERSONAL RIGHTS: THE *NE BIS IN IDEM* PRINCIPLE

Taking into account the penal character of those administrative sanctions prescribed in MAR, the system of parallel administrative and criminal liabilities raises questions about its accordance with the *ne bis in idem* principle<sup>32</sup>. In other words, some of the sanctions that are formally classified as administrative are so harmful to the perpetrators that they make experts wonder about their real nature<sup>33</sup>. The question is not restricted to insider trading. In fact, over time, many areas combined criminal and administrative sanctions in the EU space mainly because EU institutions were forbidden to legislate on criminal law up until the Lisbon Treaty.

Furthermore, given that they are usually imposed by administrative bodies composed by people with expertise in the respective field<sup>34</sup>, administrative sanctions are usually more efficient, cost less than judicial procedures and contribute to unclog the judicial system<sup>35</sup>. Thus, it became common that EU Member States would tend to the criminal aspects of a given harmful

<sup>31</sup> BUSCH, D. The private law effect of the EU market abuse regulation. *Capital Markets Law Journal*, vol. 14, n. 3, pp. 296-319, 2019.

<sup>32</sup> LUCHTMAN, M.; VERVALE, J. Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union? *New Journal of European Criminal Law*, vol. 2(5), pp. 192-220, 2014, pp. 214-215; CERIZZA, M. The New Market Abuse Directive. *EUCRIM*, n. 3, pp. 87-88, 2014; BLACHNIO-PARZYCH, A. Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and their Assessment from the Perspective of the Ne Bis in Idem Principle. *New Journal of European Criminal Law*, vol. 9 (3), pp. 366-385, 2018. pp. 367-369.

<sup>33</sup> They blur the distinction between criminal law and administrative law and very often increase the scope of the criminal justice system. Vide HUISMAN, W.; KOEMANS, M. Administrative Measures in Crime Control. *Erasmus Law Review*, 1(5), pp. 121-122, 2008. pp. 121-122; FAURÉ, M.; GOURITIN, A. Blurring Boundaries between Administrative and Criminal Enforcement of Environmental Law. In: GALLI, F.; WEYEMBERGH, A. (eds.). *Do Labels Still Matter: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU*. Bruxelles: Institute d'études Europeennes, 2014, pp. 109-136; BAILLEUX, A. The Fiftieth Shade of Grey: Competition Law, "Criministrative Law" and "Fairly Fair Trials". In: GALLI, F.; WEYEMBERGH, A. (eds.). *Do Labels Still Matter: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU*. Bruxelles: Institute d'études Europeennes, 2014, pp. 137-152; FAURÉ, M.; HEINE, G. Summary of Country Reports. In: FAURE, M.; HEINE, G. (eds.). *Criminal Enforcement of Environmental Law in the European Union*. Hague: Kluwer Law International, 2005. p. 22.

<sup>34</sup> WIDDERSHOVEN, R. Encroachment of Criminal Law in Administrative Law in the Netherlands. *Electronic Journal of Comparative Law*. 6, pp. 445-446, 2002.

<sup>35</sup> RAEDSCHELDERS, S. Interrelations between Administrative and Criminal Sanctions in Environmental Law: New Legislation and Actual Practice in Flanders. *Ninth International Conference on Environmental Compliance and Enforcement*, 617, pp. 616-627, 2011. Available at: [http://inece.org/conference/9/proceedings/65\\_Raedscelders.pdf](http://inece.org/conference/9/proceedings/65_Raedscelders.pdf). Accessed: 6 March 2018.







Lastly, every additional sanction and penalty imposed to the same infraction is an additional step towards the infringement of the principle of proportionality.

Overall, it is clear that the combination of administrative and criminal liability for the conduct of insider trading poses serious risks to the protection of human rights. On the other hand, a double-track system of protection against insider trading is undeniably more efficient, offering practical advantages that need to be preserved for the sake of the proper functioning of capital markets. Therefore, it is essential that its compatibility with the *ne bis in idem* system be judiciously assessed in each given case in order to ensure the application of the best possible anti-insider trading system within the highest individual guarantees of the constitutional order.

In Brazil, the problem of the scope of the *ne bis in idem* principle has received increasing attention in the last years<sup>46</sup>. The debate has been propped up by a decision of the supreme court that considered a procedure against money laundry carried out in the Brazilian justice system as a violation of the *ne bis in idem* principle because the defendant had been previously tried and acquitted for the same facts in Switzerland<sup>47</sup>, thus acknowledging the validity of the *ne bis in idem principle* even at the expenses of the judicial sovereignty of the country<sup>48</sup>. Another recent court decision by the superior court of justice acknowledged the violation of the principle in a trial of a military man within the ordinary justice for facts that had

<sup>46</sup> Vide ARÊDES, Sirlene Nunes. *Ne bis in idem: direito fundamental constitucional aplicável na relação entre as esferas penal e administrativa geral no direito brasileiro. Direito, Estado e Sociedade*, n.52, pp. 204-40, jan/jun 2018; OLIVEIRA, Marcus Vinícius Xavier de. *Da inconstitucionalidade dos artigos 7º, 51º e 8º do código penal por violação ao princípio ne bis in idem. Revista Quaestio Iuris*, vol.05, n. 01, pp. 69-100, 2012; ALEIXO, Klélia Canabrava; PENIDO, Flávia Ávila. *A subversão principiológica na execução penal e o princípio ne bis in idem. Delictae: Revista de Estudos Interdisciplinares sobre o Delito*, v. 2, n. 2, pp. 227-249, jun. 2017. Available at: <http://delictae.com.br/index.php/revista/article/view/25>. Accessed: 19 February 2020; DEZAN, Sandro Lúcio. *A constitucionalização do direito penal: a força normativa do princípio ne bis in idem para uma adequada leitura epistêmica dos bens jurídicos. Revista Justiça do Direito*, v. 33, n. 2, pp. 89-120, 2019; COSTA, Helena Regina Lobo da. *Ne bis in idem e Lei Anticorrupção: sobre os limites para a imposição de sanção pelo Estado. Revista Fórum de Ciências Criminais: RFCC*, Belo Horizonte, n. ja/ju 2015, pp. 73-90, 2015; FIGUEIREDO, Natália de Lima. *Considerações sobre a aplicação do princípio do ne bis in idem em casos de cartéis internacionais no Brasil. Revista do Ibrac*, v. 18, n. 19, pp. 67-104, jan./jun., 2011; SABOYA, Keity Mara Ferreira de Souza; DANTAS, Marcelo Navarro Ribeiro. *Ne bis in idem: limites jurídico-constitucionais à persecução penal*. Natal: Universidade Federal do Rio Grande do Norte, 2006.

<sup>47</sup> BRAZIL. Supremo Tribunal Federal. *Habeas Corpus HC 171118 / SP - São Paulo*. Paciente: Marcelo Brandão Machado. Impetrante: Maria Elizabeth Queijo e Outro(A/S). Impetrado: Superior Tribunal De Justiça. Relator: Min. Gilmar Mendes. Brasília, 12 de novembro de 2019. Portal STF, 2019. Available at: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5692637>. Accessed: 22 June 2019.

<sup>48</sup> On the relations between sovereignty and fundamental rights, vide FORNASIER, Mateus de Oliveira; BEDIN, Gilmar Antonio; LEVES, Aline Pedron. *Democracia, globalização e normatividade jurídica: a relativização da soberania e a eficácia dos direitos fundamentais. Revista Eletrônica do Curso de Direito da UFSM*, Santa Maria, RS, v. 14, n. 2, e32548, maio./ago. 2019. ISSN 1981-3694. DOI: <http://dx.doi.org/10.5902/1981369432548>. Available at: <https://periodicos.ufsm.br/revistadireito/article/view/32548> Accessed: 19 October 2020.

been previously tried in the military justice, where he was acquitted by virtue of the statutes of limitation<sup>49</sup>. However, the combination of criminal and administrative procedures for the same facts in relation to the same defendant is still to be assessed by the higher courts.

The Brazilian constitution does not explicitly mention the *ne bis in idem* principle, nor through the Latin brocard neither with a vernacular expression. Its validity in the Brazilian legal system is nevertheless acknowledged by the legal community through two main sources. Firstly, the prohibition of *bis in idem* is derived from the *res judicata* doctrine, which - in turn - has constitutional basis (article 5, XXXVI, of the Brazilian constitution<sup>50</sup>).

Since the *res judicata* prevents a claim that has reached a final, non-appealable judgement between the same parties from being tried again, it follows that the facts that provide the grounds for a criminal case against a given person can hardly be tried again in another criminal procedure, since in such cases the plaintiff is usually always the same, i.e. the state. This rule can be extrapolated through analogic reasoning to demonstrate that the underlying rule of *res judicata* doctrine is the prohibition against a repetition of trial against the same person for the same facts themselves regardless of the qualification that they might acquire in different regimes of liability. Secondly, and perhaps indisputably, the *ne bis in idem* principle is provided in article 8.4 of the American Convention on Human Rights (known as Pact of San José)<sup>51</sup>, ratified by Brazil in 1992. It is, therefore, beyond doubt that the principle is valid in Brazil<sup>52</sup>.

The main obstacle to the acceptance of the *ne bis in idem* principle between criminal and administrative regimes of liability is the strength of the doctrine of autonomy and independence of the branches of law, according to which the decisions reached within one

<sup>49</sup> BRAZIL. Superior Tribunal de Justiça. **Habeas Corpus nº 392.868 - MT (2017/0061601-7)**. Paciente: Adelaide Raquel dos Santos. Impetrante: Eduardo Moreira Leite Mahon e Outro(s). Impetrado: Tribunal de Justiça do Estado de Mato Grosso. Relator: Ministro Nefi Cordeiro. Brasília, 06 de junho de 2017. Conjur, 2019. Available at: <https://www.conjur.com.br/dl/stj-reconhece-bis-in-idem-anula.pdf>. Accessed: 22 June 2019.

<sup>50</sup> BRAZIL, 1988. **Constituição da República Federativa do Brasil de 1988**. Available at: [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm). Accessed: 22 June 2019.

<sup>51</sup> ORGANIZATION OF AMERICAN STATES, 1969. **American Convention on Human Rights**: Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Available at: <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. Accessed: 22 June 2019.

<sup>52</sup> BERNARDI, Renato; MATTOSINHO, Francisco Antonio Nieri. A supraconstitucionalidade dos tratados internacionais sobre direitos humanos: a superação do modelo constitucionalista moderno e da soberania do Estado. **Revista Eletrônica do Curso de Direito da UFSM**, Santa Maria, RS, v. 10, n. 2, pp. 788-817, 2015. ISSN 1981-3694. DOI: <http://dx.doi.org/10.5902/1981369419960> Available at: <https://periodicos.ufsm.br/revistadireito/article/view/19960>. Accessed: 18 October 2020.

branch do not necessarily bind the others<sup>53</sup>. The precedents of the Supreme Court has been consistent with this understanding. However, the contrary doctrine, i.e. the theory of the unity of state's punitive power, has been growing in acceptance in many countries.

Under this theory, the sanctions enforced by the state with punitive (or penal) character are not materially distinguishable, even if they are applied within independent branches of law<sup>54</sup>. Therefore, in this view the *ne bis in idem* principle needs to be understood as a limit to the state's punitive power as a whole, thus prohibiting both a second punishment for the same facts (in its material aspect) and the repetition of procedures to investigate the same defendant for the same facts when a final decision has been reached in the first one (in its procedural aspect).

In conclusion, as far as Brazilian legal system is concerned, the modern view on the relationship between the several branches of law requires that the *ne bis in idem* principle be applied across disciplinary borders in order to ensure the due protection of human rights as they are defined in the Pact of San José and the due protection of their derivations within Brazilian internal law, such as the personal rights of right to honor and to freedom<sup>55</sup>. The resistance to acknowledge the full scope of application of the *ne bis in idem* principle due to the idea of a rigid and unsurmountable independence of branches of law makes it very easy to bypass it completely, thus endangering the protection of human dignity.

Therefore, if the *ne bis in idem* is to be taken seriously in Brazil under the perspective of human and personal rights, it is a logical necessity that we ignore the distinction of regimes of liability between criminal and administrative law<sup>56</sup>. In a way, this should come naturally within the evolution of the protection of fundamental rights<sup>57</sup>.

<sup>53</sup> ARÊDES, Sirlene Nunes. *Ne bis in idem: direito fundamental constitucional aplicável na relação entre as esferas penal e administrativa geral no direito brasileiro*. *Direito, Estado e Sociedade*, n.52, pp. 204-40, jan/jun 2018. pp. 204-7.

<sup>54</sup> ARÊDES, Sirlene Nunes. *Ne bis in idem: direito fundamental constitucional aplicável na relação entre as esferas penal e administrativa geral no direito brasileiro*. *Direito, Estado e Sociedade*, n.52, pp. 204-40, jan/jun 2018. pp. 224-6.

<sup>55</sup> In light of the modern comprehension about personal rights in Brazilian law. Vide ZANINI, Leonardo Estevam de A.; OLIVEIRA, Edmundo A. de; SIQUEIRA, Dirceu Pereira; FRANCO JR., Raul de Mello. Os direitos da personalidade em face da dicotomia direito público - direito privado. *Revista de Direito Brasileira*, São Paulo-SP, v. 19, n. 8, pp. 208 - 220, Jan./Abr. 2018; MORAES, Maria Celina Bodin de. Ampliando os direitos da personalidade. In: VIEIRA, José Ribas. (Org.). *20 anos da Constituição cidadã de 1988: efetivação ou impasse institucional?* Rio de Janeiro: Forense, 2008, pp. 369-388.

<sup>56</sup> Such and understanding is overdue amidst an intense debate on the limits of criminal law that has been taking place in Brazil in the last decades. For a critical summary on the different theoretical positions in this debate, vide ÁVILA, Gustavo Noronha de. O debate entre Luigi Ferrajoli e os abolicionistas: entre a sedução pelo discurso do medo e as práticas libertárias. *Revista Jurídica Cesumar*, v. 16, n. 2, pp. 543 -

## CONCLUSIONS

Both in Brazil and in the EU, capital markets are protected against insider trading not only to prevent unfair losses to other market participants, but mainly to preserve the trust in their proper functioning. Therefore, from an economic perspective, the two systems are set out to achieve the same goal. However, the legal rationales that constitute the basis for the anti-insider trading policy in these two jurisdictions are different. The key concept behind the insider trading prohibition in the EU is market egalitarianism<sup>58</sup>. Therefore, insider trading is considered a breach of equality in the capital market and, as such, a major threat for its proper functioning<sup>59</sup>.

In Brazil, on the other hand, the question of the rationale for the prohibition of insider trading is more complex. In the beginning, fiduciary duties lied behind the anti-insider trading protection. Over time, however, the insider trading prohibition started to include people not bound by fiduciary duties. But fiduciary duties remained relevant within the system, meaning that Brazilian anti-insider trading policy seems to fit in-between two opposite models. Since the anti-insider trading system in Brazil was the product of a longer and non-linear evolution, it is to be asked whether it will gradually evolve towards the shape and form of the one in force in the

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56, maio/ago. 2016.

<sup>57</sup> On some important philosophical aspects of the dawn of fundamental rights, vide CASTRO, Alexander de. O legislador entre “felicidade pública” e “máxima felicidade”: contribuição à história da filosofia jurídica às vésperas da era dos direitos. *Revista da Faculdade de Direito da UFRGS*, Porto Alegre, n. 41, pp. 97-119, dez. 2019. DOI: <https://doi.org/10.22456/0104-6594.95267>. Available at: <https://seer.ufrgs.br/revfacdir/article/view/95267>. Accessed: 10 August 2020, and CASTRO, Alexander de; DAL RI JÚNIOR, Arno. Iluminismo e absolutismo no modelo jurídico-penal de Cesare Beccaria. *Seqüência: estudos jurídicos e políticos*. Florianópolis, n. 57, pp. 261-284, dez. 2008. DOI: <https://doi.org/10.5007/2177-7055.2008v29n57p261>. Available at: <https://periodicos.ufsc.br/index.php/sequencia/article/view/14958>. Accessed: 26 March 2018. The path towards the development of fundamental rights lies in the eighteenth-century reforms, which had different shades in different political domains. On these reforms in the lusophone world, vide CASTRO, Alexander de. Enlightened Absolutism and legal culture in Portugal: rise and decline of legal Pombalism in the 18th century (1769-1789). *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung*. Wien, Köln, Weimar, Volume 133, pp. 296-364, 2016. DOI: <https://doi.org/10.7767/zrgga-2016-0108>. Available at: <https://www.degruyter.com/view/j/zrgga.2016.133.issue-1/zrgga-2016-0108/zrgga-2016-0108.xml>. Accessed: 26 March 2018, and DE CASTRO, Alexander. “Boa razão” e codificação penal: apontamentos sobre a questão penal setecentista em Portugal (1769-1789). *Revista Brasileira de Estudos Políticos*, Belo Horizonte, n. 111, pp. 105-143, jul./dez. 2015. DOI: <https://doi.org/10.9732/P.0034-7191.2016V111P105>. Available at: <https://pos.direito.ufmg.br/rbep/index.php/rbep/article/view/P.0034-7191.2016V111P105/325>. Accessed: 25 July 2019.

<sup>58</sup> VENTORUZZO, M. Comparing Insider Trading in the United States and in the European Union: History and Recent Developments. *European Company and Financial Law Review*, vol. 4, pp. 582-586, 2019. pp. 588.

<sup>59</sup> AVGOULEAS, E. *The Mechanics and Regulation of Market Abuse*. Oxford: Oxford University Press, 2005, pp. 25; CERIZZA, M. The New Market Abuse Directive. *EUCRIM*, n. 3, pp. 87-88, 2014. pp. 85.

EU one, or if it will preserve the references to fiduciary duties in order to remain firmly as an intermediary<sup>60</sup>.

As regards sanctions, there are both differences and similarities between the two systems. Initially, when the concept of insider trading was introduced in Brazilian financial regulations, it was seen as a mere civil infraction. And as such, its consequences were civil liability for the perpetrator and compensation for those who bear losses. To the civil consequences of insider trading, administrative measures were soon introduced. According to the Law 6.385 of 1976, in its article 9º V and VI and article 11, the *Securities Commission* can impose one pecuniary penalty, i.e. fines, and three non-pecuniary penalties on insider traders: 1) reprimands; 2) suspension from the position of administrator, and; 3) revocation of the license to hold the position of administrator in public companies<sup>61</sup>.

The criminalization of insider trading occurred in 2001, though the introduction of article 27-D of the Law 6.385/1976, which was then altered in 2017. Two punishments for the crime of insider trading, meant to be applied together, were prescribed: 1) imprisonment from a minimum of one year to a maximum of five years, and; 2) fine up to three times the amount of the illicit gains obtained through the offense. In case the offender have the obligation to keep secrecy, the two penalties could be raised by one third, according to paragraph 2º added to the same article in the 2017 reform, when the obligation to keep secrecy was removed from the definition of the crime.

Likewise, in the EU law, pecuniary and non-pecuniary administrative penalties are combined. The pecuniary penalties will depend on the type of the convicted person. For natural persons, the maximum that can be imposed as administrative pecuniary penalty is at least EUR 5 million (or the equivalent in the national currency on 2nd July 2014). For legal persons, it is at least EUR 15 million or 15% of its total annual turnover (or the equivalent in the national currency on 2 July 2014). Alternatively, however, the administrative authority can impose on both types of persons pecuniary sanctions up to at least three times the achieved profits or avoided losses. Therefore, in case the precise assessment of the gains proves too difficult, there

<sup>60</sup> Between the EU system and the US American system. See more about the model in force in the United States in VENTORUZZO, M. Comparing Insider Trading in the United States and in the European Union: History and Recent Developments. *European Company and Financial Law Review*, vol. 4, pp. 582-586, 2019. pp. 554-593.

<sup>61</sup> BRAZIL, 1976. *Lei nº 6.385, de 7 de dezembro de 1976*. Dispõe sobre o mercado de valores mobiliários e cria a Comissão de Valores Mobiliários. Available at: [http://www.planalto.gov.br/ccivil\\_03/LEIS/L6385original.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L6385original.htm). Accessed: 22 June 2019.

is an alternative measure for determining the value of the fine independently of the settlements related to the gains resulted from the forbidden behaviors.

Among non-pecuniary sanctions the EU legislator stipulated the following ones: a) an order requiring the person responsible for the infringement to cease the conduct and to desist from repeating that conduct; b) the disgorgement of the profits gained or losses avoided due to infringements; c) a public warning; d) withdrawal or suspension of the authorization of an investment firm; e) a temporary ban of any person discharging managerial responsibilities from exercising management functions in investment firms; d) in the event of repeated infringement of the prohibition of insider trading, a permanent ban of any person discharging managerial responsibilities from exercising management functions in investment firms; e) a temporary ban of a person discharging managerial responsibilities from dealing on own account.

It is interesting to notice that, while the actual obtainment of profits is not required neither in Brazil nor in the EU for insider trading to legally happen, it is still relevant to determine the amount of pecuniary penalties in both jurisdictions. However, perhaps the main similarity between the two systems is the double-track prevention of insider trading.

Both Brazilian and EU law enforces criminal and administrative liability for the practice. As regards sanctions, the main consequence is that, in principle, a perpetrator of insider trading may have to bear two kinds of penalties for the same conduct. However, as seem above, according to the precedents of the European Court of Justice and the European Court of Human Rights<sup>62</sup> some of the administrative sanctions can be considered to have a criminal character. Consequently, if the same person is held both criminally and administratively liable for the same act, the *ne bis in idem* principle may be infringed. This seems not to be problematic in Brazil.

The reason might be the lack of an autonomous meaning for the term “criminal charge”, which was introduced in 1976 in the case Engel and others versus Netherlands by the European Court of Human Rights<sup>63</sup>. Therefore, while the abovementioned double-track system

<sup>62</sup> Vide EUROPEAN COURT OF HUMAN RIGHTS. Application no. 18640/10. **Grande Stevens and others v. Italy**. Judgement of the ECtHR of 4 March 2014. Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22application%20no.%2018640/10%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-141794%22%5D%7D>. Accessed: 7 March 2020. It is worth remembering that the countries over which the European Court of Human Rights has jurisdiction do not coincide with the member states of the European Union, but to member states of the Council of Europe.

<sup>63</sup> EUROPEAN COURT OF HUMAN RIGHTS. Application no. 5100/71. **Engel and others v. Netherlands**. Judgement of the ECtHR of 8 June 1976. Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22application%20no.%205100/71%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-57478%22%5D%7D>. Accessed: 7 March 2020.

remains in force, the cumulative application of both administrative and criminal penalties to the same person for the same conduct is considered a violation of human rights. Since the *ne bis in idem* principle is widely acknowledged by Brazilian criminal law literature, there seem to be elements for a consideration of a possible infringement of fundamental and personal rights in instances of cumulative application of administrative and criminal sanctions for insider trading.

The main obstacle to this understanding is the rigid separation between the branches of law, which is - for the time being - the dominant approach both in the courts and in the legal science. Given that the question concerns the protection of human and personal rights, it is mandatory that the *ne bis in idem* be applied across disciplinary borders, disregarding the limits between the branches of law. This means that the states punitive power needs to be understood as constituting a unity, at least as far as its punitive activities are concerned.

## REFERENCES

ALEIXO, Klélia Canabrava; PENIDO, Flávia Ávila. A subversão principiológica na execução penal e o princípio *ne bis in idem*. **Delictae: Revista de Estudos Interdisciplinares sobre o Delito**, v. 2, n. 2, pp. 227-249, jun. 2017. Available at: <http://delictae.com.br/index.php/revista/article/view/25>. Accessed: 19 February 2020.

ARÊDES, Sirlene Nunes. *Ne bis in idem: direito fundamental constitucional aplicável na relação entre as esferas penal e administrativa geral no direito brasileiro*. **Direito, Estado e Sociedade**, n.52, pp. 204-40, jan/jun 2018.

AVGOULEAS, E. **The Mechanics and Regulation of Market Abuse**. Oxford: Oxford University Press, 2005.

ÁVILA, Gustavo Noronha de. O debate entre Luigi Ferrajoli e os abolicionistas: entre a sedução pelo discurso do medo e as práticas libertárias. **Revista Jurídica Cesumar**, v. 16, n. 2, pp. 543-56, maio/ago. 2016.

BAILLEUX, A. The Fiftieth Shade of Grey: Competition Law, “Criministrative Law” and “Fairly Fair Trials”. In: GALLI, F.; WEYEMBERGH, A. (eds.). **Do Labels Still Matter: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU**. Bruxelles: Institute d’etudes Europeennes, 2014, pp. 137-152.

BAINBRIDGE, Stephen M. Insider trading: an overview. In: **Encyclopedia of Law and Economics III**. Cheltenham, U.K.: Edward Elgar Publishing, 2000, pp. 772-812.

BERNARDI, Renato; MATTOSINHO, Francisco Antonio Nieri. A supraconstitucionalidade dos tratados internacionais sobre direitos humanos: a superação do modelo constitucionalista moderno e da soberania do Estado. **Revista Eletrônica do Curso de Direito da UFSM, Santa Maria, RS**, v. 10, n. 2, pp. 788-817, 2015. ISSN 1981-3694. DOI:

<http://dx.doi.org/10.5902/1981369419960> Available at:  
<https://periodicos.ufsm.br/revistadireito/article/view/19960>. Accessed: 18 October 2020.

BHATTACHARYA, Utpal; DAOUK, Hazem. The world price of insider trading. In: CLAESSENS, Stijn; LAEVEN, Luc (Ed.). **A Reader in International Corporate Finance**. Vol. 2. Washington DC: World Bank Publications, 2006, pp. 91-124.

BLACHNIO-PARZYCH, A. Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and their Assessment from the Perspective of the Ne Bis in Idem Principle. **New Journal of European Criminal Law**, vol. 9 (3), pp. 366-385, 2018.

BLACHNIO-PARZYCH, A. The Concept of Defining and Combating Market Manipulation in Existing and Proposed EU Legislation. In: BRODOWSKI, D. et al. (eds.). **Regulating Corporate Criminal Liability**. Cham Heidelberg New York Dordrecht London: Springer, 2014, pp. 154-155.

BRAZIL, 1965. **Lei nº 4.728, de 14 de julho de 1965**. Disciplina o mercado de capitais e estabelece medidas para o seu desenvolvimento. Available at:  
[http://www.planalto.gov.br/ccivil\\_03/leis/L4728.htm](http://www.planalto.gov.br/ccivil_03/leis/L4728.htm). Accessed: 22 June 2019.

BRAZIL, 1975. **Lei n. 6.404, de 15 de dezembro de 1976**. Dispõe sobre as Sociedades por Ações. Available at: [http://www.planalto.gov.br/ccivil\\_03/leis/l6404consol.htm](http://www.planalto.gov.br/ccivil_03/leis/l6404consol.htm). Accessed: 22 June 2019.

BRAZIL, 1976. **Lei nº 6.385, de 7 de dezembro de 1976**. Dispõe sobre o mercado de valores mobiliários e cria a Comissão de Valores Mobiliários. Available at:  
[http://www.planalto.gov.br/ccivil\\_03/LEIS/L6385original.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L6385original.htm). Accessed: 22 June 2019.

BRAZIL, 1988. **Constituição da República Federativa do Brasil de 1988**. Available at:  
[http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm). Accessed: 22 June 2019.

BRAZIL. Superior Tribunal de Justiça. **Habeas Corpus nº 392.868 - MT (2017/0061601-7)**. Paciente: Adelaide Raquel dos Santos. Impetrante: Eduardo Moreira Leite Mahon e Outro(s). Impetrado: Tribunal de Justiça do Estado de Mato Grosso. Relator: Ministro Nefi Cordeiro. Brasília, 06 de junho de 2017. Conjur, 2019. Available at: <https://www.conjur.com.br/dl/stj-reconhece-bis-in-idem-anula.pdf>. Accessed: 22 June 2019.

BRAZIL. Supremo Tribunal Federal. **Habeas Corpus HC 171118 / SP - São Paulo**. Paciente: Marcelo Brandão Machado. Impetrante: Maria Elizabeth Queijo e Outro(A/S). Impetrado: Superior Tribunal De Justiça. Relator: Min. Gilmar Mendes. Brasília, 12 de novembro de 2019. Portal STF, 2019. Available at:  
<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5692637>. Accessed: 22 June 2019.

BUSCH, D. The private law effect of the EU market abuse regulation. **Capital Markets Law Journal**, vol. 14, n. 3, pp. 296-319, 2019.

CASTRO, Alexander de. Enlightened Absolutism and legal culture in Portugal: rise and decline of legal Pombalism in the 18th century (1769-1789). **Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung**. Wien, Köln, Weimar, Volume 133, pp. 296-364, 2016. DOI: <https://doi.org/10.7767/zrsga-2016-0108>. Available at:

<https://www.degruyter.com/view/j/zrgga.2016.133.issue-1/zrgga-2016-0108/zrgga-2016-0108.xml>. Accessed: 26 March 2018.

CASTRO, Alexander de. O legislador entre “felicidade pública” e “máxima felicidade”: contribuição à história da filosofia jurídica às vésperas da era dos direitos. **Revista da Faculdade de Direito da UFRGS**, Porto Alegre, n. 41, pp. 97-119, dez. 2019. DOI: <https://doi.org/10.22456/0104-6594.95267>. Available at: <https://seer.ufrgs.br/revfacdir/article/view/95267>. Accessed: 10 August 2020.

CASTRO, Alexander de; DAL RI JÚNIOR, Arno. Iluminismo e absolutismo no modelo jurídico-penal de Cesare Beccaria. **Seqüência: estudos jurídicos e políticos**. Florianópolis, n. 57, pp. 261-284, dez. 2008. DOI: <https://doi.org/10.5007/2177-7055.2008v29n57p261>. Available at: <https://periodicos.ufsc.br/index.php/sequencia/article/view/14958>. Accessed: 26 March 2018.

CERIZZA, M. The New Market Abuse Directive. **EUCRIM**, n. 3, pp. 87-88, 2014.

CHITIMIRA, Howard. A Historical Overview of Market Abuse Prohibition in the United Kingdom. **Mediterranean Journal of Social Sciences**. Vol. 5, n. 20, pp. 49-61, September 2014.

COMPARATO, Fábio Konder. Insider Trading: sugestões para uma moralização do nosso mercado de capitais. **Revista de direito mercantil, industrial, econômico e financeiro**. São Paulo, v. 2, p. 46, 1971.

COSTA, Helena Regina Lobo da. Ne bis in idem e Lei Anticorrupção: sobre os limites para a imposição de sanção pelo Estado. **Revista Fórum de Ciências Criminais: RFCC**, Belo Horizonte, n. ja/ju 2015, pp. 73-90, 2015.

DE CASTRO, Alexander. “Boa razão” e codificação penal: apontamentos sobre a questão penal setecentista em Portugal (1769-1789). **Revista Brasileira de Estudos Políticos**, Belo Horizonte, n. 111, pp. 105-143, jul./dez. 2015. DOI: <https://doi.org/10.9732/P.0034-7191.2016V111P105>. Available at: <https://pos.direito.ufmg.br/rbep/index.php/rbep/article/view/P.0034-7191.2016V111P105/325>. Accessed: 25 July 2019.

DE CASTRO, Alexander. O princípio da insignificância e suas vicissitudes entre Alemanha e Brasil: análise de um caso de inadvertida criatividade jurídica (1964-2016). **Revista da faculdade de direito da Universidade Federal de Minas Gerais**, Belo Horizonte, n. 74, pp. 39-64, jan./jun. 2019. DOI: <http://dx.doi.org/10.12818/P.0304-2340.2019v74p39>. Available at: <https://www.direito.ufmg.br/revista/index.php/revista/article/view/1976>. Accessed: 08 February 2020.

DE CASTRO, Alexander; MACRÌ, Francesco. Il problema dei delitti di bagatella nell'emergenza dello stato costituzionale: breve analisi dell'evoluzione del suo trattamento tecnico-dogmatico in Brasile e in Italia. **Revista direitos sociais e políticas públicas - UNIFAFIBE**, Bebedouro, v. 6, n. 2, pp. 538-579, 2018. DOI: <http://dx.doi.org/10.25245/rdspp.v6i2.486>. Available at: <https://www.unifafibe.com.br/revista/index.php/direitos-sociais-politicas-pub/article/view/486/0>. Accessed: 08 February 2020.

DE CASTRO, Alexander; MACRÌ, Francesco. Insignificância e tenuidade do fato enquanto excludentes de tipicidade: uma análise da escassa lesividade da conduta nos sistemas penais



EUROPEAN COURT OF HUMAN RIGHTS. Application no. 5100/71. **Engel and others v. Netherlands**. Judgement of the ECtHR of 8 June 1976. Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22application%20no.%205100/71%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-57478%22%5D%7D>. Accessed: 7 March 2020.

EUROPEAN UNION, 1989. Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public. **Official Journal of the European Union**. L124/8, pp 8-15, 17.04.1989. Available at: [http://www.legislation.gov.uk/eudr/1989/298/pdfs/eudr\\_19890298\\_adopted\\_en.pdf](http://www.legislation.gov.uk/eudr/1989/298/pdfs/eudr_19890298_adopted_en.pdf). Accessed: 1 March 2020.

EUROPEAN UNION, 1989. Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing. **Official Journal of the European Union**. L334/30. pp. 30-2, 18.11.1989. Available at: [https://www.legislation.gov.uk/eudr/1989/592/pdfs/eudr\\_19890592\\_adopted\\_en.pdf](https://www.legislation.gov.uk/eudr/1989/592/pdfs/eudr_19890592_adopted_en.pdf). Accessed: 1 March 2020.

EUROPEAN UNION, 1993. Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions. **Official Journal of the European Union**. L126/1, pp. 1-26, 11.6.1993. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0006>. Accessed: 1 March 2020.

EUROPEAN UNION, 2000. Charter of fundamental rights of the European Union. **Official Journal of the European Communities**. C 364, pp. 1-21, 18.12.2000. Available at: [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf). Accessed: 1 March 2020.

EUROPEAN UNION, 2003. Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). **Official Journal of the European Union**. L 96/16, p. 16-25, 12.4.2003. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0025:EN:PDF>. Accessed: 22 June 2019.

EUROPEAN UNION, 2012. Consolidated version of the Treaty on the Functioning of the European Union. **Official Journal of the European Union**. C 326/47, pp. 47-390, 26.10.2012. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF>. Accessed: 1 March 2020.

EUROPEAN UNION, 2014. Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive). **Official Journal of the European Union**. L 173, 12.6.2014, p. 179-189. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0057>. Accessed: 1 March 2020.

EUROPEAN UNION, 2014. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. **Official Journal of the European Union**. L 173/349, p. 349-496, 12.6.2014.

Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>  
Accessed: 1 March 2020.

EUROPEAN UNION. European Court of Justice. C-489/10. **Criminal proceedings v. L. Bonda.** Judgment the ECJ of 5 June 2012, section 37. Available at: <http://curia.europa.eu/juris/fiche.jsf?id=C%3B489%3B10%3BRP%3B1%3BP%3B1%3BC2010%2F0489%2FJ&oqp=&for=&mat=or&lgrec=en&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-489%252F10&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=791608> Accessed: 7 March 2020.

EUROPEAN UNION. European Court of Justice. C-617/10. **Aklagaren v. H. Akerberg Fransson.** Judgment the ECJ of 26 February 2013, section 35. Available at: <http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-617%252F10&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=792426> Accessed: 7 March 2020.

EUROPEAN UNION. European Court of Justice. Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C213/00 P, C-217/00 P and C-219/00 P. **Aalborg Portland and Others v. Commission.** Judgment ECJ of 7 January 2004, section 338. Available at: <http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-204%252F00P&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=792770> Accessed: 7 March 2020.

EUROPEAN UNION. European Court of Justice. T-217/06. **Arkema France and others v. Commission.** Judgment the ECJ of 7 June 2011, section 292. Available at: <https://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=T-217%252F06&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=793021>. Accessed: 7 March 2020.

EUROPEAN UNION. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. **Official Journal of the European Union.** L 173/1, p. 1-61, 12.6.2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>. Accessed: 1 March 2020.

FAURÉ, M.; GOURITIN, A. Blurring Boundaries between Administrative and Criminal Enforcement of Environmental Law. In: GALLI, F.; WEYEMBERGH, A. (eds.). **Do Labels Still Matter: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU.** Bruxelles: Institute d'études Europeennes, 2014, pp. 109-136.

FAURÉ, M.; HEINE, G. Summary of Country Reports. In: FAURE, M.; HEINE, G. (eds.). **Criminal Enforcement of Environmental Law in the European Union**. Hague: Kluwer Law International, 2005.

FIGUEIREDO, Natália de Lima. Considerações sobre a aplicação do princípio do ne bis in idem em casos de cartéis internacionais no Brasil. **Revista do Ibrac**, v. 18, n. 19, pp. 67-104, jan./jun., 2011.

FORNASIER, Mateus de Oliveira; BEDIN, Gilmar Antonio; LEVES, Aline Pedron. Democracia, globalização e normatividade jurídica: a relativização da soberania e a eficácia dos direitos fundamentais. **Revista Eletrônica do Curso de Direito da UFSM**, Santa Maria, RS, v. 14, n. 2, e32548, maio./ago. 2019. ISSN 1981-3694. DOI: <http://dx.doi.org/10.5902/1981369432548>. Available at: <https://periodicos.ufsm.br/revistadireito/article/view/32548>. Accessed: 19 October 2020.

HANF, D. Legal Concept and Meaning of the Internal Market. In: PELKMANS, J.; HANF, D.; CHANG, M. (eds.). **The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analysis**. P.I.E. Peter Lang. Brussels: 2008.

HUISMAN, W.; KOEMANS, M. Administrative Measures in Crime Control. **Erasmus Law Review**, 1(5), pp. 121-122, 2008.

IRVING, Robert B. French Insider Trading Law: A Survey. **The University of Miami Inter-American Law Review**. Vol. 22, n. 1, pp. 41-73, Fall/1990.

LUCHTMAN, M.; VERVALE, J. Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union? **New Journal of European Criminal Law**, vol. 2(5), pp. 192-220, 2014.

MALAVENDA, Caterina; D'ERIL, Carlo Melzi. **Abuso di mercato e informazione economica: i giornalisti e le nuove regole**. Padova: Cedam, 2007.

MALONEY, N. New Frontiers in EC Capital Markets Law: From Market Construction to Market Regulation. **Common Market Law Review**, vol. 40, pp. 811-813, 2003.

MANNE, Henry G. In Defense of Insider Trading. **Harvard Business Review**. Boston, vol. 44, n. 6, 113-122, Nov./Dec. 1966.

MANNE, Henry G. **Insider Trading and the Stock Market**. Free Press, 1966.

MICHIE, Randal C. **The Global Securities Market: A History**. Oxford: Oxford, 2006.

MORAES, Maria Celina Bodin de. Ampliando os direitos da personalidade. In: VIEIRA, José Ribas. (Org.). **20 anos da Constituição cidadã de 1988: efetivação ou impasse institucional?** Rio de Janeiro: Forense, 2008, pp. 369-388.

ÖBERG, J. **Limits to EU Powers: A Case Study of EU Regulatory Criminal Law**. Oxford and Portland: Hart Publishing, 2017.

OLIVEIRA, Marcus Vinícius Xavier de. Da inconstitucionalidade dos artigos 7º, §1º e 8º do código penal por violação ao princípio ne bis in idem. *Revista Quaestio Iuris*, vol. 05, n. 01, pp. 69-100, 2012.

ORGANIZATION OF AMERICAN STATES, 1969. **American Convention on Human Rights**: Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Available at: <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. Accessed: 22 June 2019.

RAEDSCHELDERS, S. Interrelations between Administrative and Criminal Sanctions in Environmental Law: New Legislation and Actual Practice in Flanders. **Ninth International Conference on Environmental Compliance and Enforcement**, 617, pp. 616-627, 2011. Available at: [http://inece.org/conference/9/proceedings/65\\_Raedschelders.pdf](http://inece.org/conference/9/proceedings/65_Raedschelders.pdf) Accessed: 6 March 2018.

SABOYA, Keity Mara Ferreira de Souza; DANTAS, Marcelo Navarro Ribeiro. **Ne bis in idem: limites jurídico-constitucionais à persecução penal**. Natal: Universidade Federal do Rio Grande do Norte, 2006.

VAN BOCKEL, Bas. **The Ne Bis in Idem Principle in EU Law**. Alphen aan den Rijn: Kluwer Law International, 2010.

VENTORUZZO, M. Comparing Insider Trading in the United States and in the European Union: History and Recent Developments. **European Company and Financial Law Review**, vol. 4, pp. 582-586, 2019.

WEBER, Klaus-Peter. **Insiderrecht und Kapitalmarktschutz: Haftungstheorien im U.S.-amerikanischen, europäischen und deutschen Recht**. Berlin: Duncker & Humblot, 1999.

WIDDERSHOVEN, R. Encroachment of Criminal Law in Administrative Law in the Netherlands. **Electronic Journal of Comparative Law**. 6, pp. 445-446, 2002.

WONG, C.H. Criminal Sanctions and Administrative Penalties: The Quid of the ne Bis in Idem Principle and some Original Sins. In: GALLI, F.; WEYEMBERGH, A. (eds.). **Do Labels Still Matter: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU**. Bruxelles: Institute d'études Europeennes, 2014, pp. 226-231.

ZANINI, Leonardo Estevam de A.; OLIVEIRA, Edmundo A. de; SIQUEIRA, Dirceu Pereira; FRANCO JR., Raul de Mello. Os direitos da personalidade em face da dicotomia direito público - direito privado. **Revista de Direito Brasileira**, São Paulo-SP, v. 19, n. 8, pp. 208 - 220, Jan./Abr. 2018.

ZAPATERO, Luis Arroyo. El abuso de informacion privilegiada en el derecho español. In: ZAPATERO, Luis Arroyo; TIEDEMANN, Klaus. **Estudios de derecho penal económico**. Cuenca: Servicio de Publicaciones de la Universidad de Castilla-La Mancha, 1994, pp. 61-74.

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