CVM's new understanding on conflict of interest

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The discussion regarding the nature of the conflict of interest and the consequent prohibition of the officer or shareholder from participating in the company's decision are not recent. Over the years, the orientation adopted by CVM has been alternated between the application of the formal theory of conflict – when there can be no participation in the decision in light of a potential conflict – and the material theory, in which the existence of the conflict is analyzed a posteriori. Since 2010, the understanding that prevailed was the application of a formal conflict.

In the trial finalized on November 8, however, most of the new CVM's Board expressed itself in favor of the thesis that the conflict is material, except for the Commissioner Flávia Perlingeiro. In the opinion of the Commissioners, both the controlling shareholder and the director must have the right to vote on the matter – and, if it is later verified that their vote was against the company's interests, it may be annulled and there will be liability for the damages caused.

Under the Brazilian Corporate Law (LSA), conflict of interest is disciplined in two situations, one at the level of shareholders and the other at the level of the administration. In both cases, neither the member of the administration nor the shareholder can act against the company's interests.

According to the legislator's understanding, contracting between interested parties is a fact that in itself is neither good nor bad. However, the contracting must be carried out on an equitable basis. To conclude whether or not there is a conflict, it will be necessary to analyze the reasons, conditions and effects of the business for the company.

In this sense, situations of conflict of interest arise from the existence of a legal relationship involving the shareholder or member of administration and the company on opposite sides. The conflict will exist when the interest of the shareholder or officer is dissonant with the social interest, and one cannot be served without harming the other.

In the trial of the procedure No. 19957.003175/2020-50, the CVM's Board followed the majority doctrine and concluded that the material theory should be applied to the shareholders' conflict, since the "majority principles and presumption of good faith and strengthening of the means of reparatory protection of the rights of minority shareholders in the Brazilian capital market are not consistent with the adoption of a formal analysis regarding the impediment of voting by shareholders".

Regarding the officers, the CVM's Board understood, in an analogous way, that "article 156 substantiates the hypothesis of material conflict, and there is no need to talk about impediment prior to the exercise of the officer's right to vote without analyzing the content of the manifestation and the extent of the interests involved".

The change in the Commissioners's understanding was not surprising, whereas, since 2021, in the case of Cyrela – FII Grand Plaza, the fundamentals of the material theory of conflict of interest had already been used to justify the vote of a majority shareholder of an investment fund, although the formal theory of conflict was confirmed.

As the administrative court, it lacked an undisputed precedent on the matter, as the theory applied varied as did the composition of CVM's Board of Commissioners. Precisely for this reason, CVM prepares a guidance opinion on voting in situations of potential conflict of interest. For this, it will make a careful and detailed examination of the circumstances of the cases, and the shareholder will need to be ready to clarify that he exercised the vote in the company's best interest.

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