

_CVM condemns secondary Insider Trading

In recent decision, the Brazilian Securities and Exchange Commission (CVM) has judged the administrative sanctioning process n°25/2010 to determine whether or not privileged information was used by a group of individuals and an asset manager unrelated to the company in the negotiation of shares of a paper company prior to the disclosure of material facts.

The first company's material fact announced a debt restructuring agreement with a creditor bank and the second one disclosed the acquisition of ordinary shares representing 28% of the company's capital.

CVM found that the group of shareholders acquired shares on the days prior to the disclosure of the material facts.

AFTER ANALYZING THE DEFENDANTS' PROFILE, THE HISTORY OF NEGOTIATIONS IN THE CAPITAL MARKET AND THE CHARACTERISTICS OF THE OPERATIONS CARRIED OUT WITH THE SHARES OF THE COMPANY, CVM UNDERSTOOD THAT THE INSIDER TRADING WAS CHARACTERIZED BY THE FOLLOWING ELEMENTS: (I) THE PERFECT TIMING OF THE NEGOTIATIONS, IN OTHER WORDS, THE ACQUISITION OF SHARES OCCURED RIGHT BEFORE THE DISCLOSURE

OF THE MATERIAL FACTS; (II) THE ATYPICALITY OF THE OPERATIONS, AS SOME OF THE DEFENDANT DID NOT EVEN HAD A BROKERAGE ACCOUNT UNTIL THEN, AND (III) THE LACK OF CONSISTENCY OF THE DEFENSE ARGUMENTS, CONSIDERED INSUFFICIENT TO PROVIDE THE DEFENDANTS' INNOCENCE.

In addition, the Reporting Director understood that, although it is a case of secondary insider trading, "CVM has consolidated its understanding that it is not essential to prove the direct link between the defendants and the insider trading event, even if it is not known how the defendants had access to such information."

Regarding the dosimetry of penalties, in order to apply the penalties proportionally in accordance with the principle of individualization of punishment, the CVM Board took into account, on one hand, the level of technical knowledge of the defendants in relation to the securities market, and, on the other hand, the primacy and lack of technical knowledge of the defendants with stock exchange negotiations. The fines varied between R\$100,000 and R\$1.3 million, corresponding to 1.5 and 2 times the amount of profit (potential or not) obtained by each defendant.

THE CVM'S DECISION CAN BE ACCESSED IN PORTUGUESE AT THE CVM WEBSITE IN THE LINK BELOW:

<http://www.cvm.gov.br/noticias/arquivos/2017/20170704-2.html#aracruz>

_ São Paulo State Court of Justice ruled that a non-binding term sheet eliminates the expectation for damages in case of withdrawal from a M&A transaction

In a recent judicial decision, the São Paulo State Court of Justice (“TJ/SP”) ruled that the execution of a non-binding term sheet (also called as letter of intent or memorandum of understanding) is sufficient to exclude the liability of a party to indemnify the other party in case of withdrawal from a M&A transaction.

In this case, the parties had signed a non-binding term sheet providing, among other things, the exclusivity between the parties and a due diligence process. The negotiation between the parties lasted for over 2 years, but, during the due diligence period, the potential buyer decided to withdraw from the M&A transaction claiming the decrease of the Brazilian companies’ performance.

In this context, based on an exchange of e-mails as evidence of a purchase offer by the potential buyer, the seller filed a lawsuit against the potential buyer for breach of expectation of closing the transaction, seeking compensation for the amount spent with lawyers, auditing and consulting firms, as well as the loss of the chance to sell the company for a third party who was also keen on buying the company.

According to the reporting judge, “HAVING THE LITIGANTS EXPRESSLY AGREED AND REITERATED SEVERAL TIMES THAT THE NEGOTIATION DID NOT INTENT TO

CREATE A BINDING OFFER AND NO LIABILITY ARISING FROM IT UNTIL THE EXECUTION OF A DEFINITIVE AGREEMENT, [...] THERE ARE NO REASON TO ATTRIBUTE RESPONSIBILITIES TO THE DEFENDANT AS REQUESTED BY THE PLAINTIFFS.”

The reporting judge understands that the broad access to social information of the Brazilian target companies during the due diligence does not lead to any compensation from the potential buyer, since M&A transaction involves extraordinary pressure and risks and typically involves progress and setbacks during the negotiations.

Regarding the theory of the loss of a chance, the Reporting Justice mentioned the court’s consolidated jurisprudence on the subject, clarifying that the theory of the loss of a chance applies to cases in which the advantage expected by the person who suffered the loss, within a judgment, is serious and real, excluding payment of damages in the case of simple subjective expectation or mere random expectation. Accordingly, the Reporting Justice has stated that sufficient evidences were not provided that the sellers had a serious and real offer from a third-party company.

Therefore, the TJ/SP denied the request for indemnification due to unsuccessful sale of all quotas of Brazilian companies to a US company.

_ CVM launches Non-Tax Regularization Payment Program

On July 21st, 2017, CVM Instruction No. 578 was published, which rules the Non-Tax Regularization Payment Program (“PRD”) within the Brazilian Securities and Exchange Commission (CVM).

The PRD will allow the payment of fines, commitment agreements, administrative infractions, including debts from previous installments payment programs that were terminated; or are still in effect; or under administrative or judicial discussion and includes individual or legal entities.

The program foresees the possibility of the payment being divided between 02 to 240 installments and reduction of interest and fines that varies according to the number of installments.

THE PRD'S ADHERENCE SHALL BE
REQUIRED THROUGH CVM'S WEBSITE BY
SUBMISSION OF ITS SPECIFIC APPLICATION
FORM UNTIL NOVEMBER 20, 2017.

The CVM Instruction No. 578 can be accessed in Portuguese at the CVM website in the link below:

<http://www.cvm.gov.br/legislacao/deliberacoes/deli0700/deli776.html>