



## CVM acquits defendants accused of fraud in transaction to acquire control of a publicly held company

The Brazilian Securities and Exchange Commission (“CVM”) unanimously decided to acquit shareholders of a publicly held company (“Company”) from charges related to alleged fraudulent practices arising from a transaction that guaranteed control of the Company to one of the shareholders.

The shareholders were accused of colluding to transfer control of the Company to one of its shareholders, through buying and selling ordinary shares directly on the stock exchange, in order to appear that an original acquisition of control had occurred. This was done to avoid triggering protective measures and the obligation to carry out a public tender offer (“Tender Offer”), as stipulated in the Bylaws of the Company. To this end, the accusation was based on the premise that part of the shareholders held control.

CVM concluded that there was not enough evidence to prove that part of the shareholders accused of holding control could have fraudulently alienated it. In summary, CVM relied on four main reasons to support this understanding.

**Firstly**, one of the shareholders did not have the majority of votes in shareholders’ meetings, nor the power to elect the majority of the managers, in addition to evidence of lack of alignment among such shareholders.

**Secondly**, both the information on the sale of shares held by one of the relevant shareholders and the notifications of the shareholders acquiring stake in the Company informing about their interest in participating in its management, were public.

**Thirdly**, the buying and selling of shares were conducted on the stock exchange and, therefore, subject to the interference of third parties.

And **fourthly**, within the context of increasing the Company’s share capital, the acquiring shareholder chose to subscribe to a large number of shares issued by the Company, while the other shareholders chose not to subscribe to new shares.




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In this context, CVM dismissed the need to hold a mandatory Tender Offer, since the acquisition of control in question did not result from a transfer of control by other shareholders, as required by the Brazilian Corporate Law (Law 6.404/76) and suggested by the accusation.

CVM Sanctioning Administrative Proceeding No. 19957.011669/2017-11, and more information can be accessed in Portuguese through the link below:

[https://www.gov.br/cvm/pt-br/assuntos/noticias/anexos/2023/20230919\\_pas\\_cvm\\_19957\\_011669\\_2017\\_11\\_diretor\\_otto\\_lobo\\_voto.pdf](https://www.gov.br/cvm/pt-br/assuntos/noticias/anexos/2023/20230919_pas_cvm_19957_011669_2017_11_diretor_otto_lobo_voto.pdf)



## B3 prohibits Americanas from using the Novo Mercado seal

Americanas S.A. (“Americanas”) was prevented from using the Novo Mercado seal, B3’s (Brazil’s stock exchange) highest level of corporate governance. The decision is unprecedented since the listing standard was introduced in the Brazilian system and resulted in the fines for 22 executives, totaling R\$ 6.2 million. The infractions are related to the effectiveness of Americanas’ supervision and control system, encompassing risk management, internal controls and auditing, in addition to the effectiveness in the analysis of the disclosed financial information.

This is the first formal decision since the case came to light in January, while CVM conducts sanctioning processes and more complex cases are being investigated in administrative inquiries without a defined deadline.


In practice, Americanas loses the right to use the Novo Mercado seal in its communications and in its trading ticker on the Stock Exchange. However, the Company will still be subject to all governance and trading rules applied to companies listed on the Novo Mercado.

Americanas has already announced that it will appeal the decision. Despite this, until a suspensive effect is granted to the appeal, the decision will remain in force until the

Company (i) discloses a report from the independent committee that investigated the fraud, (ii) presents a financial statement with an independent auditor’s report without remarks, (iii) updates its financial statements, and (iv) presents a detailed report on internal controls without any deficiencies.

B3’s investigation began in January after Americanas revealed the fraud that led to the request for judicial recovery. Simultaneously, the company was excluded from the Ibovespa index. The decision highlights that these are not isolated failures, emphasizing that supervision and control structures, such as the audit committee, should have acted promptly in a scenario that is not isolated.

B3 also rejected the claim that members of the board of directors and the audit committee have the “right to rely” on the board of directors and the information presented by it, reinforcing that holding such positions requires “care and diligence, under penalty of accountability.” The decision also criticized specific inquiries from the audit committee, without in-depth investigations, considering them insufficient to fulfill the expected duty of diligence in a company listed on the Novo Mercado.



## CVM acquits members of the board of directors of a publicly held company from an accusation of violating the duty of diligence

CVM acquitted members of the board of directors of a listed company of an accusation of violating the duty of diligence provided for in article 153 of the Brazilian Corporate Law (Law 6.404/76). The accusation, in summary, claimed that the managers were not diligent because they failed to call an Extraordinary Shareholders' Meeting to grant the right of withdrawal to shareholders after an alleged change in the company's corporate purpose resulting from the sale of a controlled company ("Transaction").

According to the accusation, as a result of implementing the Transaction, the company ceased to engage in activities analogous to its corporate purpose.

CVM's board did not accept the accusation's arguments as it understood that there was no alleged change in the corporate purpose. Firstly, because the company's bylaws allowed it to carry out activities through participation in other companies. Secondly, through an analysis of the corporate purpose of other companies controlled by the company, which were related to the corporate purpose of the company.

CVM also pointed out that the Brazilian Corporate Law guarantees any shareholder the right to call an Extraordinary Shareholders' Meeting when the management delays its call. However, this scenario was not even raised at the time by the shareholders of the company, which reinforces the absence of any change in its corporate purpose.

Finally, CVM also took into account the economic crisis that the company was going through, which led to a process of divestment of various equity interest held by it temporarily.

After analyzing this set of factors, CVM acquitted the members of the board of directors.

CVM Sanctioning Administrative Proceeding No. 19957.003434/2020-42 can be accessed in Portuguese through the link below:

[20230919\\_pas\\_cvm\\_19957\\_003434\\_2020\\_42\\_diretor\\_otto\\_lobo\\_voto.pdf \(www.gov.br\)](https://www.gov.br/cvm/pt-br/assuntos/decisoes/2023/09/20230919_pas_cvm_19957_003434_2020_42_diretor_otto_lobo_voto.pdf)