



CASE CVM RJ 2004 / 5494

BOARD REGISTER No. 4483/2004

PARTY OF INTEREST: CAIXA DE PREVIDÊNCIA DOS FUNCIONÁRIOS DO BANCO DO BRASIL S/A - PREVI

REPORTER: DIRECTOR WLADIMIR CASTELO BRANCO CASTRO

REPORT:

I – OBJECT OF THE APPEAL

1. The present is an Appeal, in terms of CVM Decision No. 463/2003, applied by CAIXA DE PREVIDÊNCIA DOS FUNCIONÁRIOS DO BANCO DO BRASIL S/A – PREVI face to the decision of Company Relations Superintendence (Superintendência de Relações com Empresas – SEP), which did not accept the claim of the Party of Interest against Companhia de Bebidas das Américas - AMBEV and Mr. Jorge Paulo Lemann, Mr. Carlos Alberto da Veiga Sicupira and Marcel Herrmann Telles, regarding to a swap operation involving AMBEV stocks held by the Controllers, exchanged by stocks issued by Interbrew S.A. ("the Swap") and the merger of Labatt Brewing Canadá Holding Ltd. by AMBEV ("the Merger").

2. When concluding the analysis about the Claim, SEP (1) has manifested the understanding that "there are no elements, until this moment, enabling to characterize the operation as harmful, or elements that may justify the filing of a sanctioning administrative process, a fact that does not exempt this Superintendence of its duty in following-up the facts and the evolution of the referred operation, in order to, provided in possession of sufficient elements, adopt the applicable administrative measures."

II – HISTORY OF THE CLAIM

3. On April 8, 2004, PREVI applied a claim containing information and facts that, in the opinion of the Appellant, were showing signs of irregularities involving the Swap and Merger operations performed.

4. In the referred document, the Plaintiff makes a series of considerations about the operations, basically concluding that (2):

- I. The Plaintiff considers a controlling power abuse by AMBEV controllers, which grants them exclusive benefits when imposing a corporate restructuring involving the merger of LABATT under uncertain terms and conditions;
- II. Occurrence of interests conflict of administrators, in the process of approval for the referred operation;
- III. Violation of loyalty obligations of Mr. Jorge Paulo Lemann, Mr. Carlos Alberto da Veiga Sicupira and Mr. Marcel Herrmann Telles, controlling stockholders and administrators of the company, by usurping a commercial opportunity belonging to AMBEV;
- IV. Absolute lack of diligence of the administrators, in terms of conduction, negotiation and decision making, regarding to the referred operation;
- V. Disclosure of the information to the market in a confuse, incomplete and wrong way.

5. In this way, the Plaintiff requested the following from this CVM (3):

- I. To determine immediate publication of a Material Fact Sheet clarifying all the contradictory facts that were sent to the market;
- II. To make the company inform the impact of the operation, for minority stockholders;
- III. Bring up administrative proceedings to investigate flaws in divulging the operation, controlling power abuse, particular benefits granted to the above referred parties, conflict of interests of controllers, when approving the operation and breach of duties of loyalty and diligence by the administrators.

6. Subsequently, on June 9, 2004, the Plaintiff filed a document in answer to AMBEV's manifestation of May 04, 2004, and attached the opinion of Dr. Nelson Eizirik named "Corporate operation involving control

acquisition and company merger. Duties of administrators and controllers", by which the Plaintiff intended to reinforce the arguments presented in its above referred claim, dated April 8, 2004.

7. Asked to voice an opinion, the honorable Federal Attorney Dr. Rodrigo de Oliveira Botelho Corrêa, via the document MEMO/PFE-CVM/GJU-2/No.184/2004 (fls. 88-94), opined for the opening of an administrative investigation in order to investigate the controlling power abuse by AMBEV controllers, and negligence of administrators, and also was favorable for determining the publication of a Material Fact Sheet clarifying possible implications that the law suit related to LABATT could cause to the operation as a whole.

8. The Head Deputy Attorney, Dr. Alexandre Pinheiro dos Santos, via an Order issued for the referred memorandum (fls. 95-97), showed partial agreement with the understanding of the referred Attorney, emphasizing that:

- i. There is no conflict of interests in casu, the actions of the controllers in AMBEV administrative council involved, a priori and by assumption, legitimate and converging interests, not requiring, in this way, the abstention from voting determined by the formal conflict doctrine;
- ii. on the other hand, in cases of merger of companies under a common control, the applicable legislation opts by the replacement of protective rules related to conflicts of interests by other specific legal safeguards;
- iii. it is not visible the existence of *fumus bonis iuris* or just cause for filing administrative proceedings intended to investigate an abusive exercising of controlling power;
- iv. There are no elements evidencing the existence of a commercial opportunity available to AMBEV in order this can reach the "global alliance".

9. The Head Attorney, Dr. Henrique Vergara, endorsed the understanding of Head Deputy-Attorney (fls. 98-100), emphasizing that, in synthesis:

- i. there are no evidences of controlling power abuse or that the succession of the referred corporate actions has established an one-way situation in behalf of Interbrew;
- ii. one can not intend that the controlling stockholder, under the aegis of social function of property can be restrained in disposing of its assets;
- iii. the inexistence of elements enabling to characterize the operation as harmful do not exempts this Autarchy of its duty in keeping attentive regarding to the development of the facts, nor does it means that the implementation of the "global alliance" can be show itself as unfavorable for AMBEV stockholders, diverting itself from the finalities announced to the public;
- iv. regarding the non fulfillment of Ruling CVM No. 358, the alleged insufficiency of information have derived from the natural difficulty in synthesizing the set of information related to an operation of such complexity, being not reasonable to require, also, that all elements related to operations of such nature can be included in the publication of the material fact sheet..

10. On August 16, 2004, SEP, via LETTER/CVM/SEP/GEA-2/No. 313/04 (fls. 107 to 112), positioned itself in the sense that there were no evidences enough to characterize the referred operation as harmful, and to justify the need of filing sanctioning administrative proceedings.

III – THE APPEAL

11. In September 01, 2004, PREVI presented an appeal against such understanding manifested by the technical area of CVM (Securities Commission), essentially alleging the following (fls. 01/10):

Preliminary Allegations:

- i. the concept of the referred operation itself, as described in the agreements, presents signs of irregularity, since the Controllers have committed themselves in approving the Merger to get the benefits of the Swap; and
- ii. the restraining of the Appellant's right in seeing all the issues raised in its Claim suitably investigated via administrative proceedings conducted by the CVM Security Commission, face to SEP's decision that has denied the request for filling Sanctioning Administrative Proceedings.

In the Merit of:

- iii. Controlling Power Abuse:
 - One must take in consideration the possibility of eventual damages to the social objectives, once that contractually, the Controllers may have imposed significant restraints to AMBEV's access to the North-American and Mexican markets; and

- The structure of operation, including the Swap and the Merger, denounces the absence of a basis of fair value, since, linking the minority stockholder to the consideration due by the Controller, regarding the Swap via Merger, we can deduct that (a) there were granted benefits to the Controllers; (b) the benefits to be granted to the Company are uncertain, with signs of eventual losses; and (c) the minority stockholders were damaged, with the loss of value of their interests, due to the appreciations made by the market, regarding to the operation made without a fair value basis.
- iv. Conflict of Interest:
- The present case is not a merger of companies under common control, independently negotiated and concluded, since that in the referred operation, in a single contractual instrument, the Controllers commit themselves in approve the Merger at the same time they will be negotiating the respective entry into the control group of Interbrew;
 - Having in mind that since a given stockholder is voided from voting in general meetings that can benefit him in any particular way, the interest of the Controllers in entering into the control group of Interbrew would be voided, if the merger weren't approved in the AMBEV's sphere, and
 - The benefit of becoming controllers of Interbrew only could be materialized via voting in the general meeting that has approved the Merger, a fact that characterized the conflict of interests.
- v. Commercial Opportunity Usurping:
- SEP's decision in refuse the application of article 155 of the Corporate Law is wrong, since in the present case the Controllers are also AMBEV administrators, and, pursuant paragraph 3 of article 117 of this same Law "the controlling stockholder exercising administrative or supervisory functions shall also have the duties and responsibilities inherent to the position";
 - Being absolute the forecasting of subparagraph I of article 155 of the Corporate Law, the Controllers should not, after having considered the operation inopportune for the company, have individually exploited an incursion into the global market of beers, together with the control group of Interbrew;
 - The administrators should have at least presented the commercial opportunity for purposes of decisions in the AMBEV sphere, since this was not an enterprise which this company, with its present size and field of actuation, couldn't be interested in; and
 - Having the proposal, in this way, being not submitted to AMBEV, we can conclude that the Controllers have failed in their loyalty duties, usurping a commercial opportunity that in fact belonged to the company.
- vi. Disclosure of Information to the Market:
- Despite paragraph 5 of article 3 of CVM normative ruling No. 358/02 determination that the information related to Material Fact Sheets shall be clear and precise, Material Fact Sheet published on March 04, 2004 announced a "global alliance" between AMBEV and Interbrew, masking the control assignment;
 - This same Material Fact Sheet also affirms that the operation involving the Swap and the Merger would consolidate the position of AMBEV in Latin America. At this point, one may ask what would be the markets assured to AMBEV, except the markets in which it already participates, since the Canadian market is not of a high increasing market, and the Mexican and North-American markets will not be included in this list, due to agreements previously executed with Femsas S.A. of CV and its subsidiary Femsas Cerveza S.A. of CV;
 - In the Material Fact Sheet published by AMBEV on March 05, 2004, nothing was informed about the restrictions to transferring the Mexico and United States activities to AMBEV control, even under real possibilities of non concretization of the business, what in fact has happened; and
 - Understands, in this way, that once determined the error in the information provided to the market, it is an obligation of the CVM Board to determine the republishing of the Material Fact Sheet, correcting and clarifying what was previously published, in the terms of paragraph 6 of article 3 of CVM normative ruling No. 358/02.

The Request

- vii. order to AMBEV the immediate republication of the material fact sheet, clarifying all the contradictory data previously provided to the market;
- viii. filling administrative proceedings intended to punish the administrators for the poorly disclosed information, since they have not acted with the due diligence required for exercising their duties within the company; and

ix. configuration, with the implementation of the Swap and the Merger, (a) of the abuse of controlling power; (b) the private benefits obtained by the Controllers with the Merger; (c) the conflict of interests of the Controllers when approving this operation and (d) violation of loyalty duties and diligence by the administrators.

12. To conclude, after reviewing PREVI'S appeal, SEP maintained its opinion (fls. 116/119), presenting the following remarks:

- a. there is nothing to talk about rights limitation by SEP regarding to the investigation of the issues brought by the Appellant, taking in consideration the position already manifested by this technical area that there were no elements, in the occasion, enabling to characterize the operation as harmful and, therefore justifying, in such way, the establishment of sanctioning administrative proceedings, a fact that do not exempts this Superintendence from the duty of following-up the facts and the evolution of the referred operation;
- b. the Appeal presented by PREVI does not bring new facts or data, emphasizing the fact that the Appellant has not even asked for reviewing the proceedings that have analyzed the referred operation and which have resulted in the opinion referred to in their Appeal, i.e., the Case CVM RJ 2004/2530;
- c. there is no reason for filling administrative proceedings based in the attempt of the Plaintiff in justifying the drop suffered by the economic interests detained in the company, since such thesis fails in taking in consideration the absence of tag along in the price of AMBEV'S preferred stocks;
- d. the political dilution verified in stockholders' interests, derived from capital increasing by virtue of the merger, only could be considered as unjustified if evidenced that the "global alliance" could have been obtained in another way, a fact that was not evidenced in the records;
- e. regarding to the controlling power abuse, the Appellant has not present any concrete data capable to prove the alleged damages supposedly imposed to minority stockholders, limiting itself to affirm that the operation involve risks, a factor which as a matter of fact is inherent to the capital market, by presupposing the participation of the investor in the results obtained by the businesses performed by the companies to whom he is associated;
- f. the information provided in the appraisal reports and in relevant facts disclosed, as well as the calculations elaborated by GEA-2 and by SEP, safeguarded the methodological limitations, have not indicated the occurrence of damages, in terms of economic values in the interests of minority stockholders, after the effective merger of LABATT by AMBEV;
- g. the conflict of interests issue shall be dealt *a posteriori*, given the present impossibility of indicating, in an unequivocal way, any damage caused to the company, in exclusive behalf of the Controller;
- h. seeing under a control acquisition point-of-view, there is nothing to say about commercial opportunity usurpation, by the mere fact that control only can be acquired from those who have the control; and
- i. regarding the allegation of the Claimant that the operation would have been poorly disclosed to the market, by trying to mask a control acquisition under a global alliance cover, we can stress that the material fact sheet dated March 17, 2004 (fls. 365 of Case RJ2004/2523) was already informing the execution of an OPA to the minority common stockholders, in accordance to what is provided in article 254-A of the Corporate Law.

This is the report.

VOTE

I. PRELIMINARY DECLARATIONS

13. In its appeal, PREVI sustains, preliminary, that SEP has made a mistake in affirming that there are no elements to characterize the referred operation as harmful to the minority stockholders, when disregarding the fact that the operation, as described in the records, was showing signs of irregularities and that this has restrained the Plaintiff's rights in having the issues arisen in the Claim suitably investigated.

14. In this respect, I can say that, in order to that investigatory procedures can be started upon a claim submitted to CVM, such claim must contain minimum proofs about the existence and irregularity of the facts appointed by it, what, according to SEP, do not occurs in the present case.

15. On the other hand, I would like to emphasize that when considering the non existence of signs of irregularities, SEP is not exempting itself from its duty of checking the consequence of the operations referred to

in PREVI'S Claim, and the facts presented by the plaintiff will continue to be followed-up by this Superintendence.

16. In face of what I understand that the preliminary injunction applied by the Appellant shall be withdrawn.

II. THE MERIT

CONTROLLING POWER ABUSE

17. SEP, in the questioned memorandum, concluded by the non existence of elements, in the records, characterizing the merger of LABATT by AMBEV as harmful to the minority stockholders, due to illicit acts performed by the controller, what is now challenged by PREVI.

18. In this purpose, it is worthy to remember that Law No. 6.404/76, in its article 116 and following, defines the controlling stockholder as the person who, having vested rights granted by the associates, permanently assuring to him the power to run social activities and to direct the operations of the bodies of the company, effectively makes use of it (4).

19. However, although the Law recognizes that the controller has the power of determining the destiny of the company, it also understands that this controlling power can not be irresponsibly carried on.

20. And that is why the sole paragraph of article 116 of Law No 6.404/76 says that the controller has the obligation of using the controlling power to make the company achieve its objective and fulfill its corporate activities, having in this way duties and responsibilities not only before the remaining stockholders of the company, but also to those working on it and the community on which it is operating (5).

21. In face of this, when the controller, in detriment to such legally imposed interests intentionally benefits other interests, or when wishfully omits himself in using his power in behalf of the company and the community, this will characterize the controlling power abuse (6), for which he, in the terms of article 117, caput, of the Corporate Law (7) may be rendered accountable (8).

22. Bringing such consideration to the hypothesis now presented, I can not see in the records any signs that the controller, by approving LABATT's merger by AMBEV, has directed the company on his own behalf, in detriment to the corporate activities and in prejudice of remaining stockholders of the company, as alleged by PREVI.

23. In fact, I do not see the alleged loss of value in the interest of minority stockholders, since, as signaled by SEP (fls. 666 of the Claim), LABATT's merger by AMBEV will not bring up, in principle, a reduction in minority stockholders' interest under an economical point of view.

24. Likewise, I do not see signs of access restrictions contractually imposed to AMBEV regarding to the North-American and Mexican markets in detriment to the interests of the company.

25. So, in the line of arguments presented by SEP, it looks to me, in the present case, at least until the present moment, that there are no signs of abusive exercise of controlling power by the controlling stockholders of AMBEV.

CONFLICT OF INTERESTS

26. SEP understood that there were no signs of conflict of interests by the administrators, in the process of approving LABATT's merger by AMBEV.

27. PREVI emphasizes that the participation of AMBEV controllers in INTERBREW has only became effective when they exercised them voting rights in the general meeting which approved LABATT's merger by AMBEV (9), thus characterize a clear conflict of interests, in this case.

28. Initially, I can see that PREVI, in its Claim affirmed the configuration of a conflict of interests by AMBEV administrators, violating article 156 of Law No 6.404/76 (10) (fls. 23/26 of the Claim).

29. In the appeal applied to the Board, however, the company stopped to approach the conflict issue of interests in the decisions of the administrative council of the company, but the possibility of conflict was approached, by

the stockholders exercising their voting rights in a general meeting, when challenging the participation of controllers in the meeting decision that approved LABATT's merger (fls. 05/06).

30. Well, by occasion of applying the referred Appeal, the referred merger had been already decided in an Ordinary General Meeting of AMBEV, a fact that has not being checked yet, in the moment when the Claim was submitted.

31. Thus, it is not clear if the Appellant presented a new issue related to the possibility of conflict of interests by the controlling stockholders, in the sphere of a general meeting, or if due to material error, the Appellant failed in approaching the conflict issue of interests by the members of the AMBEV administrative council.

32. Face to this doubt, I start to check the existence of conflicts signs of interests by the controlling stockholders of AMBEV, both as stockholders and as administrators of this company.

33. In this sense, it is important to remember that the corporate law, when taking care of the guardianship of the interests of the company, has foreseen the possibility of such interest be offended both by the stockholders and the administrators of the company.

34. Foreseeing the possibility that administrators of a company could rule their acts in behalf of their own private interests, Law No 6.404/76, in its article 156, prohibited the intervention of administrators in social operations having conflicting interests, regarding to the interests of the company, as well as in decisions of the administrative council that the remaining administrator may take in that respect. The rule says:

"Art. 156. It is voided to the administrator to intervene in any social operation having conflicting interests regarding to the interests of the company, as well as in the decisions taken in such respect by the remaining administrators, being his obligation to inform them about his impeachment, and making the nature and extension of his own interests be recorded in the minutes of the Administrative Council or the Board of Directors meeting.

Paragraph 1 Even if the provisions of this article are observed, the administrator can only contract with company under reasonable and fair conditions, identical to those prevailing in the market, or those under which the company would contract with third parties.

Paragraph 2 Any business contracted with infraction to what is provided in paragraph 1 is voidable, and the interested administrator will be obliged to transfer to the company the advantages that he may have taken from it." (our emphasis)

35. From the analysis of what is provided in paragraph 1 of article 156 of Law 6.404/76 transcribed above, we may conclude that in the case of the administrators it is prohibited the participation of the administrator in any deal or resolution related to a given operation in which he is a counterparty or be benefited by it. The provisions of this paragraph 1 shall be read, in my opinion, as saying: "even not participating in the resolution, the administrator shall only contract with the company..."

36. This same meaning was manifested by SJU Judiciary Secretariat, when elaborating the NORMATIVE OPINION/CVM/SJU/No. 160/79. Let's see it:

"(...) 1.2. — Commercial relationship between ENGESA and ENGEXCO — Conflict of interests and loyalty duties

Law No. 6.404/76, in order to discipline eventual conflicts of interests between the administrator and the company prohibits him from "intervene in any social operation on which he may have conflicting interests, regarding the interests of the company, as well as in the decisions taken in such respect by the remaining administrators". The same requirement imposes to him the obligation of certifying the others about his impeachment and make the nature and extension of his own interests be recorded in the minutes of the Administrative Council or the Board of Directors meeting. (article 156, Law No. 6.404/76).

Additionally, paragraph 1 of the referred article explains that the administrator only shall contract with the company under reasonable and fair conditions, i.e., under normal market conditions, under penalty of having the business annulled, with the advantages irregularly obtained by the administrator being transferred to the company.

In the case above, taking in consideration the fact that the partners of OÁSIS — holding 99.9% of ENGEXCO's capital — were administrators of ENGESA, the interest of these ENGESA administrators in the agreements signed by this company with ENGEXCO seems to be undeniable, the same for any decision of the administrative council or board of directors, which object was related to business of the company with ENGEXCO.

Thus, evidenced the participation of such administrators of ENGESA in decisions related to business with ENGEXCO, would be configured as a violation of the prohibition expressed in article 156 — caput — of Law No 6.404/76, independently of eventual benefits or losses respectively caused to ENGEXCO and ENGESA.

(...) 2. The same administrators, above described, could be accounted responsible, in terms of article 158, II of Law No 6.404/76, for violation to provisions of the caput of article 156 of this same law, if evidenced their participation in ENGESA decisions related to business between these two companies.

(...) 6. The violation by an administrator of legal provisions contained in article 155, I and II of Law No. 6.404/76, as well as that referred to in paragraph 1 of article 156, do not exclude the eventual responsibility of the controlling stockholders for abusive exercise of controlling power, under the terms foreseen in letters a, c and f of article 117 of this same law (paragraph 3 of article 117 and paragraph 2 of article 158). In this case, the responsibility of controlling stockholder(s) is assumed, when the partners of the corporation holding the control of a company are also their administrators."

37. From this we can conclude that the conflict of interests is, in case of article 156 of Law 6.404/76, assumed, that is, its application does not depend on the concrete case, remaining the administrators of the company impeded from participating in any deal or decision related to a given operation on which they are shown as counterparties of the company, or on which they are being benefited, independently if they are seeking the social interests or not.

38. In this way, the participation of Mr. Carlos Alberto da Veiga Sicupira in the administrative council decision that approved LABATT's merger is, in my opinion, contrary to the legal order foreseen in article 156 of Law 6.404/76.

39. This because Mr. Carlos Alberto da Veiga Sicupira, besides being an administrator of AMBEV, was also the controller of the company and, as it seems, one of the persons who would be more benefited, in a direct manner, with the celebration of the referred agreement with INTERBREW controllers, whose efficacy, on the other hand, was conditioned to the execution of the Merger, approved by the administrative council of AMBEV, with his participation.

40. In this way, I recommend that SEP, according to CVM Decision No. 457/02, take the measures it may deem required to investigate the conduct of Mr. Carlos Alberto da Veiga Sicupira in AMBEV's Administrative Council meeting of March 2, 2004, when the LABATT Merger Agreement was approved by this company.

41. This being said, I pass to analyze the conflict of interests regarding the voting rights by the stockholder, foreseen in article 115 of Law 6.404/76 (11).

42. The corporate law has also considered the possibility of divergences between stockholders interests and the company interests and, in this respect, in the caput of its article 115, establishes that these stockholders, when exercising their voting rights, shall observe the interest of the company, considering as abusive "the vote exercised with the purpose of causing damages to the company or other stockholders, or getting to himself or for someone else advantages to which he has not right to, and which will result or may result in damages for the company or other stockholders".

43. And it was exactly to avoid that the stockholders could privilege their own particular interests, in detriment to the social interest, that, in paragraph 1 of the referred article 115, the Law has determined that stockholders shall abstain themselves of voting in general meeting decisions where they may have personal interests conflicting with the interests of the company, establishing both the hypothesis of vote prohibition and conflict of interests.

44. Now, when paragraph 1 of article 115 provides that the stockholder can not vote in general meeting resolutions related to the assets appraisal report destined to form the capital stock, or the approval of his own accounts as administrator or concession of any personal advantages (12), it is conclusively prohibiting the exercise of voting rights by the stockholder under any one of these situations.

45. In such cases, the existence of conflicting interests is verified by means of purely formal criteria, without casuistic procedures to analyze the existence of an effective disagreement between the interests of the company and the interests of that stockholder.

46. Different from the situation foreseen in the final portion of paragraph 1 of article 115 of the Corporate Law, which restricts the exercise of voting rights by the stockholder, in general meeting resolutions on which he has interests that may conflict with the interests of the company.

47. Indeed, in this case, the corporate law is making reference to a substantial conflict, requiring an *ex post* control of voting right exercise by the stockholder, by analyzing the content of the resolution.

48. In this respect, Erasmo Valladão Azevedo & Novaes França explains that:

"(...) the law, in such case, preventively prohibits the stockholder from voting. If the stockholder votes, then it must be checked how he voted. So, if he has effectively impaired the interests of the company in behalf of his personal interests, with potential or effective damages to the company or other stockholders, his vote shall be annulled, as well as the decision taken, if his vote was decisive for composing the majority of votes" (13).

49. It is important to note that this has always been the position adopted by this CVM, as we can verify in the opinion professed by Director Luiz Antonio de Sampaio Campos – followed by the majority of the CVM Board – in the sphere of Sanctioning Administrative Proceeding CVM RJ 2002/1155, where it was stated that "the conflict of interests shall be analyzed in an *ex post* way, a posteriori, and trying to check if it is strident, colliding and irreconcilable, as we use to say. "

50. However, in case of merger of companies under a common control, the corporate law recognizes the submission of the company interests to the interests of the group, rejecting in this way the application of the rules about conflict of interests in general meeting resolutions (as per art. 264, caput and paragraph 4 of Law No 6.404/76).

51. It is not asked if the controlling stockholder exercised his voting rights in conflict with the interests of the company, being always allowed his participation to form the corporate will.

52. In return, for minority stockholders, consists in the warranty of an equanimous relation of stock replacement, as can be seen in the elucidative lesson of José Luiz Bulhões Pedreira, who, in an opinion included in the records by AMBEV, has stated that:

"In a group of joint-stock companies (where all the companies are subjected to the direct or indirect control of a controlling company) the decision about the convenience of merging can only be taken, according to the majority principle, which is fundamental for the organization of joint-stock companies, to the controlling corporation (or, if applicable, to the controlling stockholder of that corporation); and the measures for protecting the minority stockholders of the controlled company will only require the stock replacement relations defined by it be equanimous.

53. This rule, established in article 264 of the Corporate Law, which expressly deals with decisions taken in the sphere of general meetings of joint-stock companies, in my opinion, can not be extensively construed, in an extent that may also reject the application of rules about conflict of interests in decisions of the administrative council of the company.

54. Now, it does not seem logical to me to conclude that in the hypothesis of companies merger on a common control, where the rules related to interests conflict in decisions made in general meetings are not applicable to the stockholders, such release would reach the members of the administrative council of the company.

55. In fact, we must not confuse the image of the administrator with the image of the stockholder or group of stockholders electing him, in the sense that the member of the administrative council has duties and responsibilities before the company (as per art. 153 and following of Law No. 6.404/76), which the stockholders do not have.

56. Likewise, for exercising the position of member of the administrative council of a joint-stock corporation, the corporate law establishes a series of requirements and impediments (as per art. 146 and 147 of Law No. 6.404/76), to which the present stockholders of a company or those wanting to be part of the company will not be subjected.

57. Thus, we can see that article 264 of Law No. 6.404/76 is useful only to remove the application of the rules of interests conflict related to resolutions made in general meetings, under the situations specified in said article.

58. After these considerations made, I initially emphasize the applicability, in the present case, of the referred article 264, since that in the moment of the approval of LABATT's merger operation by the AMBEV General Meeting, the referred companies were under a common control.

59. Indeed, when analyzed together, articles I and VI of LABATT Merger Agreement (fls. 134 e 175) reveal that the Swap operation had to be concluded, before the approval of said merger, in a general meeting of AMBEV.

60. The Swap would be, in this way, one of the requirements to finalize the Merger, by which we can see that in the moment when this last operation was approved, AMBEV and INTERBREW were already under a common control.

61. Face to this fact, it seems applicable to me the provisions of article 264 of Law No. 6.404/76, leaving no reasons to discuss about the possibility of conflict of interests by controlling stockholders of AMBEV who have participated in the decision taken during the general meeting of the company, where LABATT's merger was approved.

USURPATION OF COMMERCIAL OPPORTUNITY.

62. According to SEP, there were no signs of usurpation of commercial opportunities, by AMBEV administrators, since the Swap proposal was directly submitted to the controllers.

63. PREVI, however, sustains that, since the controllers of AMBEV are also administrators of this company, there is not a way to affirm that the operation was exposed only to the controllers, and thus the submission of such commercial opportunity should have been object of resolution in the AMBEV sphere.

64. This issue, is worthy to say, is regulated by article 155, subparagraph I, of Corporate Law, which provides the following:

"Article 155. The administrator shall serve the company with loyalty and keep secrecy about its business, being void to him: I – to use, in his own behalf or in behalf of third parties, with or without detriment to the company, the commercial opportunities made available to him by force of exercising his duties;"

65. From the reading of the provisions transcribed above, we can presume that, in order to configure a usurpation of commercial opportunity, it is required that said opportunity has been previously presented to the company.

66. However, it looks to me that the commercial opportunity referred to in the present case (consubstantiated by the Swap operation) was directly presented to AMBEV controllers, not in their capacity of administrators, but in the capacity of holders of control power of this company.

67. Thus, in the line of arguments brought by SEP, I do not see signs of usurpation of commercial opportunities by the controllers of AMBEV.

DISCLOSURE OF INFORMATION TO THE MARKET IN A CONFUSE, INCOMPLETE AND WRONG WAY:

68. The Appellant affirms that AMBEV did not disclosed in a clear and precise way, nor in a language accessible to the investor public, the information about the Swap and Merger operations, as required by article 3, paragraph 5 of CVM normative ruling No. 358/02.

69. Likewise, the Appellant sustains the announcement, in the Material Fact Sheet published in March 03, 2004 (fls. 42 of the Claim) the creation of a true "global alliance" between AMBEV and INTERBREW, which, in its opinion, would be inadequate to classify the acquisition of a company control by another company.

70. In this matter, PFE-CVM and SEP understand that these alleged insufficiencies would be derived from the difficulty of explaining complicated situations in a synthetic way.

71. However, I disagree from this position, by considering imprecise the relevant facts disclosed by the company, specially in what refers to the idea that INTERBREW and AMBEV would suffer a merger, when what was happening, in fact, was a disposal of AMBEV control, with corporate reorganization, including LABATT's merger by AMBEV.

72. I can observe that the first material, disclosed on March 01, 2004 (fls. 336/337 of the Claim), was limited to the notice that the parties would be negotiating "a series of operations by which Interbrew S.A. would pass to hold, directly or indirectly, an interest in AmBev capital, and an eventual stocks swap involving Ambev, Interbrew S.A. and/or its subsidiaries".

73. In this way, no mention was made to the operation related to LABATT's merger by AMBEV in that Material Fact Sheet, with the information about that Merger being presented to the public only two days after this, via the Material Fact Sheet dated March 03, 2004 (fls. 368/374 of the Claim).

74. It do not seems, however, that the referred Material Fact Sheet has provided precise and complete information, since the existence of possible hindrances to the transfer of LABATT in Mexico and United States to AMBEV's control was only mentioned by the company on March 17, 2004 (fls. 361/366 of the Claim).

75. So I understand the existence of signs of failures when disclosing relevant facts of AMBEV.

III. CONCLUSION

76. Face to the elements presented, I understand that there are no signs that the Merger and Swap operations, by themselves, are harmful to the interests of the company or the interest of the minority stockholders, a fact that does not exempt this Autarchy from its duty of following-up the development of the facts, for checking eventual damages to the minority stockholders, or even misinterpretation of the purposes announced to the public by the administrators of AMBEV.

77. Likewise, I believe that there is not a minimum of elements leading to initiate an administrative investigation to investigate the majority of the irregularities alleged by PREVI, a fact that will not impede the adoption of pertinent administrative measures by this Commission, in a future date, if in possession of concrete and sufficient elements. However, in respect to the administrative council meeting of AMBEV, held on March 2, 2004, where LABATT'S merger was approved, as well as regarding the deficiencies and imprecision when disclosing the information about the referred operations, I understand that the present proceedings should be returned to SEP, in order the convenience and opportunity for initiating an administrative investigation about these facts can be verified by the Technical Area.

78. For all the reasons presented above, I vote by the adoption, by SEP, of the previously referred recommendations.

This is my vote.

Rio de Janeiro, December 16, 2004.

Wladimir Castelo Branco Castro
Director-Reporter

(1) LETTER/CVM/SEP/GEA-2/NO. 313/04 (fls. 112).

(2) As summarized in MEMO/CVM/SEP/GEA-2/No. 081/2004, FLS. 82/87.

(3) Idem.

(4) "Art. 116. Controlling stockholder is understood as the natural person or legal entity, or the group of persons connected via a voting agreement or under common control, who:

a) have partner's rights assigning to him, in a permanent way, the majority of votes in the decisions taken in general meetings and the power of electing the majority of administrators of the company; and

b) effectively uses this power to direct the social activities and to direct the operation of the bodies of the company."

(5) Art. 116, sole paragraph: "The controlling stockholder shall use the power in order to make the company attain its objective and fulfill its corporate activities, having duties before the remaining stockholders of the company, the workers, and the community where it operates, whose rights and interests he shall loyally respect and serve".

(6) COMPARATO, Fábio Konder. "Controle conjunto, abuso no exercício do voto acionário e alienação indireta de controle empresarial" (Joint control, abuse in exercising stock votes and indirect alienation of entrepreneurial control), in *Direito Empresarial: Estudos e Pareceres*. São Paulo: Saraiva, 1990, p.86.

(7) "Art. 117. The controlling stockholder shall be accountable for damages caused by acts exercised with abuse of power".

(8) In this point, it is important to highlight that, however the first paragraph of the referred article 117 presents different modalities of abusive exercising of control power, that list is not restrictive.

(9) In a manifestation presented in the records of the Claim, PREVI highlighted that the conflict of interests issue would not be connected to the approval by the controllers of LABATT's merger by AMBEV, but connected to the execution of the Merger and Swap in a connected and dependent way, which would only met the interests of the controllers, in detriment to the interests of the company and the remaining stockholders (fls. 692 of Proceedings 1).

(10) "Art. 156. It is voided to the administrator to intervene in any social operation having conflicting interests regarding to the interests of the company, as well as in the decisions taken in such respect by the remaining administrators, being his obligation to inform them about his impeachment, and making the nature and extension of his own interests be recorded in the minutes of the Administrative Council or the Board of Directors meeting.

Paragraph 1 Even if the provisions of this article are observed, the administrator can only contract with company under reasonable and fair conditions, identical to those prevailing in the market, or those under which the company would contract with third parties.

Paragraph 2 Any business contracted with infraction to what is provided in paragraph 1 is voidable, and the interested administrator will be obliged to transfer to the company the advantages that he may have taken from it."

(11) Art. 115. The stockholder shall exercise his voting rights in the interests of the company; and the vote exercised with the purpose of causing damages to the company or other stockholders, or getting to himself or for someone else advantages to which he has not right to, and which will result or may result in damages for the company or other stockholders will be considered as abusive.

Paragraph 1 The Stockholder can not vote in general meeting resolutions related to the assets appraisal report destined to form the capital stock, or the approval of his own accounts as administrator, nor in any other which may benefit him in any particular way, or having interests conflicting with the interests of the company.

Paragraph 2 If all subscribers were joint owners of the assets granted by them to form the capital stock, they will be able to approve the award, with no detriment to the responsibilities referred to in paragraph 6 of article 8.

Paragraph 3 The stockholder will be accountable for damages caused by the abusive exercising of voting rights, even if his vote has not prevailed.

Paragraph 4 Resolutions taken by virtue of the vote of a stockholder having interests conflicting with the interests of the company are annulable. The stockholder shall be accountable for the damages caused and will be obliged to transfer to the company any advantaged obtained with this.

(12) When prohibiting the participation of the stockholder in resolutions "that may benefit him in a particular way", the corporate law is not making reference to undue advantages, capable of generate damages to the company or other stockholders, but referring to benefits that, in terms of the Law, may be granted to the stockholders (as per Erasmo Valladão Azevedo & Novaes França. *Conflito de Interesses nas Assembléias das S.A.* (Conflict of Interests in General Meetings of Joint-Stock Corporations) São Paulo: Malheiros, 1993, p.90).

(13) As per Erasmo Valladão Azevedo & Novaes França, ob. cit., p. 97.