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Ten years in the making: ECJ to hear Portugal's class action on sell-out rights under the Takeover Directive

Lisbon — ATM confirms that, ten years after the first filings, the question raised in Portugal's collective action has finally reached the Court of Justice of the European Union (ECJ). In 2016/2017, ATM presented the issue to an audience of over 250 lawyers, EU regulators, Maltese officials and other stakeholders, committing to bring the matter before the ECJ. A related Croatian reference touched the edges of this theme, but it is now squarely before the Court, following the conduct of Fidelidade and the CMVM. Several dozen legal opinions from professors across multiple Member

States support the investors' position. The ECJ will now provide authoritative guidance.

Procedural note. The first Portuguese reference was deemed inadmissible for failing Article 94 of the Rules of Procedure, because the referring court merely incorporated the facts "by reference" to the appealed judgment. The Supreme Administrative Court (STA) has now re-referred with a complete factual record. The case number may be reassigned.

The Advocate General. The case is assigned to Advocate General Manuel Campos Sánchez-Bordona, re-elected until 6 October 2027. Before joining the ECJ, he served extensively within Spain's judiciary, including the Administrative Chamber of the Supreme Court. In C-76/22, he addressed how to compute the reduction of the "total cost of credit" upon early repayment under Directive 2014/17/EU, concluding that the directive does not impose a single mandatory methodology and leaves calibrated room for national choices. His opinions show a measured, text-and-purpose approach that balances consumer protection with Member-State discretion where the EU legislature is not explicit. In ATM's view, Article 16 of the Takeover Directive is explicit on the point now before the Court, and its text and ratio legis undercut Fidelidade's contrary reading.

The Chamber. The reporting judge is Dimitrios Gratsias; the other members are Eugene Regan and Jan Passer. ATM salutes their distinguished records. Judge Gratsias joined the Court of Justice in 2021 after a long tenure at the Greek Conseil d'État and the General Court; formation in Athens and DEA at Paris I. Judge Regan has served since 2015, former Senior Counsel and senator in Ireland, with public interventions on rule of law and the justice system's encounter with AI. Judge Passer joined in 2020, previously at the Czech Supreme Administrative Court and the General Court; LL.M. Stockholm and doctoral work in Prague. There are no public statements by these judges on the specific legal question at issue.

The legal question. The STA asks whether Article 16(2) of Directive 2004/25/EC ("sell-out") covers investors who acquired their shares after the takeover results were known. Article 16 requires that "any holder of the remaining securities" may require the offeror to buy at a fair price, within national time-limits and conditions. The provision contains no restriction tied to the moment of acquisition; it turns on the objective condition that the shares remained outside the offer and are within scope.

ATM's legal assessment. The better reading is functional, not personal. "Remaining securities" include shares acquired after the bid, provided formal conditions are met. Reasons:

Directive teleology: equal treatment and minority protection (Article 3(1)).

Symmetry with Article 15 (squeeze-out): the system anchors "fair price" in the bid, to curb arbitrage, not to disenfranchise holders.

No restrictive wording in Article 16(2).

Arbitrage risks are already mitigated by the fair-price anchor and short, peremptory deadlines.

Prediction, subject to the Court. ATM expects the ECJ to confirm that sell-out and squeeze-out



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mechanisms apply to all shares not acquired in the takeover, irrespective of when they were purchased, preserving the Directive's coherence and effectiveness.

Further reading from ATM and partners

“As falhas dispendiosas dos artigos 15 e 16 da Diretiva 2004/25/EC” — ATM internal circular:  
<https://www.associacaodeinvestidores.org/index.php/comunicados/circulares-internas/368-as-falhas-dispendiosas-dos-artigos-15-e-16-da-directiva-200425ec->

<https://citizensvoice.eu/2025/02/17/ensuring-the-effectiveness-of-the-takeover-directive-luz-saude-affair/>

### **Backgrounder — Ensuring the Effectiveness of the Takeover Directive: Why Article 16 Must Protect All Remaining Shareholders**

Core principle. The Takeover Directive seeks a clear, predictable framework that treats all shareholders fairly. Article 16 governs sell-out and complements Article 15's squeeze-out. It does not distinguish “remaining shareholders” by purchase timing. All shares not acquired in the bid qualify as “remaining,” save for newly issued shares post-bid. The sell-out right attaches to the share, not the identity of the holder.

Effectiveness at risk. If post-result acquisitions were excluded from sell-out, they would also fall outside squeeze-out. Any investor could buy a single share and block a squeeze-out, gutting the Directive. Excluding late purchasers would invite tactical buying to frustrate corporate resolution, contrary to the Directive's purpose and to market integrity.

Need for clarity and the ECJ's role. European authorities should endorse the only interpretation that preserves equal treatment and legal certainty. ATM and Citizens' Voice advocate a ruling confirming that sell-out and squeeze-out cover all non-tendered shares, irrespective of acquisition date. A clear judgment will close loopholes, prevent manipulation, and keep minority protection intact.

Conclusion. Article 16 must be read to prevent strategic disruption and ensure both sell-out and squeeze-out work as designed. Excluding post-bid buyers would create an unacceptable loophole. The forthcoming ECJ decision will be pivotal to safeguard the Directive's integrity and protect minority investors across the Union.

