Provisional text

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 November 2026 (1)

Case C-757/25

AF,
IL
v
Comissão de Mercados de Valores Mobiliários (CMVM),
Fidelidade-Companhia de Seguros, S. A.

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal))

(Preliminary ruling proceedings – Company law – Directive 2004/25/EC – Takeover bid – Right of sell-out in respect of the remaining securities – Protection of minority shareholders – Article 16(2) – Notion of 'holders of the remaining securities' – Holders who acquired their securities after the time allowed for acceptance of the bid had elapsed – Possible inclusion)

1. Directive 2004/25/EC (2) establishes minimum guidelines with the aim of ensuring transparency and legal certainty in takeover bids.

2. Articles 15 and 16 of Directive 2004/25 provide, respectively, for 'the right of squeeze-out' and 'the right of sell-out' in respect of securities:

– In accordance with Article 15, Member States must provide that, where, as a result of a takeover bid, an offeror acquires a certain percentage of a company's capital carrying voting rights, the offeror may acquire the remaining securities at a fair price.

– In accordance with Article 16, holders of remaining securities (that is to say, securities which have not been sold in a takeover bid made to all of the shareholders) are entitled to require the offeror company to buy those securities at a fair price.

3. In the main proceedings, two minority shareholders in an offeree company are in dispute with the majority shareholder. (3) The latter, having acquired more than 90% of the share capital carrying voting rights in the takeover bid, is refusing to buy the remaining securities from the minority shareholders. The minority shareholders argue that the right of sell-out entitles them to require the offeror to buy those securities.

4. The reference for a preliminary ruling offers the Court of Justice an opportunity to interpret Article 16(2) of Directive 2004/25, in order to determine whether the right of sell-out entitles minority shareholders to require the offeror to purchase their securities where they acquired those securities after the time allowed for acceptance of the takeover bid had elapsed.

I. Legal context

A. European Union law. Directive 2004/25

5. According to recital 24:

'Member States should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. Likewise, where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the holders of the remaining securities should be able to require him/her to buy their securities. These squeeze-out and sell-out procedures should apply only under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze-out and sell-out procedures in other circumstances.'

6. Article 5 ('Protection of minority shareholders, the mandatory bid and the equitable price') provides:

'1. Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.

2. Where control has been acquired following a voluntary bid made in accordance with this Directive to all the holders of securities for all their holdings, the obligation laid down in paragraph 1 to launch a bid shall no longer apply.

3. The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases

securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired. …'

7. According to Article 15 ('The right of squeeze-out'):

'1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 to 5 apply.

2. Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him/her those securities at a fair price. Member States shall introduce that right in one of the following situations:

(a) where the offeror holds securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in the offeree company,

or

(b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90% of the offeree company's capital carrying voting rights and 90% of the voting rights comprised in the bid.

In the case referred to in (a), Member States may set a higher threshold that may not, however, be higher than 95% of the capital carrying voting rights and 95% of the voting rights.

3. Member States shall ensure that rules are in force that make it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of securities, Member States may provide that the right of squeeze-out can be exercised only in the class in which the threshold laid down in paragraph 2 has been reached.

4. If the offeror wishes to exercise the right of squeeze-out he/she shall do so within three months of the end of the time allowed for acceptance of the bid referred to in Article 7.

5. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash. Member States may provide that cash shall be offered at least as an alternative.

Following a voluntary bid, in both of the cases referred to in paragraph 2(a) and (b), the consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90% of the capital carrying voting rights comprised in the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.'

8. Article 16 ('The right of sell-out') provides:

'1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 and 3 apply.

2. Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his/her securities from him/her at a fair price under the same circumstances as provided for in Article 15(2).

3. Article 15(3) to (5) shall apply *mutatis mutandis*.'

B. National law. Securities Code (4)

9. In accordance with Article 196:

'1. No later than three months following the date on which the outcome of the takeover bid referred to in Article 194(1) is determined, every holder of the remaining shares may exercise their right of sell-out, to which end they must first notify the controlling shareholder, inviting that party to make them an offer to acquire their shares within eight days.

2. If the offer referred to in the preceding paragraph is not made, or if that offer is not considered satisfactory, any holder of remaining shares may exercise the right of sell-out by sending a declaration to the CMVM, enclosing the following:

(a) proof of the allocation or locking-up of the shares that are to be sold;

(b) a statement of the consideration calculated in accordance with Article 194(1) and (2).

3. Once the CMVM has established that the requirements for the sell-out are satisfied, it shall take effect from the moment the controlling shareholder is notified by that authority.

4. The certificate proving that such notification has taken place shall constitute an enforceable title.'

10. The preamble to Legislative Decree No 219/2006 of 2 November 2006, amending various provisions of the CVM, states:

'The rules on the right of squeeze-out and the right of sell-out laid down in Directive [2004/25] do not present any special features in the national legal system, since, in essence, they differ little from the rules laid down in [the CVM]. Consequently, the amendments introduced in Articles 194 to 196 of [the CVM] are aimed, in particular, at harmonising the periods for making those offers and the presumption relating to the fairness of the consideration.'

II. Facts, dispute and questions referred for a preliminary ruling

11. Fidelidade launched a takeover bid for all of the shares representing the share capital of ESS.

12. On 26 September 2014, the CMVM granted the pre-registration of the takeover bid and approved the prospectus. On that same day, the announcement of the launch of that bid and the associated prospectus were published on the website of the CMVM.

13. The securities forming the subject of the takeover bid were the ordinary shares in ESS, each with a nominal value of one euro, representing the entirety of the share capital and the voting rights in ESS. Those which were already directly held by Fidelidade, or by persons or entities linked to it,

were excluded.

14. On 26 September 2014, Fidelidade held 1 504 shares, representing 0.0016% of the share capital and voting rights in ESS. The securities which are the subject of the bid were 95 540 750 shares, representing, approximately, 99.99% of the share capital and voting rights in ESS.

15. The cash consideration initially offered by Fidelidade was EUR 4.82 per share. The final and definitive amount of the consideration was set at EUR 5.01, after Fidelidade revised the amount. The price of the bid remained the same between 29 September and 14 October 2014.

16. The bid was completed with its outcome being determined at a special session of the Euronext Lisbon regulated market, held on 15 October 2014, the definitive results of which were published that same day.

17. As a result of the takeover bid, Fidelidade acquired 91 782 932 shares, representing 96.065% of the share capital in ESS and 96.12157% of the respective voting rights. The percentage acceptance of the bid (excluding the 54 385 own shares) was, then, 96.12151%.

18. After the end of the offer period, various investors bought EES shares which had not been acquired by Fidelidade. (5)

19. Some of those investors (who had now become minority shareholders) sent a request to Fidelidade asking that company, as the controlling shareholder, to make them an offer to buy the ESS shares they had acquired.

20. Fidelidade replied to the minority shareholders telling them that it had no intention of making an offer to buy their securities, given that they had been acquired after the time allowed for acceptance of the bid had elapsed. According to Fidelidade, the mechanism provided for in Article 196 of the CVM did not apply, since the shares in question were not shares *remaining* from the takeover bid.

21. On 7 November 2014, Fidelidade asked the CMVM, in accordance with Article 196(3) of the CVM, *a contrario sensu*, (i) to declare that the requirements for exercising the right of sell-out were not satisfied and, consequently, (ii) to refrain from sending Fidelidade the relevant notification relating to the acquisition of those securities.

22. On 19 November 2014, the CMVM prepared report No DMEI/2014/212, entitled ‘General and voluntary takeover bid made by Fidelidade … for the shares of ESS – Exercise of the right of sell-out’. In that report, the CMVM stated, inter alia, that in the course of the takeover bid for the ESS shares, ‘no limitation with regard to the amount or maximum percentage of securities that were going to be acquired’ had been established.

23. Both Fidelidade and the CMVM considered that the legal prerequisites for the right of sell-out to arise had not been satisfied.

24. The CMVM emphasised that, from its point of view, the right of sell-out provided for in Article 196 of the CVM only applies to a shareholder who, at the time when the outcome of the takeover bid is determined, was already a holder of shares in the company that is the subject of the bid and which were not sold in the course of that bid.

25. Two minority shareholders brought a ‘collective action’ against CMVM and Fidelidade before the Tribunal Administrativo de Círculo de Lisboa (District Administrative Court, Lisbon, Portugal), which accepted the defence that the claimants lacked *locus standi*.

26. The decision at first instance was set aside by the Tribunal Central Administrativo Sul (Southern Central Administrative Court, Portugal) by a judgment of 17 November 2022. That court, when considering the merits of the case, held that the appellants did not have the right of sell-out in relation to Fidelidade.

27. Disagreeing with the judgment at second instance, the two minority shareholders brought an appeal before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal). They argued, in short, that, in accordance with Article 16 of Directive 2004/25, they had the right to require Fidelidade to buy their securities.

28. The CMVM and Fidelidade contested the view of the minority shareholders.

29. In that context, the Supremo Tribunal Administrativo (Supreme Administrative Court), after finding the appeal to be admissible (decision of 23 March 2023), has referred the following question to the Court of Justice for a preliminary ruling: (6)

‘Must Article 16(2) of Directive [2004/25] be interpreted as meaning that it includes the holders of securities that were not sold in the course of a takeover bid, but which were acquired after the outcome of that bid was determined?’

III. Procedure before the Court of Justice

30. The request for a preliminary ruling was received at the Court on 21 November 2025.

31. Written observations were submitted by the two minority shareholders, the CMVM, the Greek, Italian and Portuguese Governments and the European Commission.

32. The Court did not consider it necessary to hold a hearing.

IV. Assessment

33. The referring court wishes to know, in short, whether, in accordance with Article 16(2) of Directive 2004/25, those who acquired securities of a company after the time allowed for acceptance of a takeover bid had elapsed are able to require the offeror to buy their securities.

34. I note at this stage that the two minority shareholders, the Greek and Italian Governments, and also the European Commission, propose that the question referred should be answered in the affirmative. Conversely, the CMVM, the Portuguese Government and Fidelidade favour a negative response.

A. Preliminary point

35. Before addressing the content of the question referred, a clarification of a linguistic nature is required.

36. According to the Spanish version of Article 16(2) of Directive 2004/25, ‘los titulares de valores que no hayan aceptado la oferta’ (holders of securities who have not accepted the bid) are to enjoy the right of sell-out. That version of the provision at issue appears to limit the notion of the beneficiary of the right, restricting it solely to those who were already holders of the securities during the time allowed for acceptance of the bid.

37. Conversely, the versions of the provision in the other official languages refer to the ‘holder of remaining securities’, without any further specification. That must be understood to mean a holder of securities that have not been acquired by the offeror company, that is to say, the remaining

securities which, following the bid, are held by minority shareholders, whatever the time at which those shareholders acquired them.

38. It is settled case-law of the Court of Justice that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions.

39. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union. Accordingly, where there is a divergence between the various language versions of an EU legislative provision, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part. (7)

40. I shall, therefore, start from the premiss that Article 16(2) of Directive 2004/25 confers the right of sell-out on 'the holders of the remaining securities' following the outcome of the bid.

41. In order to determine whether or not that expression includes minority shareholders who acquired securities of the company after the time for the acceptance of the bid had elapsed, I shall apply the usual interpretative criteria: the wording of the provision, the context in which it occurs and the objectives pursued by the legislation of which it forms part. (8)

B. Literal interpretation

42. According to the Portuguese Government, Fidelidade and the CMVM, the text of Article 16(2) of Directive 2004/25 indicates that only the initial holders of the remaining securities have the right of sell-out. In their view, those who were not addressees of the takeover bid, did not reject it and, therefore, do not hold 'remaining' securities after the end of the period for accepting it cannot be regarded as holders of remaining securities.

43. I do not share that view.

44. From the textual point of view, having eliminated the reference contained in the Spanish version, to which I have referred above, the syntagm 'remaining securities' is to be understood, in relation to the takeover bid, as referring to those securities which the offeror did not acquire during the time allowed for acceptance of the bid. (9)

45. In the present case, what is at issue is not so much the meaning of the expression 'remaining securities' as that of the term 'holder'. The latter, according to its usual meaning, designates the person who currently holds a security, regardless of the time at which that person acquired it.

46. Article 16 of Directive 2004/25, just like Article 15 of the same directive, makes no reference to the characteristics of the shareholders and says nothing to indicate that those characteristics are relevant to the exercise of the right of sell-out in the context of a takeover bid.

47. The legislation in question focuses on transferable securities, without taking into account, I repeat, the particular characteristics of the holders of those securities (apart from a few exceptions), nor since when they have held them. I agree with the Greek Government's view that the right of sell-out in respect of those securities takes the form of an ancillary right of ownership linked to the security (*propter rem*). (10)

48. As the Italian Government correctly notes, Article 16 of Directive 2004/25 does not, textually, establish any restrictions in respect of securities that were not acquired by the offeror during the takeover bid, nor does it introduce restrictions based on subjective or temporal factors related to ownership of the shares during the time allowed for acceptance of the bid. (11)

49. In short, the literal criterion supports an interpretation of Article 16(2) of Directive 2004/25 as meaning that the holder of a remaining security, acquired after the end of the time allowed for acceptance of the takeover bid, is able to exercise the right of sell-out.

C. Systematic interpretation

50. From the systematic point of view, the right of sell-out enjoyed by the holders of remaining securities (Article 16 of Directive 2004/25) is the counterpart of the right of squeeze-out provided for in Article 15(2) of that same directive. (12) Accordingly, a similar and consistent interpretation of the two provisions is required.

51. Article 16(3) of that directive provides for the application, *mutatis mutandis*, to the right of sell-out, of Article 15(3) to (5), while Article 16(2) states that the right of sell-out must be exercised 'under the same circumstances as provided for in Article 15(2)'.

52. In my Opinion in *Svema Trade* (13) I noted that the symmetry between the squeeze-out and sell-out procedures is backed up by the preparatory work which led to the adoption of Directive 2004/25. (14)

53. Article 15 of Directive 2004/25, then, provides for the right of an offeror that has acquired not less than 90% of the capital carrying voting rights (as well as 90% of the voting rights in the target company) to require 'holders of remaining securities' to sell the offeror those securities at a fair price. That provision would be deprived of any useful effect if the concept of 'holders of remaining securities' had to be interpreted as meaning that it does not include those who have acquired the securities after the time allowed for acceptance of the bid.

54. Indeed, if such a restrictive interpretation were to be accepted:

– the offeror could not acquire securities the holder of which had changed after the time allowed for acceptance of the bid and, consequently, all of the securities in the company forming the subject of the bid;

– the holders of remaining securities who did not wish to sell them to the offeror would only have to transfer them, even temporarily, to another person, in order to avoid being required to sell them.

55. It follows from the foregoing that the concept of 'holders of remaining securities', within the meaning of 15(2) of Directive 2004/25, also includes holders of those securities who acquired them after the time allowed for acceptance of the bid.

56. It would be paradoxical to accept the interpretation of a concept appearing in Article 15 of Directive 2004/25 differing from that of the same concept appearing in the following article (Article 16) of that directive, when it is question of two closely related rights.

57. That conclusion is not contradicted by recital 24 of Directive 2004/25, as the CMVM suggests. In that recital, it states that '… squeeze-out and sell-out procedures should apply only under specific conditions linked to takeover bids.'

58. The 'specific conditions' to which recital 24 of Directive 2004/25 refers are those set out in Articles 15 and 16 of that directive, namely:

– the prior existence of a takeover bid, in the context of which the offeror has acquired a certain percentage of the share capital carrying voting rights in the offeree company;

– the existence of remaining securities;

– the limitation *ratione personae* of the right or obligation to buy the remaining securities to the offeror; and

– the period of three months, from the end of the time allowed for acceptance of the bid, in which the right of sell-out or squeeze-out is to be exercised.

59. Those specific conditions, which are common to the rights of squeeze-out and sell-out, do not include any conditions relating to the holders of the remaining shares and when those shares were acquired.

60. The systematic interpretation of Article 16(2) of Directive 2004/25, then, leads to the conclusion that the right of sell-out extends to securities held by minority shareholders (the remaining securities), regardless of whether they acquired those securities before or after the time allowed for acceptance of the bid had elapsed.

D. Teleological interpretation

61. One of the objectives of Directive 2004/25 is to protect the interests of shareholders in offeree companies.

62. In the words of the Court,

– ‘As is clear from recitals 1 to 3 and 9 of Directive 2004/25, the objective of that directive is to protect the interests of holders of the securities of companies the control of which is acquired by a natural or legal person and it seeks, in that perspective, to guarantee clarity and transparency of the rules in respect of takeover bids.’ (15)

– ‘Furthermore, the principles that must be complied with in the implementation of Directive 2004/25, set out in Article 3(1) of that directive and described as ‘general principles’ by that provision, include the principle that, if a person acquires control of a company, the holders of securities must be protected. (16)

63. Recitals 9 and 24 of Directive 2004/25 also refer expressly to the protection of minority shareholders.

64. The rights of squeeze-out and sell-out, regulated in Articles 15 and 16 of Directive 2004/25, reflect, from their respective angles, the objective of the protection of shareholders. (17)

65. In the case of the right of squeeze-out (Article 15 of Directive 2004/25), the interests of the majority shareholder who has won the takeover bid are respected, permitting that majority shareholder to require minority shareholders to sell their remaining securities (that is to say, the securities that were not disposed of during the time allowed for acceptance of the bid) to the majority shareholder at a fair price.

66. Symmetrically, the right of sell-out (Article 16 of Directive 2004/25) protects minority shareholders, who are able to require the majority shareholder to buy the remaining securities, held by the minority shareholders, at a fair price.

67. The right of sell-out, I repeat, protects minority shareholders from the negative consequences they could suffer following a successful takeover bid. (18)

68. Because of the majority shareholder’s dominant position, minority shareholders may find themselves excluded from the company’s decision-making processes and lose the possibility of selling their remaining shares, on account of the foreseeable collapse in the price of those shares on the market. The sale of those securities on the market is complicated by the substantial reduction in the free float and in their liquidity. (19)

69. The CMVM, Fidelidade and the Portuguese Government share the same understanding of the objective of the right of sell-out provided for in Article 16(2) of Directive 2004/25. They submit, in that regard, that:

– The raison d’être of that provision is to provide a shareholder who has rejected the takeover bid with an opportunity, under equitable conditions, to exit the company, which, once the outcome of the bid has been determined, is now under the complete control of the offeror.

– The protection guaranteed by the provision is justified by the appearance of a new fact (the concentration of the capital in the hands of a single shareholder), which alters the balance of power within the company – the capital of which was previously dispersed – and reduces the liquidity of the remaining securities, making it disadvantageous to exit the company by disposing of the securities.

– The sell-out mechanism contained in Article 16 of Directive 2004/25 is set within the context of the takeover bid procedure and, therefore, is presented as an extension of the time allowed for acceptance of that bid.

70. However, according to the CMVM, Fidelidade and the Portuguese Government, the sell-out mechanism would not make sense for investors who, having been aware of the offeror taking control of the company and the limited liquidity of the shares in that company, voluntarily decided to invest in that company. They base that view on the arguments, all more or less similar, that I summarise below:

– Nothing would justify extending the protection to a shareholder who acquired securities remaining following a takeover bid, after the outcome of the bid had been published and, therefore, in full possession of the facts.

– The Winter Report indicates that Article 16(2) of Directive 2004/25 is also intended to counteract the pressure put on the addressees of the bid, ensuring they retain a right to sell their securities on terms that are no less favourable. The right of sell-out would thus guarantee their freedom to decide in the context of the takeover bid procedure, which would not make sense in relation to subsequent holders of remaining securities.

71. While I acknowledge the weight of the arguments put forward by the CMVM, Fidelidade and the Portuguese Government, they do not quite convince me.

72. First of all, those arguments, if they could be valid (*quod non*) in relation to a holder of remaining securities who had acquired them voluntarily, would not, however, be so in cases where those securities were acquired by the heirs of a holder who, being a natural person, had died after the end of the time allowed for acceptance of the bid, but before the time limit for exercising the right of sell-out had passed. Nor would they be valid in relation to the successors to a holder which, being a legal person, had been dissolved during that same period. It is difficult to accept that, in such circumstances, which might conceivably arise, the right of sell-out is extinguished with the disappearance of the original holder.

73. Second, the right of sell-out undoubtedly protects persons who already hold the securities of a company that is the subject of a takeover bid during the time allowed for acceptance of that bid. But the protection conferred on those persons would be broader precisely if they were afforded the possibility of transferring their shares (now known as ‘remaining securities’), together with the benefit of the right of sell-out, once the time allowed for acceptance of the bid had elapsed. That way, holders of those securities, if they have an immediate need for liquidity and cannot wait until the right of sell-out has been exercised, would not have to sell them on the market at a low price.

74. Third, the reliance placed by the CMVM and Fidelidade on the Winter Report to justify their interpretation of Article 16(2) of Directive 2004/25 does not seem appropriate to me.

75. The Winter Report does not address the question of whether or not the right of sell-out extends to the holders of remaining shares who acquired them after the time allowed for acceptance of the bid had elapsed. (20) It seems logical to deduce that, if that group of experts did not address such a limitation, it is because they did not consider such a limitation necessary.

E. Speculation, unjustified profits and opportunistic behaviour on the part of the holders of remaining securities bought following the takeover bid

76. Fidelidade, (21) the CMVM (22) and the Portuguese Government (23) maintain, with various nuances, that conferring the right of sell-out on the holders of securities bought after the time allowed for acceptance of the bid had elapsed:

– Would incentivise so-called financial arbitrage: those acquiring the shares of minority shareholders would have bought the securities at a low price after the publication of the outcome of the takeover bid and would sell them to the offeror, making a certain and unjustified capital gain.

– Would encourage speculative behaviour: the new shareholders would acquire the remaining securities at a lower price after the success of the takeover bid, only to then require the offeror to buy them at the price set during the bid.

77. Those arguments do not seem convincing to me either.

78. To begin with, it should not be forgotten that the price at which the holders of remaining securities are able to require the offeror to buy those securities from them is not set by the holders themselves. In the terms of Article 16(2) of Directive 2004/25, the price in question is to be a fair price. A sale made at a fair price can hardly be described, categorically, as speculative behaviour.

79. In my opinion, which coincides with that of the two minority shareholders in this dispute, the right of sell-out in respect of the remaining securities, which may be exercised for a limited period (three months), approximates to a ‘put option’. Options of that kind, which are well known in financial markets, are, as a general rule, transferable; that is to say, they can be transferred freely between individuals.

80. The hypothetical risk of unjustified gains and speculation, should it exist, would be neutralised, because the holder selling shares to a third party after the takeover bid and the new holder of remaining shares are aware of the existence and outcome of the bid. Except in anomalous cases of fraud or abuse, the price for the sale, between minority shareholders, of the remaining securities of an offeree company is agreed, in full knowledge of the situation, between the original holder of the securities (that were not sold to the offeror) and the new buyer. (24)

81. A holder of securities acquired prior to the takeover bid who prefers to retain them, instead of tendering them during the bid, is entitled to require the offeror to buy those securities; on that point there is no debate. If that same holder, instead of requiring the offeror to buy those securities (which have now become ‘remaining securities’), transfers them to a third party, that third party is subrogated to the position of the original holder. The offeror, in any case, is compelled to buy the remaining securities, whoever their holder is, within the period provided for in the legislation, if that is what the holder of those securities requires.

82. As the two minority shareholders note in their written observations, there will be holders of remaining shares who need immediate liquidity (for personal reasons, for portfolio rotation or for alternative opportunities) and who, rationally, would prefer to sell on the market prior to exercising their right to exit by means of the right of sell-out. If, during that period, buyers of the securities could not be subrogated to the right of sell-out, the sellers would be obliged to accept a price lower than that set during the takeover bid. (25)

83. Conversely, if the right to exit by means of the right of sell-out accompanies the securities in their capacity as remaining securities, the market could offer the holders of those securities a price very close to the price of the takeover bid, potentially adjusted (reduced) according to the delay discount and the administrative actions necessary to exercise the right of sell-out. That way, liquidity, efficiency and the economic equivalence of ‘exiting via the market’ and ‘exiting by means of the right of sell-out’ would be preserved.

84. The risk of financial speculation and the possibility of unjustified profits on the part of buyers of remaining securities after the end of the offer period is, moreover, tempered by taking into account the foreseeable ‘difficulties’ in exercising the right to require the offeror to buy those securities.

85. Article 15(5) of Directive 2004/25, read together with Article 16(3) of that directive, provides for a period of three months from completion of the takeover bid in which to ask the offeror to buy the remaining securities. If the offeror refuses to buy them and it is necessary to take administrative or legal action in order to enforce that right, a person who has acquired remaining securities will be faced with uncertainty for an indefinite period of time, (26) with the negative consequences that may have in financial terms.

86. If the right of sell-out were not to be conferred on the holders of remaining securities acquired after the takeover bid, it is the majority shareholder who could make a significant gain: as the majority shareholder already controls the company, having a dominant position in it, that shareholder would, as an alternative, be in a position to offer to acquire those remaining securities from their holders at a lower price. Accepting the right of sell-out in those circumstances restores the equilibrium, as the majority shareholder has to buy (during a specified period of time) the securities of the minority shareholders at a fair price.

87. To sum up, Article 16(2) of Directive 2004/25 must be interpreted as meaning that the right of sell-out extends to all of the securities remaining after the end of the time allowed for acceptance of the takeover bid, regardless of whether their holders acquired them before or after that time, provided that the right is exercised within three months following completion of the bid.

V. Conclusion

88. In the light of the foregoing, I propose responding to the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) as follows:

‘Article 16(2) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

must be interpreted as meaning that the right of sell-out extends to all of the securities remaining after the end of the time allowed for acceptance of the takeover bid, regardless of whether their holders acquired them before or after that time, provided that the right is exercised within three months following completion of the bid.’

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142, p. 12).

3 The majority shareholder, following the takeover bid, is Fidelidade-Companhia de Seguros, S. A. (‘Fidelidade’), whose position is supported by the Comissão do Mercado de Valores Mobiliários (Securities Market Commission, Portugal; ‘the CMVM’). The minority shareholders purchased their securities after the time allowed for acceptance of the takeover bid, launched by Fidelidade for the shares of Espírito Santo Saúde, SGPS, S. A. (‘ESS’), had elapsed.

4 Código dos Valores Mobiliários (Securities Code; ‘the CVM’), approved by Legislative Decree No 486/99 of 13 November 1999 (*Diário da República*, Series I-A, No 256, of 13 November1999). The text transcribed is that deriving from Decreto-Lei n.º 219/2006 – Sétima alteração ao Código dos Valores Mobiliários, aprovado pelo Decreto-Lei n.º 486/99, de 13 de Novembro, que procede à transposição para a ordem jurídica nacional da Directiva n.º 2004/25/CE, do Parlamento Europeu e do Conselho, de 21 de Abril, relativa às ofertas públicas de aquisição, e primeira alteração ao regime jurídico da concorrência, aprovado pela Lei n.º 18/2003, de 11 de Junho (Legislative Decree No 219/2006 – Seventh amendment to the CVM, approved by Legislative Decree No 486/99 of November 13, thereby incorporating into the national legal system Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, approved by Law No 18/2003 of 11 June), of 2 November 2006, amending various provisions of the CVM (seventh amendment), in particular, Articles 195 and 196, and transposing Directive 2004/25 into domestic law.

5 Specifically, AF bought 34 198 shares (29 153 between 11 and 16 December 2014, 5 000 on 31 December 2014 and 45 on 7 January 2015). IL became a shareholder in ESS, purchasing 20 500 shares at different times, following the takeover bid. Moreover, HAPV, who is not a party to the proceedings, also acquired 2 150 ESS shares during the month of October 2014, after the bid had been completed.

6 By the order of 3 October 2025, *Fidelidade* (C-200/25, EU:C:2025:756), the Court of Justice found the (first) request for a preliminary ruling made in this dispute by the same court *a quo* to be inadmissible.

7 Judgments of 27 October 1977, *Bouchereau* (C-30/77, EU:C:1977:172, paragraph 14); of 30 April 2025, *Celní jednatelství Zelinka* (C-330/24, EU:C:2025:296, paragraph 19); and of 27 November 2025, *Svema Trade* (C-567/24, ‘the judgment in *Svema Trade*’, EU:C:2025:920, paragraph 23).

8 Judgments of 17 November 1983, *Merck* (C-292/82, EU:C:1983:335, paragraph 12); of 30 October 2025, *Pome* (C-398/24, EU:C:2025:843, paragraph 23); and of 13 May 2026, *Korfin and Sempiola Invest* (C-225/25, EU:C:2026:401, paragraph 27).

9 In the present case, since, as a result of the takeover bid, Fidelidade acquired 96.065% of the share capital in ESS, the ‘remaining securities’ were the shares representing 3.935% of that same share capital.

10 Written observations of the Greek Government, paragraph 9.

11 Written observations of the Italian Government, paragraph 30. The Commission comments in a similar vein (paragraphs 25 to 31 of its written observations).

12 The judgment in *Svema Trade*, paragraph 27: ‘… as regards the holders of the securities of the company affected by a mandatory takeover bid who have not accepted that bid, Article 15(2) of Directive 2004/25 provides for the possibility, under certain conditions, for the offeror to ‘squeeze-out’ those holders by requiring them to sell him or her their securities. Article 16(2) of that directive also provides for the *corresponding* right of every holder of the concerned company’s remaining securities to require the offeror to buy his or her securities.’ Emphasis added.

13 C-567/24, EU:C:2025:533, point 37.

14 See the Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, of 10 January 2002 (‘the Winter Report’). In the explanatory memorandum for the proposal for a Directive of the European Parliament and of the Council on takeover bids, (COM(2002) 534 final) (OJ 2003 C 45 E, p. 1), of 2 October 2002, under the heading ‘General considerations’, it states that the Commission ‘[took] broad account of the recommendations made’ by the group of experts in its report. Two paragraphs further on, it specifies that ‘the proposal here follows the recommendations set out for the Commission in the Winter Report as regards the introduction of a squeeze-out right (Article 14) and a sell-out right (Article 15) following a takeover bid.’

15 The judgment in *Svema Trade*, paragraph 41, citing the judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 24).

16 The judgment in *Svema Trade*, paragraph 42, citing the judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 26).

17 Judgment of 15 October 2009, *Audiolux* (C-101/08, EU:C:2009:626, paragraphs 47 to 52), and the judgment in *Svema Trade*, paragraph 43.

18 TGS Baltic, *Study on Minority Shareholders Protection. Final Report*, European Commission, January 2018, available at *https://op.europa.eu/en/publication-detail/-/publication/1893f7b8-93a4-11e8-8bc1-01aa75ed71a1/language-en,* pp. 44 and 45. There it states that the objective of the right of [sell-out] is to allow minority shareholders to pursue their economic interests by exiting a company in which they are no longer capable of influencing the management in a significant or meaningful way, once a shareholder or group of shareholders acting jointly have acquired the majority of the capital and/or control. A holder of the remaining shares in that scenario can force the majority shareholder to acquire those remaining shares. Legal scholarship defines the right of sell-out as a ‘quid pro quo for the minority shareholder of the majority shareholder’s right of squeeze-out’.

19 TGS Baltic, *Study on Minority Shareholders Protection. Final Report*, European Commission, January 2018, available at https://op.europa.eu/en/publication-detail/-/publication/1893f7b8-93a4-11e8-8bc1-01aa75ed71a1/language-en, p. 45. It states that the reasons for implementing these sell-out provisions are the following: (i) majority shareholders can abuse their dominant position, and when the stake of the minority shareholders is below a certain established threshold, minority shareholders are unable to influence the corporate governance of the Company and prevent the abusive actions; (ii) in the case of an illiquid market, it can be very difficult for minority shareholders to withdraw from the company and obtain sufficient

remuneration for selling their shares; (iii) the sell-out right is [an] appropriate mechanism to counter the pressure on shareholders to tender during a takeover bid.

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20 See the Winter Report, pp. 58 to 60, dedicated to the right of sell-out.

21 For Fidelidade, extending the right of sell-out to those who acquired securities after the takeover bid [closed for acceptance] would turn that mechanism into a speculative instrument, which would allow opportunistic investors to require the offeror to acquire their shares at a predetermined price, entirely disconnected from the logic of the market (paragraph 10 of their written observations).

22 According to the CMVM, if the right of sell-out were allowed to apply to a person who acquired the remaining securities for the sole purpose of requiring the controlling shareholder to buy that person's holding, it would turn that mechanism into an instrument of arbitrage, for obtaining improper gains and for illegitimate speculation, without any market risk (paragraph 72 of its written observations).

23 In the opinion of the Portuguese Government, conferring the right of sell-out on investors who, knowing the outcome of the bid and the situation of increased control, acquired shares after the bid had closed for acceptance would turn that mechanism into an instrument capable of allowing improper gains to be obtained, without any risk. Nothing would prevent investors, taking advantage of the natural fall in the quoted price of the shares after the bid closed for acceptance, from acquiring shares on the market for the sole purpose of reselling them to the offeror at the higher price of the takeover bid, thereby obtaining a guaranteed profit, created artificially by the law itself. That scenario would constitute rapid and unjust enrichment at the expense of the offeror, without any basis in the objective of Article 16 of Directive 2004/25. Moreover, it would encourage speculation and harm transparency and the correct formation of prices in the market (paragraphs 52 to 55 of its written observations).

24 The Commission fundamentally agrees with that argument when it maintains that investors acquiring the remaining securities at a price lower than that of the takeover bid, but during the period in which the right of sell-out may be exercised, are limited to carrying out a transaction on the basis of publicly accessible information. In a free market economy, such transactions cannot be regarded as illegitimate. Furthermore, Directive 2004/25 does not provide for any restriction on the right to sell to third parties once the bid has been completed. The fact that such behaviour generates profits is not a sufficient basis on which to describe such a transaction as 'opportunistic'. And, even if it were, that would not, by itself, restrict the sale of the securities to third parties during or after a takeover bid, nor would it prevent a person acquiring those securities from exercising the legal rights derived from ownership of those securities (paragraph 69 of its written observations).

25 The Commission comments along similar lines (paragraph 68 of its written observations) when arguing that the holders of remaining securities on completion of the takeover bid may have a legitimate interest in selling their shares to third parties and allowing those new buyers to exercise the right of sell-out, in order to avoid possible disputes with the majority shareholder and to receive the funds immediately. If potntial buyers were excluded from the right of sell-out, shareholders who held shares during the bid would not be able to sell them, or would only be able to do so at a substantial loss, following the publication of the outcome of the bid, or even before the outcome was made public. The Commission cannot see any basis on which, contrary to the objective of Article 16 of Directive 2004/25 of ensuring adequate protection for minority shareholders, such negative consequences for shareholders who hold shares during a takeover bid could be justified.

26 The present case is an illustration of those difficulties: the requests to exercise the right of sell-out were submitted in 2014 and, more than twelve years later, they still have not been carried out.