No passado dia 17 de Outubro, na reunião do *Legal Committe* da BetterFinance que teve lugar em Malta, Octávio Viana, presidente da Associação de Investidores e Analistas Técnicos do Mercado de Capitais (ATM), apresentou as falhas dispendiosas dos artigos 15 e 16 da Directiva 2004/25/EC (Directiva das OPA). Em consequência, o referido *Legal Committe* decidiu apoiar a ATM em todas as iniciativas tendo em vista a alteração da Diretiva por forma a mitigar as falhas identificadas. Para o efeito a ATM contará com a consultadoria de dois professores catedráticos, especialistas em direito societário, do mercado de valores mobiliários e europeu.

No próximo dia 4 de Dezembro, Octávio Viana, Christiane Hölz (German Investors Association - DSW) e Aleksandra Maczynska (BetterFinance), todos membros do Financial Services User Group (FSUG), irão reunir, em Bruxelas, com Marianna Uotinen, *Policy Officer* (*Company law and Corporate governance in the Capital Markets*) na Comissão Europeia. A reunião visa sensibilizar a Comissão Europeia, por intermédio de Mariana Uotinen, para os aludidos problemas identificados na Directiva e para a sua incorrecta aplicação em Portugal no caso do direito de alienação potestativa na Luz Saúde S.A. Na aludida reunião será ainda abordado o tema da perda de qualidade aberta (*delisting*) e a tutela dos accionistas minoritários que têm suscitados preocupações à BetterFinance e ao FSUG.

Pode consultar a apresentação sobre as falhas dispendiosas dos artigos 15 e 16 da Directiva das OPA no seguinte link: https://drive.google.com/file/d/1swuL3ZEUqPPTYukoPxBj-3FsYm4QAOHH/view?usp=sharing (consultado em 17/11/2017).

Transcrição da apresentação sobre as falhas dispendiosas dos artigos 15 e 16 da Directiva das OPA:

Meeting of the Legal Committee of Better Finance

12th October 2017

SLIDE 1 – GOOD AFTERNOON, Ladies and Gentlemen,

My name is Octávio Viana and I am the president of the board of directors of the Portuguese Investor's association.

Thank you very much for having me here. The Legal Committee of Better Finance, constitutes the most prominent people in industry from both the consumers and investors side. Only the best in the field will take the time and make the sacrifice to come so far for a conference like this, in Malta. Once again, thank you for your time, it's an honor to be here with you today.

SLIDE 2 – As you all know, today I am going to discuss the costly failures of articles 15 and 16 of the Takeover Directive.

In order to protect the interests of minority shareholders, the Directive 2004/25/EC of The European Parliament and of The Council of 21 April 2004, known as The Takeover Directive, provides for a mandatory bid rule to all holders of transferable securities carrying voting rights in a targeted company. Under this rule, an offeror, after having acquired control over a listed company, unless such control has been acquired following a voluntary bid, is required to make a bid to all the remaining holders of securities carrying voting rights at an equitable price.The mandatory bid rule provides that all shareholders are treated equally regarding the opportunity to share the control premium.

SLIDE 3 – The well-known Takeover Directive applies, in general, to listed companies incorporated within the European Union. This means that the costly impact of the directive applied to real situations of the stock market, may affect investors in listed companies from countries that have adopted article 15 (2.b) of the directive. This can prove to be a serious concern for our associates with interests in listed companies incorporated in these countries. Even the offeror may have problems.

SLIDE 4 – The Directive sets out six general principles. Member States are required to ensure that their rules comply with these general principles.

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They are:

Equivalent treatment: all holders of voting securities of an offeree company of the same class must be afforded equivalent treatment; in particular, if a person acquires control of a company, the other holders of voting securities must be protected;

Sufficiency of time and information: The holders of voting securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid.

Avoidance of false markets: false markets must not be created in the voting securities of the offeree company, of the offeror company, or of any other company concerned by the bid in such a way that the rise or fall in the prices of securities becomes artificial and the normal functioning of the markets is distorted;

Responsible conduct: an offeror shall announce a bid only after ensuring that it can fulfill any consideration (in cash or other type);

Duties of offeree`s company boards: the board of an offeree company is to act in the interests of the company as a whole and must not deny the holders of voting securities the opportunity to decide on the merits of the bid, and

"Siege principle": an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

The equivalent treatment is important, but this is only fair when the parties are treated equally whenever they are equal and treated unequally in their inequality - The offeror and the minority investors are not equal.

SLIDE 5 – Apart from the discussion on the binding legal force of the Directive`s preamble, but considering that law`s preambles are often taken into account by the European Union Court, I think that it is important to consider:

Number 9 – "Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company's securities for all of their holdings at an equitable price in accordance with a common definition."

Number 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."

In other words, the preamble of the Directive makes it clear that the main goal is to protect the minority shareholders in a takeover bid. Number 24 clearly refers to such protection as the sell-out right. This means that the sell-out right is not really a counterpoint measure for the squeeze-out right, but rather a necessary legal standard to protect the minority shareholders from the lack of dispersion in the stock market (a reduced free-float) and concomitant lack of liquidity and an agency control mechanism, to mitigate the costs of the majority principle; of a majority shareholder opportunism.

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SLIDE 6 – The Takeover Directive considers the situation of a target company after a successful bid, in particular when the bidder has acquired or has firmly contracted to acquire securities representing not less than 90 % of the offeree`s voting rights and 90 % of the voting rights comprised in the bid (targeted votes).

Article 15 "implements" "squeeze-out" rights in one of two possibilities:

a) An offeror can squeeze-out the holders of the remaining securities once it has acquired 90 % of the offeree's voting securities and 90 % of the target`s voting rights;

b) An offeror can squeeze-out the holders of the remaining securities once it has acquired 90 % of the offeree's voting securities and 90 % of the voting rights comprised in the bid, regardless of whether such securities/rights were acquired before or pursuant to the offer.

The problem, in the sell-out right perspective, arises in case of implementing article 15 (2.b), as we will soon notice.

Either the squeeze-or sell-out rights must be exercised within three months after the end of the time allowed for acceptance of the (mandatory or voluntary) bid.

SLIDE 7 – In such circumstances, Article 15 provides the offeror a right to squeeze-out the residual shareholders (the offeror is able to require that the holders of the remaining securities sell him those securities at a fair price), whilst, in turn, Article 16, mutatis mutandis, provides minority shareholders the right to sell-out their shares (a holder of the remaining securities is able to require the offeror to buy his/her securities at a fair price, under the same conditions as provided for in Article 15).

SLIDE 8 – COSTLY FAILURE: SELL-OUT RIGHT

SLIDE 9 – The squeeze-out is intended to protect the offeror`s (majority shareholder) option to become a sole shareholder and freely reorganize the target company.

Conversely, the Takeover Directive provides residual minority shareholders a sell-out right, which they might individually exercise regardless of the majority shareholder`s plans to exercise his or her squeeze-out right.

The sell-out right grants a second chance for residual minority shareholders to require the successful bidder, within a predetermined period of time, to require the compulsory purchase of their remaining securities at a fair price.

SLIDE 10 – But… taking into account the conditions of the squeeze-out and sell-out rights;

Minority shareholders aren`t protected after a successful bid whenever the offeror is not legally enabled to squeeze-out the residual shareholders, because, in that circumstance, minority shareholders are also not legally enabled to exercise the sell-out right, freezing their holdings to a large extent, and thereby becoming trapped shareholders.

SLIDE 11 - These type of situations are common when the offeror, before launching the takeover bid, has already got a large share in the target company, and, although having acquired securities representing more than 90 % of the offeree company`s capital carrying voting rights, achieves less than 90 % of the voting rights comprised in the bid.

SLIDE 12 – The rule should be:

Whenever a majority shareholder, after the end of the takeover bid, achieves not less than 90 % of the voting rights and 90 % of the targeted votes, he has the right to squeeze-out the remaining shareholders; and the remaining shareholders have got the corresponding symmetric right to sell-out the remaining shares to the majority shareholder.

SLIDE 13 – Unfortunately, sometimes:

An offeror achieves more than 90 % of the voting rights, but no more than 90 % of the targeted votes. Sometimes the offeror achieves 98 % of the capital carrying voting rights, but only 82 % of targeted voting rights. For example, assuming a shareholder holds 89 % of the capital, it is easy to understand that is almost impossible to achieve 90 % of the targeted voting rights – 1.11 % of the capital with voting rights is enough to block the sell-out right. And if we consider 10 % of the target's voting rights in treasury shares, it is still more complicated.

In those circumstances, the offeror does not hold the right to squeeze-out the remaining shareholders, nor do the remaining shareholders have the right to require the sell-out. And herein lies the real problem…

The free-float becomes very small and the market illiquid to the offeree`s securities, thus, reducing the value of the holdings of the minority shareholders and increasing the risk and agency costs.

SLIDE 14 – The sell-out right is more valuable and important to residual shareholders than the warranty of a fair price that is "granted" by the condition that the offeror needs to achieve more than 90 % of the voting rights comprised in the bid (targeted votes).

And this is quite easy to understand: Residual shareholders can always decide to not exercise the sell-out right if they consider the price unfair, but at least they have the opportunity to sell the remaining shares (even if not a fair price) and avoid being trapped in a company with a very small free-float, an illiquid market, and at the mercy of the majority shareholder.

An effective and usable sell-out right is important as an agency control mechanism, to ensure the market efficiency, and to protect the remaining shareholders from being trapped because of a faulty rule - A rule that looks good in theory and on paper, but where the math proves to be more distant to reality, and a notable adversary of the High Level [Jaap] Winter's Group's logic.

SLIDE 15 – Math proves to be a notable adversary of the High Level Winter's Group's logic behind the sell-out right… and, the understanding of the stock market and the mechanics of the takeover, shows the fatal and costly error of Winter's Group in conditioning the sell-out right to the observance of the squeeze-out right, treating both, minority investors and offeror, as if they were equal, treating both rights equally, as if they were the same.

Minority investors and offerors aren`t equal, thus the rights can't be equal. The rights must be symmetrical, as a mirror of one another.

The equivalent treatment is an important principle of the Directive, however, equivalent treatment is only equivalent if it treats the parts equally when they are equal and treats them unequally in their inequality - The offeror and the minority shareholders are not equal.

Why? Because to the offeror it is not important the warranty of a fair price is "granted" by the condition that the offeror needs to achieve more than 90% of the voting rights comprised in the bid (targeted votes). In fact, that price is (was) decided by himself. To the offeror it is not important to have agency control mechanisms. Once an offeror has acquired 90% of the float, the rights of the remaining shareholders are of no concern.

This means obtaining 90 % of the targeted voting rights are required to ensure the fairness of the price for the squeeze-out rule, however, the same is useless and harmful considering the sell-out right rule.

SLIDE 16 – Driven by our experience, and in order to protect minority shareholders, we believe Member States should introduce the sell-out rights, (only) in accordance with Article 15 (2. a) of the Takeover Directive, i.e., in the situation where the offeror holds securities representing not less than 90 % of the capital carrying voting rights, but not 90 % of the targeted votes.

I think it is necessary to conduct an urgent study and survey at the European level in order to understand and to examine the nature of the real risks and costs associated with the failure of the squeeze-out and sell-out rights, considering the two options available in The Directive.

Also related to sell-out rights and the protection of minority shareholders, is a new and bizarre question which arose in Portugal, in 2015, when the Portuguese Securities Commission (CMVM) took an illegal administrative decision by refusing the right of sell-out to all holders of the remaining shares (ISIN:PTEOT0AM0005) of Espírito Santo Saúde, SGPS, S.A. acquired after the period of the offer made by Fidelidade – Companhia de Seguros, S.A. (14th October 2014), an ex- state owned company.

Regarding the Takeover bid made by Fidelidade – Companhia de Seguros, S.A., (the offeror), once the takeover offer resulted in the acquisition of at least 90 % of targeted votes and 90 % of the capital holding voting rights, that fact gave rise to the birth of the squeeze-out rights.

The squeeze-out rights (both the right of the offeror to acquire the remaining shares: squeeze-out right, and the right of the target company shareholders to require a buy-out: sell-out right), applies to any shares "to which the offer relates". An offer is typically stated to apply to any shares of the relevant class in issue or to be issued.

So, if the shares are acquired after an offer has closed but are shares to which the offer relates, carrying voting rights in the offeree`s company, they should undoubtedly fall within the squeeze-out and sell-out rights.

Against all previous practices in Portugal and in the rest of EU, Portuguese Securities Commission (CMVM) breached application of Union law, namely the provision of Article 16 of The Directive 2004/25/EC, by refusing the right of sell-out to all holders of the remaining shares.

It is extremely important for EU financial markets and specifically to Portuguese minority shareholders to clarify this question and the correct application of the law, because, in 2016, Portuguese courts gave

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preliminarily reason to CMVM`s procedure, with the allegation that the concept of remaining shares is only applicable to those shares acquired before the close of an offer, contradicting the Directive and the protection of the minority shareholders.

In my view, the intervention of The Court of Justice of the European Union is necessary.

Furthermore an urgent response is needed to clarify the Directive related to this issue, and to ensure EU Law is interpreted and applied uniformly in every EU country. This is of great importance considering Portuguese courts are known to take a decade to or more to issue final verdicts on such matters.