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ARTICLE

Lowballing Under the EU Takeover Bid Directive: Strategies, Concerns, and Gold-Plating Remedies

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Abstract

This paper investigates the phenomenon of lowballing within the context of the EU Takeover Bid Directive (TBD), where offerors set bid prices typically below the current market price. It delves into the key features of the TBD's mandatory bid regime and examines the varied implementation approaches by Member States, including 'gold-plating' practices. The analysis encompasses strategies employed in both mandatory and voluntary bids, with prominent cases such as Porsche/VW and ACS/Hochtief serving as illustrative examples. The paper critically assesses the implications of low-cost control transactions, the pressure exerted on shareholders to accept undervalued offers, and the circumvention of or maneuvering around the TBD's mandatory bid rule. The impact of lowballing on the Directive's objectives, particularly the protection of minority shareholders, is thoroughly evaluated. Additionally, the study reviews gold-plating remedies adopted by Member States, such as supplementary bid requirements and mandatory minimum acceptance thresholds, and assesses their effectiveness and legal viability. The paper concludes with a discussion on the adequacy of current regulations in safeguarding minority shareholders and mentions potential reforms to address the persistent issue of lowballing within the EU framework.

Keywords Takeover TBD · Mandatory bid rule · Lowballing · Equal treatment · Exit

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1 Introduction

Lowballing[1] in a takeover under the EU mandatory bid regime, first observed in some widely noticed German cases (Porsche/VW, ACS/Hochtief[2]), is a controversial phenomenon. The offeror, by setting a seemingly unreasonably low price—typically, below the current share price of the company in question at the moment the offer is announced or launched—wants to ensure that only a few shareholders or none at all will accept the offer.[3]

The practice immediately provoked a lively debate in Germany and prompted the European Commission to address the issue in its 2012 assessment of the Takeover Bid Directive (TBD), emphasizing concerns about the circumvention of protections for minority shareholders.[4] The Commission asserted that some bidders had circumvented the protection afforded to minority shareholders by exploiting the exemptions from the mandatory bid rule (MBR) provided for in Art. 5(2) of the TBD.[5] To address these loopholes, the Commission announced its intention to 'take the appropriate steps to discourage the use of this technique across the EU, such as through bilateral discussions with the concerned Member States or Commission Recommendations'.[6] Subsequently, the European Parliament even requested that the Commission prepare a new assessment of the TBD once takeover activity had returned to a 'more regular volume' following the global financial crisis.[7] However, since then, neither the Commission nor the Parliament has shown any further interest in the subject. In accordance with this approach, BaFin's supervisory practice regarding takeovers refrained from addressing the issue in subsequent cases of lowballing in Germany.[8] However, given that lowballing has proven to be recurrent rather than a

[1] Lowballing is generally defined as 'the practice of deliberately underestimating a cost, price, rate etc in order to deceive', see Macmillan Dictionary. Historically, the term was used in the audit context to describe the practice of setting audit fees below total current costs of the initial audit engagement. See DeAngelo (1981), p 118 et seqq.

[2] See Sections 4.2.1.1 and 5.2.2.1.

[3] Lowballing must be distinguished from creeping-in or so-called creeping acquisitions. The latter refers to the accumulation of shareholdings up to the 30%-formal control threshold. Such creeping-in may be followed by a lowballing offer. However, this is by no means always the case, e.g., if the sub-control position enables the acquirer to exercise de facto control. For further details, see Enriques and Gatti (2015), p 63.

[4] European Commission (2012). A comprehensive study conducted by Marccus Partners, in cooperation with the Centre for European Policy Studies was the basis for the assessment report of the Commission, see Clerc et al. (2012).

[5] European Commission (2012), para. 25: 'This technique is clearly not in line with the objective of the Directive to protect minority shareholders in situations of change of control, although it does not appear to breach the letter of the Directive'.

[6] Ibid.

[7] European Parliament (2013); Hopt (2014), p 158.

[8] See Section 4.2.2.2 below.

one-off event,[9] there are ample grounds for revisiting[10] the phenomenon of lowballing under the European MBR.

2 Setting the Stage

Whether the special case of a low-priced bid requires specific regulation ultimately depends on the bidder's motivation and the resultant effects on (minority) shareholders. This, in turn, is influenced by the broader regulatory environment. With regard to the bidder's motivation, we can distinguish between two scenarios; however, our focus will be on the second one only:

i. The launch of a low-price offer with the intention of capitalizing on the *pressure on shareholders to tender*, which arises from the well-known collective action problem present in the case of (widely) dispersed shareholders.[11] Given the practical limitations on effective communication among such shareholders and the risk of becoming one of a small number of (outside) minority shareholders in the event of a successful takeover, accepting an offer at a price below fair value might appear to be a second-best strategy.[12] The various takeover regimes that exist around the world–including those of the EU Member States implementing the TBD–employ a variety of approaches to address this issue.

[9] We cite several cases, primarily from Germany, as illustrative examples (Section 4.2). To our knowledge, there are no comprehensive empirical studies dealing specifically with lowballing offers in the EU, but only studies on offer premiums. For instance, Bessler and Schneck (2015) evaluate excess premiums across the EU between 1992 and 2012; Kellner and Maltritz (2023) examine, among other things, second offer premiums in bidding contests; and Missonier-Piera and Spadetti (2023) investigate the impact of earnings management on acquisition premiums in friendly takeovers. In addition, some market authorities and law firms have published overviews of takeover offers within their jurisdictions, addressing premiums and occasionally highlighting lowball offers. For example, Ashurst (2024) provides an appendix with an overview of all takeover offers and premiums in the UK in 2023, and Hogan Lovells (2024) notes that approximately 14% of bids for German targets in 2023 did not offer a premium above the statutory minimum price.

[10] Previously, e.g., Enriques and Gatti (2015), p 78 et seqq.; Hopt (2014), p 176 et seqq.; Habersack (2018), p 37 et seqq.; European Company Law Experts (2013), p 9 et seqq.; Tyrolt and Cascante (2011), p 110; Falkenhausen (2010), p 298 et seqq.; Merkt (2010), p 529; Merkt (2011), p 561; Baums (2010), p 2374; Tyrolt and Cascante (2024), para. 124 et seqq; von Schwarzkopf (2021); Verse (2022), pp 59, 71 et seqq.

[11] On the pressure to tender, see Hopt (2014), p 152; Mülbert and Birke (2000), p 467, and Section 5.2.2 with n. 88 below.

[12] There is a growing body of empirical and theoretical research on negative premium bids, the reasons why shareholders might accept such offers, and how shareholders form expectations about premiums. Weitzel and Kling (2018) argue that 'hidden earnouts', where target shareholders participate in the bidder's share of joint synergies, and corrections of overvaluation explain the rational acceptance of negative premiums. Ang and Ismail (2015) examine the relative weight of rational and behavioral factors underlying the process of expectation formation. Oldford (2017) argues that the combination of negative market reactions to negative premium bids (resulting in the convergence of the target's stock price to the bid price) and high blockholdings (resulting in lower share liquidity) leads target shareholders to prefer the negative premium bid over selling at market prices. In particular, Oldford and Otchere (2021) focus on cross-ownership and portfolio-wide wealth effects as reasons for accepting lowball offers.

These approaches include the imposition of disclosure obligations and obligations to keep offers open for a specified period, as well as the enforcement of more or less strict equal sharing rules, exit rights, and the upholding of sell-out rights for shareholders who decline such offers.[13] In particular, the European Union's regime requires both voluntary and mandatory bids to be made to all shareholders on the same terms. These requirements eliminate the coercive elements associated with partial and two-tier bids and ensure, at least in theory, that all minority shareholders can make a free and unbiased decision.

ii. The launch of a low-price offer with the objective of ensuring that no shareholder or only a very small number of shareholders will accept the offer. Such strategies are typically implemented under a *mandatory bid regime*, such as the one stipulated by the TBD, with a view to avoiding the obligation to make a mandatory bid and thus preventing all shareholders from equally sharing in the eventual control premium paid to some shareholders to acquire control.

With regard to the second setting, i.e., the acceptance-minimizing lowballing strategy, the mandatory bid regime set out in Art. 5 of the TBD is an essential element in both understanding and assessing the phenomenon. To reassess the necessity for reform of the TBD with a view to such acceptance-minimizing lowballing offers, this article proceeds as follows: first, we describe the core features of the TBD's mandatory bid regime and highlight some differences regarding its transposition and gold-plating by Member States (Section 2). We then examine various techniques of lowballing under the EU mandatory bid rule that have become prevalent in the current era and consider these in light of several cases that have arisen in practice (Section 3). Against this backdrop, we proceed to assess whether lowballing runs counter to the rationale(s) of the MBR (Section 4). Finally, we discuss the anti-lowballing effects of various Member States' gold-plating measures (Section 5) and assess their compatibility with the TBD's legal framework regarding takeovers (Section 6). In its conclusion, this article presents some final observations (Section 7).

3 Core Features of the TBD's Mandatory Bid Regime and Member States' Implementation: Overview

The TBD has achieved a partial harmonization of the previously diverse or even non-existent takeover laws of the EU Member States. The most significant harmonization effect was the EU-wide[14] introduction of the mandatory bid regime, which

[13] See Hopt (2014), p 152; Davies et al. (2017), p 224 et seqq., rightly mentioning the 'trusteeship strategy', where the incumbent management is obliged to obtain independent advice on the offer and its conditions. This latter strategy is the cornerstone of the US system.

[14] Hopt (2014), p 166; Wouters et al. (2009), p 75; cf. Clerc et al. (2012), p 122 et seqq. Prior to the implementation of the TBD, numerous Member States had already introduced a mandatory bid regime based on the London City Code (Rule 9.1 of the UK Takeover Code). See Hopt (2014), p 153 et seq., 166; Habersack (2018), p 29; Hansen (2018), p 1; Jennings (2005), p 37; Kershaw (2016), 8.01 et seqq., p 234 et seqq. However, historically, the introduction of the MBR at the European level was by no means a foregone conclusion. See Habersack (2018), p 29; Hopt (1997), p 384 et seqq. and the proposal pre-

requires an entity or individual acquiring control of a public company to launch a bid for the outstanding minority shares at the highest price paid by the bidder during a period of six to twelve months before the offer. The designation of the MBR as a 'cornerstone'[15] of EU takeover law[16] clearly illustrates its pivotal role in regulating control transactions. Despite Brexit and widespread and sometimes fundamental criticism, it is unlikely that the MBR will undergo significant modification or dilution.[17]

On the other hand, the TBD's vague definitions of the MBR's core minimum harmonization requirements, coupled with the broad wording of the TBD's clauses providing for Member States' options, permit a significant divergence in the manner in which the MBR is implemented at the national level.[18] Member States' takeover laws still represent a rather uneven level playing field, making it 'hard to analyse the MBR's impact on Cas [creeping acquisitions] even in very broad terms: it depends heavily on the choices made at the Member State level'.[19] With a view to this problem, we will briefly sketch some of the fundamental divergences in implementing the MBR's core minimum harmonization requirements.

3.1 A Maximum of Minimum Harmonization

In accordance with the stated objective of the TBD merely 'to establish minimum guidelines for the conduct of takeover bids and ensure an adequate level of protection for holders of securities throughout the Community' (Recital 25), the mandatory bid regime as set out by Art. 5 of the TBD comprises only a few not very well-defined core minimum harmonization requirements. Moreover, in addition to the exemption explicitly provided for in Art. 5(2) of the TBD, Art. 4(5) of the TBD acknowledges unspecified Member States' options regarding exceptions or exemptions from the obligation to launch a bid.[20] Art. 5(4)(2) of the TBD permits Member States to deviate from the minimum price rule applicable to the mandatory bid while upholding the general principles of Art. 3(1) of the TBD, and Art. 5(3) of the TBD refers to the provisions of Member States' law for the control threshold applicable to the mandatory bid.

In line with its 'minimum approach', the TBD explicitly permits Member States to subject public takeover bids to additional and more stringent conditions. With regard to mandatory bids, Member States may, in addition to the requirements

Footnote 14 (continued)
sented in the 1996 draft of a takeover bid directive (Proposal for a 13th European Parliament and Council Directive on company law concerning takeover bids, OJ 1996, C 162/5).

15 Habersack (2018), p 1; see also Roth et al. (2024), p 4.

16 In addition to the UK, numerous other non-EU jurisdictions introduced a mandatory bid regime (European Commission (2012)), para. 13; Roth et al. (2024), p 18 et seq.). In the US, only Maine and Pennsylvania have somewhat similar provisions (Merkt (2011), p 565; Habersack (2018), p 30).

17 Cf. Hopt (2014), p 166.

18 European Commission (2007), 2.2.1., p 9.

19 Enriques and Gatti (2015), p 77.

20 As to derogations from the MBR, see Skog and Sjöman (2024).

stipulated by the TBD, provide for further instruments to protect the interests of the shareholders of the target company, provided that they do not hinder 'the normal course of a bid' (Art. 5(6) of the TBD).[21] More generally, with regard to all bids, Member States may implement 'additional conditions and provisions more stringent than those of this Directive', 'with a view to ensuring compliance with the principles laid down in paragraph 1' (Art. 3(2)(b) of the TBD). Foremost among these principles is lit. a, which requires that 'all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected'.

Consequently, explicit maximum requirements are a rare exception, and limited to the approval of the offer document in the case of offers in several Member States (Art. 6(2)(2) of the TBD), the maximum period for the determination of the fair amount of compensation in the case of a mandatory offer (Art. 5(4)(1) of the TBD), and the maximum threshold for the right of exclusion and the right to compensation (Arts. 15(2)(3), 16(3) of the TBD).

3.2 Acquisition of Shares Giving Control: The Trigger Event

3.2.1 Art. 5(1) of the TBD

A mandatory bid must be made 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' which, directly or indirectly, give him/her a percentage of voting rights conferring control of the company on him/her (Art. 5(1) of the TBD). Thus, the key event triggering the obligation to launch a mandatory bid is the attainment or crossing of the *control threshold* as a consequence of an acquisition of voting shares.

The TBD does not provide a precise definition of *control* and, thus, it is up to the Member States to determine the percentage of voting rights conferring control and the method of its calculation (Art. 5(3) of the TBD). Likewise, except for acting in concert (Art. 5(1) of the TBD), the TBD refrains from specifying the criteria under which an indirect holding of shares confers control, i.e., the criteria for attributing shares to the bidder.

Moreover, while Art. 5 of the TBD, following the UK example, unequivocally stipulates the *acquisition principle*, the Directive lacks a definition of the term 'acquisition of shares'. This omission results in ambiguity regarding the types of transactions covered under Art. 5(1)(1) of the TBD. However, with respect to the 'acting in concert'[22] extension, the wording leaves no room for doubt: simply entering into an agreement with another person for the purpose of coordinating how to

[21] CJEU (Fourth Chamber), ECLI:EU:C:2017:572 n. 27 - *Marco Tronchetti Provera et al.*; CJEU (Fourth Chamber), ECLI:EU:C:2020:1014 n. 41 - *Euromin Holdings (Cyprus) Limited*.

[22] As to the numerous controversies at European and Member State level connected to the concept, see Clerc et al. (2012), p 59 et seqq.; Hopt (2014), p 185 et seqq.; European Company Law Experts (2013), p 4 et seqq.; Garcia de Enterria (2023), p 6 et seqq.

exercise their voting rights in the future or even for the purpose of acquiring further voting shares to attain control of the company does not trigger the obligation to launch a mandatory bid. In other words, the agreement between concerted parties does not, in and of itself, confer control on these persons within the meaning of Art. 5(1)(1) of the TBD.[23] The definition in Art. 2(1)(d) of the TBD clearly supports this interpretation, since, for present purposes, 'persons acting in concert' refers to legal persons who cooperate with the offeror on the basis of an agreement aimed at acquiring control.

3.2.2 Member States' Transposition and Gold-Plating

Member States define 'control' quite differently.[24] The majority of states have implemented a *formal concept of control*, which is based solely on the acquisition or exceeding of a certain percentage of voting rights. In most cases, this percentage is 30%,[25] although in some cases it is 33% or one third[26] of the voting rights. Only Estonia has implemented a purely 'material' concept of control, which is based on the—differently specified—'actual' attainment of control.[27] Denmark and Spain have opted for a combination of a formal and a material concept of control.[28]

With regard to the acquisition requirement, some Member States have opted for a derogation, stipulating that an acting in concert agreement or understanding as such will result in the attribution of shares among all concerted parties, i.e., without any subsequent acquisition of shares by such parties.[29] In Germany, for instance, voting rights from third-party shares with which the bidder coordinates its behavior on the basis of an agreement or in some other way are attributed to all concerted parties (Section 30(2)(1) of the WpÜG).[30] Nevertheless, Section 30(2)(2) of the WpÜG restricts this universal attribution by requiring that the concerted behavior involve an agreement on the exercise of voting rights or cooperation in a manner aimed at permanently and significantly changing the entrepreneurial orientation of the target company.

[23] Winner (2014), p 369; Ghetti (2014), p 608; Garcia de Enterria (2023), p 8 et seq.

[24] Clerc et al. (2012), p 55 et seqq.; on the control threshold, see Cahn (2011), p 77.

[25] Austria, Belgium, Cyprus, the Czech Republic, Finland, France, Germany, Ireland, Italy, the Netherlands, Sweden and the UK. See Clerc et al. (2012), p 57.

[26] Greece, Hungary, Luxembourg, Poland, Portugal, Romania and Slovakia. Ibid.

[27] Ibid.

[28] Ibid.

[29] It is controversial whether Member States are free to gold-plate the acquisition requirement by providing that the control threshold is crossed solely because of an agreement or understanding between the concerted parties to act in concert, i.e., without an accompanying acquisition. Cf. European Company Law Experts (2013), p 6; Winner (2014), p 369; Garcia de Enterria (2023), p 11 et seqq. Indeed, a deviation from the acquisition principle laid down in Art. 5(1) of the TBD can be justified neither as a mere 'method of … calculation' of control (Art. 5(3) of the TBD) nor as an 'additional' protection within the meaning of Art. 5(6) of the TBD, but only as an additional 'more stringent' provision protecting shareholders in the event of an acquisition of control (Art. 3(2)(b) of the TBD).

[30] As to the reasons for the German transposition, see Ghetti (2014), p 614 et seqq.

3.3 Minimum Price Rules

3.3.1 Equitable Price: The Highest Price Previously Paid

Mandatory bids are to be made at an *equitable price* as further specified in Art. 5(4) of the TBD. Pursuant to the first sentence of Art. 5(4) of the TBD, the equitable price is 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 6 months and not more than 12 months prior to the bid.[31] However, it is uncertain whether all types of prior transactions—e.g., a merger or a donation—qualify as an acquisition under Art. 5 of the TBD. Moreover, even if that were to be the case, these transactions do not necessarily comprise a consideration in cash or shares, e.g., in the case of a donation and a pooling of shares. The TBD does not link the concept of an equitable price to the pre-bid (weighted average) share price of the target company. Instead, as previously stated, it specifies that only certain transactions can serve as a benchmark for determining the minimum price of the bid.

Moreover, Art. 5(4)(2) of the TBD stipulates that, provided that the general principles set forth in Art. 3(1) of the TBD are complied with, Member States may authorize their supervisory authorities (Art. 4 of the TBD) to adjust the equitable price under very specific conditions and in accordance with clearly defined criteria.[32] Where a national rule provides that the equitable price is to be determined using a number of methods, one of which is the method provided for in Art. 5(4)(1) of the TBD, it may, in accordance with the case law of the European Court of Justice and subject to certain conditions, be assumed that the other methods envisaged implement the power to adjust the equitable price provided for in Art. 5(4)(2) of the TBD.[33]

3.3.2 Member States' Transposition and Gold-Plating

Numerous Member States have implemented a two-pronged threshold for determining the equitable price. The compensation offered must correspond to the higher of two prices, at least: the one paid in any prior acquisition as stipulated by Art. 5(4) of the TBD, and the (average weighted) stock exchange price during a period prior to the announcement of the crossing of the control threshold.[34] For instance, Sections 39 and 31(1)(2) of the WpÜG in conjunction with Section 4(1) of the German Takeover Offer Ordinance (*WpÜG-Angebotsverordnung*–WpÜG-AV) require the bidder to offer a compensation that equals the (highest) price paid in prior acquisitions having occurred within the 6 months preceding the announcement of

[31] Cf. CJEU (Fourth Chamber), ECLI:EU:C:2020:1014 n. 44 - *Euromin Holdings (Cyprus) Limited*; CJEU (Fourth Chamber), CJEU ECLI:EU:C:2017:572 n. 30 - *Marco Tronchetti Provera et al*. See also Roth et al. (2024), p 23.

[32] Cf. CJEU (Fourth Chamber), ECLI:EU:C:2020:1014 n. 45 - *Euromin Holdings (Cyprus) Limited*.

[33] CJEU (Fourth Chamber), ECLI:EU:C:2020:1014 n. 49 - *Euromin Holdings (Cyprus) Limited*.

[34] Austria, Belgium, Germany, Greece, Portugal, Spain and (only under certain circumstances) Italy. See Clerc et al. (2012), p 33.

the crossing of the control threshold. Despite that, Sections 39 and 31(1)(2) of the WpÜG in conjunction with Section 5(1) of the WpÜG-AV require the bidder to offer a compensation that equals the weighted average domestic stock exchange price of the shares of the target during the 3 months preceding the publication of the crossing of the control threshold as stipulated in Section 35(1)(1) of the WpÜG, whichever is higher. Very similar rules apply, for example, pursuant to Section 16(1) and (2) of the Austrian Takeover Act (*Übernahmegesetz*–ÜbG), although the respective time periods are longer: with regard to prior acquisitions, the 12 months preceding the announcement of the offer are of relevance, while with regard to the average stock exchange price, the 6 months preceding the announcement of the intention to make the offer are relevant.[35]

3.3.3 Member States' Extension of the Equitable Price Requirement to Voluntary Takeover Bids

The TBD does not provide for pricing rules applicable to *voluntary takeover bids*, i.e., bids aimed at acquiring control of the target company in question. However, Member States are entitled to implement additional 'more stringent' provisions with a view to ensuring equal treatment of shareholders of a target company and, obviously, (time-constrained) minimum pricing rules provide for equal treatment of shareholders in the case of a voluntary bid as well.[36]

Accordingly, numerous Member States have enacted minimum price requirements for voluntary takeover bids.[37] As for Germany, for example, pursuant to Section 31 of the WpÜG, voluntary takeover bids must offer at least the highest pre-acquisition price paid in the preceding 6 months and the average weighted stock exchange price of the 3 months preceding the announcement (Section 10 of the WpÜG) of the voluntary takeover bid, whichever is higher. In Austria, bids made with the intention of attaining control are also generally subject to pricing rules very similar to those applicable to mandatory bids.[38] In the UK, even though the pricing rules differ from those applicable to mandatory bids,[39] pursuant to Rule 6.1(a) of the City Code, the price offered in a voluntary takeover bid must equal the terms of any purchase of shares in the 3 months preceding the announcement of the offer.[40]

[35] Diregger et al. (2021), para. 37.

[36] Noack and Zetzsche (2020), paras. 5, 10; Cascante and Tyrolt (2024), para. 40; Habersack and Verse (2019) Section 10, para. 7; Stephan (2021), pp 272, 276; Merkt and Binder (2006), p 1287 et seq.; Simon (2006), p 16. For an opposing view, see Hopt et al. (2005), p 111; formerly also Mülbert (2004), p 640 et seq.; Mülbert (2006), p 165 et seqq.

[37] Cf. Clerc et al. (2012), p 61 et seqq.

[38] Diregger et al. (2021), para. 42.

[39] Regarding the pricing rules for mandatory bids, see Kershaw (2016), 8.20 et seqq., p 244 et seqq.

[40] See Kershaw (2016), 6.29, p 196.

3.4 Exemption for Control-Acquiring Voluntary Bids

3.4.1 Art. 5(2) of the TBD

The TBD provides for an exemption from the obligation to make an offer if the control threshold was not attained or exceeded in the context of an acquisition, but rather following a voluntary takeover bid meeting all the requirements of the TBD pertaining to such a bid (Art. 5(2) of the TBD).[41]

In requiring that the (voluntary) takeover bid resulting in the attainment of control '[has] been made in accordance with this Directive', the TBD ensures that the voluntary takeover bid is a *full bid* made to *all* shareholders *on equal terms*.[42] However, it is not a prerequisite that the voluntary takeover bid also complies with the minimum price provisions applicable to mandatory bids.[43] The Directive expressly refers to the making of a voluntary offer in accordance with the Directive, and the TBD does not provide for any minimum price regulations for voluntary offers.

The European Commission, in its assessment of the TBD, explicitly states:

> … Article 5(2) of the Takeover Bids Directive regulates that where control has been acquired following a voluntary bid to all the holders of securities for all their holdings, the obligation to launch a mandatory bid no longer applies…. The advantage for the offeror is that the Directive does not regulate the price of a voluntary bid.[44]

With regard to the rationale behind the exemption, the Commission notes:

> The exemption for situations where control has been acquired following a voluntary bid assumes that the offer price was high enough to persuade a significant part of the shareholders to accept the offer, otherwise the offeror would not have acquired control through the bid.[45]

3.4.2 Member States' Transposition

Member States' implementations of Art. 5(2) of the TBD vary significantly, depending on whether a Member State stipulates a minimum price requirement for voluntary takeover bids or not.[46] German takeover law, as set out, provides for such an (additional) requirement. Pursuant to Sections 31 and 39 of the WpÜG, voluntary bids and mandatory bids must comply with the same (pricing) rules.[47]

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41 See, e.g., Krause and Pötzsch (2024), para. 25.

42 Hopt (2013), p 46, para. 170; Hopt (2014), p 177; Krause and Pötzsch (2024), para. 25; cf. Clerc et al. (2012), p 61 et seq.; Roth et al. (2024), p 24.

43 Krause and Pötzsch (2024), para. 25; cf. High Level Group of Company Law Experts (2004), p 46. For a different view, see Tyrolt and Cascante (2011), pp 110, 112.

44 European Commission (2012), para. 18.

45 Ibid.

46 See 3.3.2. above.

47 See Section 3.3.2 above.

Consequently, in Germany, any successful voluntary takeover bid exempts a bidder from the mandatory bid requirement (e.g., Section 35(3) of the WpÜG),[48] since it is, by necessity, also in compliance with the minimum pricing rules applicable to mandatory offers (Section 31 in conjunction with Section 39 of the WpÜG). Conversely, Section 35(3) of the WpÜG has a much more limited scope of application than is implied by Art. 5(2) of the TBD which provides for an exemption without regard to the offer price.

According to the German Government's official explanation accompanying the draft of the WpÜG, both the bidder and the target company should be exempt from the burden of two bids—a voluntary and a mandatory one—following in close succession.[49] Given that identical pricing rules apply to both types of bids, minority shareholders are not placed at a disadvantage and should not be given more than one exit option at a fair price.[50] This line of reasoning, however, does not apply to the exemption provided for in Art. 5(2) of the TBD, since the Directive does not stipulate any price requirements applicable to voluntary bids.

3.5 Some Preliminary Observations

Building on the previous discussion, two notable aspects of the TBD might encourage potential bidders to seek control by making lowballing offers:

- The exemption provided for in Art. 5(2) of the TBD,[51] i.e., the exemption of a bidder from the obligation to launch a mandatory bid where she crossed the control threshold following a voluntary takeover bid meeting the requirements of the TBD pertaining to such a bid.
- The fact that a mandatory bid must only be launched when the control threshold is exceeded *for the first time*, and not upon any subsequent acquisition of shares.

The viability and appeal of lowballing as a strategy is contingent upon the regulatory frameworks governing voluntary and mandatory bids in Member States. These frameworks exhibit considerable variation due to the limited degree of harmonization prescribed by the TBD.[52]

[48] Krause and Pötzsch (2024), para. 271; Tyrolt and Cascante (2024), para. 251 et seqq.; Schlitt (2021), para. 252; Section 35(3) of the WpÜG already entered into force prior to Art. 5(2) of the TBD. Following the entry into force of the Directive, the German legislature did not see any need to adapt Section 35 of the WpÜG in general or the exemption in Section 35(3) WpÜG specifically. Cf. BT-Drs. 16/1003 (2004), p 13. Irrespective of this chronological order of entry into force, Section 35(3) WpÜG is the German implementation of Art. 5(2) TBD.

[49] BT-Drs. 14/7034 (2001), pp 30, 60; Krause and Pötzsch (2024), para. 9.

[50] Ibid.; critically as to this line of argument, Mülbert (2001), p 1223 et seqq.; Habersack (2002), p 624.

[51] See Section 3.4.1 above.

[52] Cf. Enriques and Gatti (2015), p 77: 'All in all, it is hard to analyse the MBR's impact on CAs even in very broad terms: it depends heavily on the choices made at the Member State level'.

4 Lowballing in Practice

4.1 Strategies

4.1.1 Lowballing Mandatory Bids

In the event that a shareholder with a controlling stake increases their position, the TBD does not require any further mandatory offers to be made. Art. 5(1) of the TBD stipulates that the obligation to launch an offer is contingent on the acquisition of shares attaining or exceeding the control threshold, rather than on the increase of an existing position of control.[53] Some Member States have enacted provisions that require a controlling shareholder to launch a (mandatory) bid in the event of an increase in their controlling interest by a certain percentage, i.e., 2% or more.[54] In the absence of such provisions (e.g., in Germany and Austria), a controlling shareholder, after exceeding the control threshold through a lowballing offer accepted by only a few or even no shareholders, will be free to increase her stake without being required to launch any further mandatory offer.[55]

To ensure that the lowballing mandatory offer is accepted by only a few shareholders at most, the bidder must carefully choose the point in time at which she attains or crosses the control threshold. In particular, the bidder has to ensure that she attains or crosses the threshold by means of an acquisition below the current stock market price and that she does not acquire shares within 6–12 months (depending on Member States' implementation) prior to the offer at a price above the stock market price at the time of the publication of the acquisition of control.[56] One potential strategy for achieving this dual objective is through utilizing early-stage call option transactions, which would be exercised once the previous high-price block acquisitions are no longer considered in the determination of the mandatory bid price.[57] If the minimum price also depends on the weighted average stock market price prior to the announcement of having acquired control, the bidder will additionally have to wait for a favorable, i.e., an upward-sloping, share price movement during the relevant period.

[53] See Section 3.2.1 above.

[54] For example, in France, Greece, Ireland, Italy, Austria, Poland and the United Kingdom; cf. Clerc et al. (2012), p 127 et seqq.; Krause (2013), p 185.

[55] European Company Law Experts (2013), p 11, where comparable techniques are described as the 'creep on problem'.

[56] Cf. Krause (2013), p 186; Baums (2010), p 2375; Hitzer and Düchting (2011), p 1084 et seq.

[57] This is possible under German law, as long as this is merely an option under the law of obligations. See BGH NZG 2014, p 985, fn. 40 – *Postbank*, according to which an attribution and thus an advancement of the valuation period for Section 30(1)(No. 5) of the WpÜG only occurs in case of options in rem in the sense of an acquisition of ownership through a unilateral declaration of intent or a secured acquisition opportunity.

4.1.2 Lowballing Voluntary Bids

A bidder who, for the time being, does not intend to further increase her shareholding after attaining or crossing the control threshold will raise her stake to just below the control threshold (creep-in) and then launch a lowballing voluntary takeover bid, which will be accepted by such a small number of shareholders that the bidder will only just cross the control threshold but, nevertheless, by virtue of Art. 5(2) of the TBD, will be exempt from the mandatory bid requirement.[58] That is precisely the technique described by the European Commission:

> Even if the offeror offers a very low price, he is likely to acquire control through the voluntary bid and thus is able to make use of the exemption to the mandatory bid rule. In this case, minority shareholders are unable to share in the control premium.[59]

Regarding the timing and the price of the offer for such a strategy to work, the bidder needs to factor in whether the applicable takeover law of the Member State in question regulates voluntary takeover offers and, if so, in what respects. Clearly, if a voluntary takeover bid is not subject to statutory minimum price provisions (i), the bidder will enjoy much greater leeway in choosing the timing and the pricing of the bid than if such provisions are in place (ii). More specifically:[60]

i. Under the takeover regime most common among Member States—providing for a purely formal concept of control and no minimum pricing rules for voluntary bids[61]—, the bidder will choose the point in time for attaining or even crossing the control threshold based on her overall strategy for acquiring a stake in the company. To allow for a lowballing strategy, the bidder will first engage in building a stake to just short of the control threshold, *in extremis* to just one share below the control threshold. Subsequently, to attain or cross the control threshold, she will launch a voluntary bid at such a low price relative to the current stock exchange price that only a small but nevertheless sufficient number of shareholders will tender their shares. Notwithstanding shareholder rationality, as experience shows, such a lowballing offer—even one significantly below the current market price—is likely to secure the percentage of shares necessary for attaining or crossing the control threshold.
ii. In jurisdictions such as Germany and Austria, which also provide for minimum pricing rules for voluntary takeover bids, at first glance, the bidder's starting point is somewhat less favorable. This is because the voluntary takeover bid

[58] European Company Law Experts (2013), p 9 et seqq., which refers to these techniques as the 'creep in problem'. See, furthermore, Kalss (2013), p 140; Tyrolt and Cascante (2011), p 141; Baums (2010), p 2377. Some Member States (Germany, Greece and Romania) partially address these strategies by applying the minimum pricing rules for mandatory bids to voluntary takeover bids. With regard to the effectiveness of these rules, see Section 5.4 below.

[59] European Commission (2012), para. 18.

[60] Strategies for creeping in described by Enriques and Gatti (2015), p 87 et seq.

[61] See Section 3.3.3 above.

which will exempt her from the obligation to make a mandatory bid will be subject to the identical minimum price requirements, which—in the case of Germany and Austria—refer not only to the price paid in prior acquisitions, but also to the average stock exchange price for the three or 6 months preceding the announcement of the intention to make a bid, respectively. However, since the bidder is free to choose the point in time for making that announcement, she can time the offer such that for the purpose of determining the minimum price, prior acquisitions will be disregarded and, given an upward-sloping average weighted stock exchange price curve, such price for the preceding three or 6 months will be lower than the stock exchange price at the time of the announcement. Once more, an offer price below the current stock exchange price will increase the probability that no or at most only a very few shareholders will tender their shares.

Furthermore, if a Member State lacks legislation requiring a controlling shareholder to launch a (mandatory) bid every time she increases her controlling interest by a certain minimum percentage, i.e., 2% or more (e.g., not Germany and Austria), the 'successful unsuccessful' bidder just attaining or crossing the control threshold will be exempt from having to launch any mandatory bid once they commence acquiring additional shares regardless of the quantity involved.

4.2 German Cases

4.2.1 Lowballing Mandatory Bids

4.2.1.1 Porsche/VW One of the most notable instances of lowballing involved Porsche and Volkswagen (VW). As early as 2005, Porsche had acquired an 18% stake in VW and publicly declared its intention to take over VW. Subsequently, Porsche began to hedge against a rising VW share price through the use of cash-settled options. Over the subsequent 2 years, Porsche acquired a significant interest in VW—partly through shares, partly concealed through options (as in the Continental/Schaeffler case). In March 2007, Porsche crossed the 30% threshold (coming in at just under 31%), and subsequently launched a mandatory offer at the statutory minimum price, which was consistently below the current stock market price both at the time of the announcement and at the time of the publication of the offer and during the offer period. As might be expected, only a small number of shareholders tendered their shares (0.06%), and Porsche proceeded to increase its stake to over 50% later in 2008.

4.2.1.2 Further Cases In the context of the takeover of the former Balda AG, which was operating under the name Clere AG at the time of the takeover bid, the Berlin lawyer Thomas van Aubel acquired a 26.7% share package from the Taiwanese Chiang family in 2013. By April 2016, van Aubel had increased his shareholding to exceed the 30% threshold, thereby becoming obliged to make a mandatory bid. His offer of EUR 25.50 per share corresponded to the statutory minimum price but was

EUR 1.50 below the then current stock market price.[62] Consequently, the shareholders were somewhat constrained in their choices, with van Aubel's stake merely rising to 33.2%.

A similar situation occurred with wind turbine manufacturer Nordex. The Spanish industrial company Acciona (Acciona/Nordex), having exceeded the mandatory offer threshold in October 2019 (raising its stake from 29.9% to 36.3%), submitted an offer at only the statutory minimum price of EUR 10.34, which was only slightly higher than the share price prior to the publication of the intention to make the offer (EUR 10.14).[63] The offer was classified as a lowballing offer, as the low—almost non-existent—premium was seen as a clear signal that Acciona was not interested in significantly increasing its stake (for the time being).[64] This became evident when Nordex's stock price rose to over EUR 13 following the announcement and during the course of the takeover bid. However, Acciona remained unwilling to increase its offer. Consequently, only 0.14% of the shareholders accepted the offer.

4.2.2 Lowballing Voluntary Bids

4.2.2.1 ACS/Hochtief The takeover of the German Hochtief AG by ACS in 2010[65] triggered the reform discussion in Germany and subsequently at the European level. In September 2010, ACS held 29.98 % of the shares in Hochtief AG. In mid-September 2010, ACS launched a voluntary takeover bid (in the form of an 'exchange offer') for all the shares of Hochtief AG with the explicit intention of crossing the critical 30% threshold and subsequently increasing its shareholding to approximately 50% through open market acquisitions. The price (i.e., pursuant to the exchange condition) was deemed to be too low and designed to enable the bidder to fall just short of the 30% threshold. In fact, ACS only just exceeded the control threshold.

4.2.2.2 Further Cases The takeover of Vossloh by German billionaire Hans Herrmann Thiele also received considerable public attention. Thiele commenced his acquisition of Vossloh by incrementally increasing his stake to 29.99%, with an average purchase price of EUR 80 per share.[66] After a sufficient period of time had elapsed to ensure that his previous acquisitions would not affect the minimum price of a voluntary takeover bid, Thiele launched a voluntary takeover bid in January 2015, offering only the statutory minimum price of EUR 48.50 per share. This price was 10% below the previous day's stock market price at the time of the announcement of his intention to make such a bid.[67] The stock market price consistently remained above EUR 50 per share up until the expiration of the—extended—offer period.

[62] Börsen-Zeitung (2017), p 9.
[63] Börsen-Zeitung (2019), p 8.
[64] Ibid., p 9.
[65] Cf. Baums (2010), p 2375 et seq.
[66] See Börsen-Zeitung (2015a), p 9.
[67] Ibid.

Nevertheless, 29,711 shares (0.22% of the share capital) were tendered, increasing Thiele's stake to 30.21%.[68]

The takeover of Klöckner & Co SE by SWOCTEM GmbH in 2023 is the most recent case. SWOCTEM's voluntary cash offer of EUR 9.75 per share met the statutory requirements. However, the offer did not include a premium over the current market price at the time of the offer (the opening price on 13 March 2023 was EUR 9.53), nor did it include a minimum acceptance threshold. SWOCTEM GmbH, owned by Prof. Dr. E.h. Friedhelm Loh, already held a significant stake in Klöckner & Co SE and aimed to increase its shareholding to over 30% to gain greater flexibility for future share purchases.[69] However, SWOCTEM declared that its intention was not to obtain a majority stake. The price was considered inadequate by Klöckner & Co SE's management and supervisory boards, who advised shareholders to reject the offer. The takeover bid for Klöckner & Co SE by SWOCTEM GmbH ultimately succeeded. SWOCTEM GmbH managed to secure approximately 41.53% of Klöckner & Co SE's shares after the expiry of the extended acceptance period.

5 Concerns About Lowballing Under the EU Mandatory Bid Regime

5.1 Defining the Problem

5.1.1 Low-Cost Control Transactions

The standard economic argument against low-cost control transactions[70]—whether through the creeping-in technique[71] or through the lowballing techniques discussed here—holds that such transactions do not result from an efficient market for corporate control. Instead, they represent a transfer of wealth from shareholders to the acquirer of the target company.[72] The relatively modest investment required to secure a formal and possibly de facto controlling position in the company reduces the likelihood of a bidding auction that would benefit all shareholders of the target company. This is because the controlling shareholder dominates the market for corporate control in the target company.[73] Consequently, the argument goes, the likelihood of efficiency-enhancing control transactions and of shareholders receiving a premium diminishes if low-cost control transactions are not effectively prevented.

However, a comprehensive cost-benefit analysis might reveal that a legal regime implementing mechanisms to prevent lowballing techniques (see Section 6) could incur higher total social costs than one that lacks such restrictions. This is because

[68] Börsen-Zeitung (2015b), p 9.

[69] See https://www.kloeckner.com/en/media/press-releases/kloeckner-co-se-confirms-announcement-of-a-voluntary-public-takeover-offer-by-swoctem-gmbh/.

[70] For more detailed arguments, cf. Bebchuk (1988), p 217 et seqq., and, with a focus on creeping acquisitions, Enriques and Gatti (2015), p 62 et seqq.

[71] For a detailed discussion in this regard, see Enriques and Gatti (2015), p 62 et seqq.

[72] Cf. ibid., regarding creeping acquisitions with reference to Bebchuk (1982), p 1041 et seqq.

[73] Cf. ibid.

these measures increase the costs of takeovers and risk preventing some efficient takeovers. The uncertainty surrounding the total economic impact of anti-lowballing mechanisms mirrors the uncertainty surrounding the MBR in general, namely whether it produces efficient outcomes or prevents some value-enhancing takeovers.[74] Given the substantial procedural and financing costs associated with making a takeover bid, additional mandatory bid thresholds beyond the control threshold may discourage bidders from launching voluntary bids in the first place.[75]

5.1.2 Pressure to Tender in Case of Lowballing Bids?

From the perspective of takeover law, lowballing bids will particularly pose a problem if they act as coercive bids, exerting non-negligible pressure on shareholders to tender their shares merely because of the lowballing offer.[76] However, the EU takeover framework contains a number of structural measures to address the issue of pressure to tender.[77] Moreover, acceptance-minimizing lowballing offers do not in themselves put pressure on shareholders to tender their shares, as evidenced by the minimal acceptance rates in the cases discussed above.[78] This result corresponds exactly to that which the bidder wishes to achieve. In the absence of pressure to tender, takeover law does not generally take issue with a bidder timing her offer such that the applicable minimum pricing rules do not prevent her from launching a lowballing offer, i.e., a bid at a price typically below the current stock market price.

5.1.3 Circumvention of the TBD's Mandatory Bid Regime?

Evaluating acceptance-minimizing lowballing offers under the TBD's mandatory bid regime is more complex. Due to the twofold limit on the obligation to launch such a bid—Art. 5(1) of the TBD provides for a one-off mandatory bid and Art. 5(2) of the TBD completely exempts a bidder from the mandatory bid obligation—a control-acquiring or control-maintaining lowballing bid releases the offeror from having to launch any further mandatory bids. This is regardless of the percentage of shareholders accepting the offer and regardless of the size, price, and timing of future acquisitions. Hence, whether the acceptance-minimizing lowballing strategy circumvents the MBR or constitutes a permissible avoidance strategy, and whether regulatory loopholes should be closed, depends on one's assessment of the MBR

[74] See Section 4.2.1 above.

[75] Baums (2010), p 2387; Falkenhausen (2010), p 301; Hitzer and Düchting (2011), p 1086; for a different view, see Merkt (2010), pp 529, 542 et seq.

[76] Cf. Hitzer and Düchting (2011), p 1087, who argue that the 'neuralgic point' of lowballing is not the absence of any premium, but the evolution of shareholding structures following a lowball offer, which is not transparent for minority shareholders, and the resulting de facto pressure to accept the lowball offer. We disagree. Indeed, the strategies analyzed in this paper are only successful because there is no pressure to tender.

[77] See Section 2 above.

[78] See Section 3.2 above.

itself.[79] Those arguing against the MBR will have no strong objection to techniques that save the bidder from launching a costly mandatory bid at or above the current stock market price. Conversely, those supporting the MBR as an efficient regulatory tool,[80] or those who acknowledge the clear intention of EU and national legislatures with respect to Art. 5 of the TBD, will argue against lowballing techniques and highlight conflicts with the MBR's underlying purposes.

The following sections will detail these aspects. Both lowballing mandatory offers (Section 5.3) and lowballing voluntary offers (Section 5.4) will be assessed based on the rationales underlying the MBR (Section 5.2).

5.2 The TBD's Mandatory Bid Regime

5.2.1 Controversial Assessment

Before and even after its adoption, the MBR has faced severe criticism, predominantly on economic grounds.[81] The MBR increases the cost of some takeover bids, potentially discouraging otherwise effective bids.[82] Bidders need to amass greater financial resources to purchase not merely 51% of outstanding shares (or whatever percentage suffices to gain control) but possibly up to 100%, leading to greater risks and higher interest rates. The price required to induce minority shareholders to tender their shares in a partial bid may be lower than the price required to induce all shareholders to tender.[83] Additionally, since the MBR only applies to listed companies, some may choose to go private to avoid the MBR regime, thereby removing themselves from the market for corporate control.[84]

Conversely, numerous scholars not only reject any fundamental criticism of the MBR on the grounds of fairness, equal treatment, or protection of minority shareholders in general, but, in turn, emphasize the positive economic effects of an MBR regime.[85] Although the MBR may prevent some takeover bids due to an unfavorable cost-benefit analysis, these 'non-offers' will often be precisely those takeovers that are inefficient.[86] The MBR increases the cost of acquiring control, particularly due to the combined effect of minimum pricing rules and the equal sharing rule, and thus discourages transactions aimed merely at realizing private benefits.[87]

Despite extensive academic discussion, the controversy over the efficiency and desirability of the MBR regime for other reasons remains unresolved.[88]

[79] Cf. European Company Law Experts (2013), p 9; Verse (2022), pp 59, 73.

[80] See Section 5.1.1 above.

[81] See, for example, Habersack (2018), p 29 et seqq.; Enriques (2004), p 440; Pacces (2007), p 664 et seqq.; McCahery and Vermeulen (2010), p 2201.

[82] Mülbert and Birke (2000), pp 469, 470.

[83] Ibid.

[84] Hopt (2014), p 168.

[85] Ibid., p 169; Schuster (2013), p 529; Davies (2002), p 9; Lee et al. (2024), p 16 et seqq.

[86] Hopt (2014), p 169; cf. Bebchuk (1994), p 968 et seq.

[87] Schuster (2013), p 539 et seqq.

[88] Habersack (2018), p 31.

5.2.2 Underlying Rationales

By establishing minimum pricing rules to ensure that all shareholders receive an equal and fair price and that they share in any control premium paid by the offeror to third parties, the MBR aims to protect minority shareholders, as stated in Recital 9(1)/(2), Art. 3(1)(a), and Art. 5(1)(1) of the TBD.[89] This protection is based on two rationales in particular:[90]

5.2.2.1 Time-Constrained Equal Treatment Rationale According to the equal treatment rationale, shareholders who do not facilitate the acquisition of control by selling their shares to the bidder should nevertheless participate in its terms (the 'equal sharing rationale').[91] Paul Davies further specifies this 'sharing rule' as follows: (i) equality in the context of the bid and (ii) equality in matters outside the bid.[92] The second category concerns the obligation of the bidder, under the TBD MBR regime, not only to make an equal offer to all shareholders but also to accord them the same treatment as that given to those from whom she acquired shares before making the offer. This can be described as a 'backward-looking' equal treatment requirement. Conversely, a 'forward-looking' equal treatment requirement is not part of the MBR but is provided by some national gold-plating implementations. For instance, Section 31(5) of the WpÜG mandates that if the bidder purchases shares at a higher price within 1 year following the offer, she must compensate all shareholders who accepted her lower offer by paying them the same higher price.

However, the TBD does not stipulate an absolute right to equal treatment in time, i.e., a right to participate in any control premium ever paid.[93] Instead, it only requires time-constrained equal treatment, which takes into account transactions within a specified time period set by the Member State's legislation implementing the TBD, as clarified by the European Court of Justice.[94] To comply with this time-constrained backward-looking equal treatment requirement, the bidder must accord existing shareholders of the target the same treatment as that given to those in previous acquisitions within the reference period. This limitation is a necessary feature

[89] See also CJEU, ECLI:EU:C:2017:572 n. 24 - *Marco Tronchetti Provera et al.*: 'As is clear from recitals 1, 2, 3 and 9 to Directive 2004/25, its objective 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'; CJEU (Fourth Chamber), ECLI:EU:C:2020:1014 n. 38 - *Euromin Holdings (Cyprus) Limited*.

[90] For a third rationale ('undistorted choice'), see European Company Law Experts (2013), p 2; Jennings, (2005), p 48 et seqq. As explained above (Section 5.1.2), pressure to tender is not present in the lowballing cases at hand.

[91] Also called the 'control premium rationale', see, e.g., Hansen (2018), p 6; Verse (2022), pp 59, 73; European Company Law Experts (2013), p 2; Jennings (2005), p 43 et seqq.; for the early US debate on the issue, see, e.g., Easterbrook and Fischel (1982), p 698, against an equal treatment rule, and Brudney (1983), pp 1122-26, in favor of an equal treatment rule.

[92] Davies (2002), pp 9, 10 et seqq.; following on from this in the same vein, see Kershaw (2016), 6.05, p 185.

[93] Cf. Baums (2010), p 2384 (with regard to WpÜG); Krause (2013), p 187.

[94] CJEU (Forth Chamber), ECLI:EU:C:2009:626 n. 50 et seqq. - *Audiolux*.

of the MBR, as premiums would otherwise have to be accounted for regardless of changes in the company's economic situation, the economy, stock price, or inflation rate.

5.2.2.2 Exit Rationale The MBR also follows the so-called exit rationale[95] by providing existing shareholders with the right to tender their shares on reasonable terms if a shareholder acquires control for the first time or if a controlling stake is transferred to another shareholder. The rationale behind this exit right—technically somewhat of a misnomer since the shareholder's opportunity to tender depends on a bidder launching a bid[96]—is that existing shareholders' shares could lose value in the future.[97] In the absence of a (group) company law regime that ensures that the controlling shareholder cannot realize private benefits of control to the detriment of minority shareholders, the shareholder acquiring control will be in a position to extract private benefits of control.[98] From this perspective, the MBR addresses the principal-agent conflict between majority and minority shareholders, and opportunistic behavior by the former, by granting an exit option.[99]

For this exit option to effectively protect minority shareholders, it must be available at a reasonable price.[100] The TBD seeks to guarantee the reasonableness or adequacy of the mandatory bid-based exit option by providing for a specific minimum price requirement.[101] It builds on prices paid in prior acquisitions, reflecting the idea that the parties involved in privately negotiated transactions may—in certain circumstances—possess more accurate information than the market. Consequently, prices paid in these transactions often reflect the shares' economic value more accurately than the current market price, rendering them a reliable reference for determining the exit option's adequacy.[102]

However, the Directive specifically ties this reference—for obvious reasons[103]—to a limited timeframe (six to twelve months before the bid), without considering the target's share price or its fundamental value, unlike in some Member States.[104] This limitation can lead to situations where pre-acquisitions within the relevant timeframe may not accurately reflect the intrinsic value of the shares.

95 Hansen (2018), p 2; Jennings (2005), p 41 et seqq.; Bebchuk (1985), pp 1695, 1714; Brudney (1983), p 1122 et seq.; critically, Wymeersch (1992), p 357.

96 The mechanism seriously undermines an effective protection of minority shareholders, as a recent decision of the German Federal High Court of Justice clearly illustrates. See Bundesgerichtshof, judgement of 23.11.2021 – II ZRR 312/19 (denying minority shareholders any civil law remedies), with further references to the lively German discussion (including references to opposing views).

97 Jennings (2005), p 42; Bebchuk (1985), p 1711 et seq.

98 Enriques and Gatti (2015), p 64 et seq.; Bebchuk (1994), p 986 et seq.

99 Habersack (2018), p 32; Hansen (2018), p 7; Christie and Liptrap (2020), p 596; on private benefits of control, Dyck and Zingales (2004), p 537.

100 Jennings (2005), p 43.

101 See Section 3.3.1 above.

102 Cf. Baums (2010), p 2382.

103 See Section 5.2.2.1 above.

104 See Section 3.3.1 above.

The fundamental right to property under the EU Charter of Fundamental Rights (Art. 17) does not necessitate the imposition of additional minimum price requirements for the MBR to be considered a fair exit option. Admittedly, Art. 15 of the TBD mandates that Member States ensure a 'fair price' in squeeze-outs, and establish irrebuttable[105] presumptions of fairness: for mandatory bids, the offered consideration is presumed fair; for voluntary bids, fairness is presumed if the offeror acquires at least 90% of the voting capital through the bid. Therefore, in lowballing scenarios, where minimum pricing rules are contingent solely upon pre-acquisitions within a specified timeframe, the TBD allows for situations where shareholders may be squeezed out without compensation reflective of their shares' intrinsic value. However, according to the jurisprudence of the European Court of Justice, compliance with EU fundamental rights is not mandatory if EU law sets only minimum standards and leaves further regulation to Member States.[106] Consequently, as long as Member States retain the right to enhance minimum pricing rules for both mandatory[107] and voluntary[108] bids, potential conflicts with the fundamental right to property can only arise at the national constitutional level.[109] As for the EU, whether to link minimum pricing rules to a fundamental value metric, such as the share price, is not a requirement of the EU Charter of Fundamental Rights, but a political issue.

5.3 Lowballing Mandatory Bids

5.3.1 Time-Constrained Equal Treatment Rationale

Lowballing mandatory offers do not violate the time-constrained equal treatment rationale of the MBR. The strategy of postponing the acquisition of control long enough for certain previous acquisitions to be excluded from the calculation of the minimum offer price is a logical consequence of the constrained reference period stipulated by Art. 5(4) of the TBD regarding minimum price-relevant prior acquisitions.[110]

[105] This is contested but it is the prevailing opinion in the legal literature.

[106] CJEU (Fifth Chamber), ECLI:EU:C:2014:2055 n. 43, 47 - *Hernández*.

[107] This is uncontested, especially in light of recent CJEU decisions: CJEU (Fourth Chamber), ECLI:EU:C:2017:572 - *Marco Tronchetti Provera et al.*; CJEU (Fourth Chamber), ECLI:EU:C:2020:1014 - *Euromin Holdings (Cyprus) Limited*. See also Mülbert (2006), p 162 et seq.

[108] See Section 3.3.3 above.

[109] Under German constitutional law, in a squeeze-out scenario, the stock exchange price must serve as the minimum threshold for determining the equitable price (BVerfGE 100, 289 = WM 1999, 1666). Moreover, there is no constitutional requirement to use other methods, such as a DCF (Discounted Cash Flow) corporate valuation, to determine the intrinsic or equitable price (BVerfG, WM 2007, 1520, 1522). Instead, a statutory provision can determine the equitable price solely by reference to the share price (BVerfG NZG 2012, 907 Rn. 18).

[110] See Section 5.2.2.1 above.

5.3.2 Exit Rationale

In order to effectively protect minority shareholders, the exit right provided for by the TBD must be available to the latter at a reasonable price.[111] However, the Directive clearly determines the appropriateness or reasonableness of the minimum price of the mandatory offer solely by reference to previous transactions within a specific timeframe.[112] It does not refer to any other parameters like the current stock price to determine the shares' intrinsic value. By only referencing these pre-acquisitions, the Directive allows for situations where the pre-acquisitions might not reflect the shares' true intrinsic value. This unequivocal decision not to attach relevance to the share price or other methods for determining the shares' intrinsic value for the minimum offer price should be accepted regarding cases under the *lex lata*. Whether this constitutes an optimal regulatory approach is a separate question. Consequently, a bidder's strategy to exclude a pre-acquisition by timing the bid cannot be regarded as circumventing the MBR; rather, it can be considered a perfectly legitimate strategy.[113]

5.4 Lowballing Voluntary Bids

5.4.1 Time-Constrained Equal Treatment Rationale

Lowballing voluntary offers may, due to the exemption in Art. 5(2) of the TBD, undermine the MBR's time-constrained equal treatment rationale.[114] As a consequence of this exemption, minority shareholders will be unable to participate in any premium paid in prior transactions within the reference period stipulated by the TBD and in transposing Member States' legislation. If the bidder increases her shareholding—possibly at a high premium—to just below the control threshold and then launches a voluntary takeover bid not subject to any minimum price requirement,[115] yet enabling her to gain formal control,[116] she will be exempt from the obligation to make a mandatory bid by virtue of Art. 5(2) of the TBD.[117] Thus, the bidder is formally not required to treat minority shareholders the same as those who tendered the shares needed to build a stake just below the control threshold.

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111 See Section 5.2.2.2 above.

112 Ibid.

113 Something different may be true if the bidder uses certain derivative instruments.

114 As to this rationale, see Section 5.2.2.1 above.

115 This is the case, in particular, in Belgium, Finland, Ireland, Portugal, the Czech Republic and Slovakia. See Clerc et al. (2012), p 61. In other Member States, a voluntary bid will only exempt the bidder from the obligations pursuant to the MBR if the voluntary bid satisfies specific conditions. See ibid., p 62.

116 With regard to the background thereto, see Section 3.2 above.

117 Cf. European Commission (2012), para. 18.

5.4.2 Exit Rationale

Lowballing voluntary offers may also undermine the exit rationale. Such offers fail to provide shareholders with an adequate exit option, i.e., one that a rational shareholder would deem sufficient for acceptance. However, due to the exemption in Art. 5(2) of the TBD, the bidder is exempt from making a mandatory bid if she secures enough shares to cross the control threshold.

At first glance, this appears to be a non-issue, as shareholders who do not wish to end up as minority shareholders in a controlled company can sell their shares on the stock market. However, if a significant number of shareholders choose this exit route, the selling pressure will depress the current stock price, ultimately down to the lowball offer price. In other words, only a fraction of minority shareholders would be able to realize the market-based exit option at a price above the lowball offer. Shareholders unwilling to sell at a below-fair-value price will end up as minority shareholders[118] without ever receiving a rationally acceptable exit offer—a situation that runs counter to the MBR's exit rationale.[119]

5.5 Preliminary Conclusions

Evaluating lowballing bids solely based on the mandatory framework stipulated by the TBD reveals a nuanced legal landscape: the TBD framework permits strategic timing of both voluntary and mandatory bids. Nevertheless, in light of the underlying rationales of the MBR, these strategies raise concerns for those lowballing voluntary bids that exploit the exemption from the mandatory bid requirement set forth in Art. 5(2) of the TBD. For mandatory bids, lowballing is 'not a bug but a feature' of the TBD—albeit one available only in rather atypical acquisitions, i.e., control-establishing acquisitions at or below the current stock market price.[120]

6 Gold-Plating Remedies: Effectiveness and Admissibility Under the TBD

Available remedies to disincentivize the acceptance-minimizing lowballing offer strategies examined here are rather limited. Extending the minimum pricing rules for mandatory bids to voluntary bids will result in an increase in the cost of voluntary bids (and a reduction of their probability), particularly if the weighted average

[118] Cf. Enriques and Gatti (2015), p 61; Bebchuk (1987), p 917, who assumes that the value of the minority shares after the offer will typically be lower than the offer price. Although this is not necessarily true in the case of a lowballing offer, it can be assumed that the value will be lower than what would have been paid in the case of a 'fair' control premium.

[119] For a different view, see Baums (2010), p 2383, whose focus is, however, on the German regulatory context and thus on the identical pricing rules applicable to voluntary takeover bids and mandatory bids.

[120] Lowballing is, at least in theory, easier where national law (e.g., Germany; see Section 3.3.2 above) provides for a universal attribution of voting rights among the parties to an acting in concert agreement or understanding without the need for a subsequent acquisition.

stock exchange price serves as a second threshold for the minimum price to be offered. Nevertheless, even an additional minimum price threshold cannot prevent—as the German experience demonstrates[121]—lowballing offers and cannot alleviate or eliminate the MBR-based concerns about voluntary lowballing offers. Only two mechanisms available in some Member States seem capable of dealing with the lowballing problem more or less effectively. We will describe these mechanisms and examine their effectiveness and admissibility under the TBD.

6.1 Additional Bid Requirement(s) upon Subsequent Acquisitions

6.1.1 Member States' Law

The imposition of supplementary bid obligations in the event of enforcing an existing control position (secondary control threshold) is often referred to as a possible solution to the lowballing problem.[122] Member States such as Austria,[123] France,[124] Italy,[125] Greece[126] and Poland[127] (and the UK[128]) provide, with varying degrees of detail, for such an imposition of additional obligations.[129] In most EU Member States, the obligation to launch a (further mandatory) bid is tied to a minimum percentage increase in the controlling position within a specified timeframe, starting with the original mandatory bid or the voluntary takeover bid that triggered the exemption from the mandatory bid obligation (Art. 5(2) of the TBD). In contrast, the UK City Code (Rule 9(b)) requires an additional bid for *any* increase between 30% and 50% without any time limitation.[130] Member States generally apply their minimum pricing requirements for mandatory bids to additional bid requirements. This means that the minimum price is determined based on pre-acquisitions within a specified timeframe and, where applicable, the weighted average stock price before crossing the additional (secondary) control threshold.[131]

[121] See the cases described above in Section 4.2.

[122] Hopt (2014), p 176 et seqq; Verse (2022), pp 55, 77; Merkt (2010), pp 529, 542 et seqq.

[123] Increase of 2% between 30% and 50% within 12 months.

[124] Increase of 2% in capital or voting rights between 30% and 50% within 12 months.

[125] Increase of 5% between 30% and 50% within 12 months.

[126] Increase of 3% between 33% and 50% within 6 months.

[127] Increase of 10% by a shareholder holding less than 33% within 60 days or 5% increase by a shareholder holding more than 33% within 12 months.

[128] Every increase between 30% and 50% without any limitation as to time.

[129] Clerc et al. (2012), p 56 et seqq.; Merkt (2011), p 563; Baums (2010), p 2379 et seq.; Hopt (2014), p 177; Verse (2022), pp 59, 74.

[130] Kershaw (2016), 8.05, p 237.

[131] See, for example, Section 22(4) of the Austian Takeover Act (*Österreichisches Übernahmegesetz*) and Rules 9.1(b), and 9.5 of the UK City Code on Takeovers and Mergers.

6.1.2 Effective Remedy to Lowballing?

Despite appearances, additional offer obligations tied to acquisitions above the control threshold are neither an effective tool for completely eliminating voluntary lowball offers nor lowball mandatory bids.[132] Lowballing strategies primarily appeal to bidders temporarily satisfied with acquiring or maintaining a stake just above the control threshold. An obligation to launch one or several bids upon further acquisitions will not deter these bidders from making a lowball offer initially. This is especially true if the additional offer obligations only kick in within a limited post-offer period and allow for further lowballing offers.

Admittedly, an additional control threshold may hinder or even prevent lowballing offers if the bidder's plan is to further reinforce her controlling position without constraints from takeover law.[133] However, this will only be the case if the bidder, due to financial constraints or business reasons, cannot wait out the limited post-offer period for an additional offer to be made. Ultimately, requiring a controlling bidder to launch further mandatory bids upon acquiring additional stakes does not resolve the conflict between lowballing strategies and the purposes of the MBR.

6.1.3 Admissibility

The conformity of further mandatory offer thresholds with the TBD is not self-evident.[134] While these rules serve as additional instruments to protect the shareholders of the offeree company and might not impede or hinder 'the normal course of a bid' (Art. 5(6) of the TBD), there may be doubts about whether these provisions comply with the general principles of Art. 3(1) of the TBD, particularly the principle of equal treatment of holders of securities. One might even question whether the TBD refers to offers that qualify neither as voluntary takeover offers nor as first-time mandatory offers. It appears that such offers are not within the scope of the TBD, rendering them ineligible for assessment against the standards of Art. 5(6) or Art. 3 of the TBD. Instead, the question is whether the TBD hinders Member States from regulating offers not covered by it. The answer is clearly negative: Member States are free to regulate offers not covered by the TBD.

6.2 Mandatory Minimum Acceptance Threshold

6.2.1 Member States' Law

A seemingly obvious remedy to disincentivize voluntary lowball offers is the minimum acceptance threshold for voluntary[135] bids 'imported' from the UK City Code on Takeovers and Mergers (Rules 9.1 and 9.3) to the Netherlands, Austria and

[132] Cf. Verse (2022), pp 59, 78.
[133] Ibid., pp 59, 77 et seq.
[134] A different opinion is articulated by Merkt (2011), p 562, referring to Recital 9 of the TBD.
[135] European Company Law Experts (2013), p 10 et seq.; Hopt (2014), p 177.

France.[136] Stipulating that the validity of share sales contracts is contingent upon attaining the statutory minimum effectively renders a voluntary bid successful only if the bidder, as a consequence of the bid, holds more than 50% of the target company's shares. If the bidder fails to attain the requisite percentage, the entire bid will be unsuccessful, and the sales contracts will remain invalid.

6.2.2 Effectiveness

This regulation effectively addresses concerns regarding acceptance-minimizing lowballing voluntary offers. Although it cannot eliminate all concerns regarding equal treatment,[137] it significantly mitigates issues regarding the exit rationale. The minimum acceptance threshold effectively serves as a minimum pricing obligation,[138] ensuring that the price for the voluntary takeover bid is sufficiently high to be accepted by at least 20% of shareholders, which is unlikely if the offer is below the current stock market price. Consequently, the regulation implements a market test implying the reasonableness of the exit option.[139]

Admittedly, the offer price may not always be the same as the highest premium paid in a pre-bid acquisition.[140] However, this is a natural consequence of the Directive's approach, which provides for time-constrained rather than absolute equal treatment.[141]

The criticism that the mandatory minimum acceptance threshold may be overly restrictive by preventing the accumulation of shareholdings between 30% and 50%[142] fails to take into account the second main rationale for the MBR, namely to provide shareholders with a fair exit option.[143] The fact that due to the exception in Art. 5(2) of the TBD,[144] the fair exit option can be circumvented is precisely the deficit that the minimum acceptance threshold is intended to address.

Finally, it is argued that well-organized minority shareholders could use minimum acceptance thresholds to block takeover bids ('bumpitrage').[145] However, given that a minimum acceptance requirement could bring the offer price closer to a fair level, rather than allowing low-cost control strategies that circumvent the rationales of the MBR,[146] this argument is in fact a general criticism of the MBR and the

[136] The introduction of a minimum acceptance threshold for mandatory bids, as is the case in the UK, can only be effective in addressing acceptance-minimizing lowballing strategies if it is accompanied by additional obligations. Such obligations include the requirement to either make a further mandatory bid or abandon control, as set out in Rule 9.3, Note 2 of the UK Takeover Code.

[137] See Verse (2022), pp 59, 79.

[138] Cf. European Company Law Experts (2013), p 10.

[139] But see Verse (2022), pp 59, 79 et seq. for a critical assessment.

[140] Ibid., with a reference to the *Deutsche Bank/Postbank* case.

[141] See Section 5.2.2.1 above.

[142] Verse (2022), pp 59, 79.

[143] See Section 5.2.2.2 above.

[144] See Section 5.4.2 above.

[145] Verse (2022), pp 59, 80.

[146] See Section 5.4.2.

fair exit option, rather than a specific criticism of a mandatory minimum acceptance threshold.

6.2.3 Admissibility

A mandatory minimum acceptance threshold for voluntary takeover bids presents no conflict with the TBD. This conditional requirement is practically equivalent to a minimum price requirement for voluntary bids. If minimum price requirements for voluntary takeover bids are compatible with the TBD,[147] functionally equivalent requirements should also be admissible.

7 Concluding Observations

The lowballing concerns within the EU mandatory bid regime highlight significant challenges in ensuring market efficiency and protecting minority shareholders. Low-cost control transactions, such as creeping-in and lowballing techniques, threaten to shift wealth from shareholders to acquirers, reducing the likelihood of competitive bidding and preventing shareholders from receiving a fair premium. Mechanisms to prevent these practices could increase takeover costs and discourage efficient transactions, leaving the overall economic impact of anti-lowballing measures uncertain. This reflects the broader debate on the efficacy of the mandatory bid rule in promoting efficient outcomes or hindering value-enhancing takeovers.

Addressing lowballing within the EU mandatory bid regime requires balancing shareholder protection with market efficiency. Stricter regulations can prevent circumvention or strategic maneuvering around the MBR but must be designed to avoid deterring beneficial takeovers. A nuanced approach is necessary to enhance fairness and efficiency without imposing undue burdens on takeover activities. From the perspective of the rationales underlying the MBR, only lowballing voluntary bids exploiting the exemption in Art. 5(2) of the TBD conflict with the Directive's spirit. Consequently, a modest regulatory response at the EU level could entail the abolition of the exemption in Art. 5(2) of the TBD.

Member States' gold-plating remedies aim to address both lowballing voluntary bids exploiting the Art. 5(2) exemption and lowballing mandatory bids. Extending minimum pricing requirements for mandatory bids to voluntary bids did not prevent the practice. The effectiveness of additional bid requirements is also doubtful, though they may reduce lowballing offers where the bidder's strategy involves increasing their control position after the mandatory offer obligation is eliminated or fails. In contrast, mandatory minimum acceptance thresholds effectively act as minimum pricing obligations, largely eliminating concerns regarding the exit rationale of the MBR for voluntary bids. Member States, particularly those combining mandatory minimum acceptance thresholds with additional bid requirements, appear to rarely encounter lowballing offers. The UK's regime, combining strict additional bid

[147] Cf., e.g., Winner (2020), p 1492.

requirements and mandatory minimum acceptance thresholds, seems to effectively prevent lowballing offers. Therefore, implementing both regulatory tools represents a viable approach for Member States seeking to effectively address lowballing offers.

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