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**Articoli**

# COLLUSION AND INEQUITABLE PRICES IN THE EU MANDATORY BID REGIME

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## Abstract

This article examines the phenomenon of collusion in corporate acquisition transactions under the framework of the EU mandatory bid rule, focusing on avoidance practices that undermine the application of the highest price paid rule. Through a comparative analysis of landmark cases in France, Italy, and Germany, this study shows how collusive arrangements — often involving side contracts — enable acquirers to offer lower prices to minority shareholders, thereby undermining shareholder protection and distorting the efficiency of the market for corporate control. This article also assesses the adequacy of legal responses at both the EU and national levels in addressing these distortions, arguing that, to effectively restore an 'equitable' price, supervisory authorities should take into account any additional benefits granted to the seller of the controlling stake. Compared to valuation methods based on allegedly 'objective' criteria, this approach more effectively neutralizes the distorting effects of collusion and strengthens the deterrent function of the mandatory bid rule against inefficient acquisitions.

**Keywords**: Mandatory Takeover bid; Highest Price Paid rule; Takeover Directive; Collusion.

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## 1. COLLUSION: THEORY AND PRACTICE[1]

Acquiring control of a listed company under EU takeover law is expensive: the person obtaining 'control' (however defined under national laws) must offer to purchase all the remaining shares at the highest price paid over the previous six to twelve months for the same securities. Such price is often well above the then prevailing market price for the float because it typically incorporates the premium paid to entice the selling shareholder(s). Prospective buyers may at times seek transaction structures that minimise their acquisition costs and, among the many ways to reduce such costs,[2] collusion is one of the most treacherous.

Collusion is an arrangement whereby a portion of the consideration agreed upon between the acquirer and the seller for the controlling interest is paid through a separate transaction, normally a transfer of other assets. Because formally the considera-

[1] While the piece reflects collaborative thinking, authorship of specific sections may be attributed as follows: paragraphs 1, 3, and 4 to Federica Cadorin, and paragraphs 2 and 5 to Matteo Gatti. An earlier version of this contribution appeared as a chapter in A. F. de Araoz, *European Takeovers: The Art of Acquisition* (3rd edition), Globe Law and Business, 2022, p. 53.

[2] Other transaction structures may be designed to reduce acquisition costs in the context of a mandatory bid: for an example, see the takeover for Funespaña by Mapfre. In that case, the acquirer crossed the relevant threshold as a result of a merger between its subsidiary Gesmap and the target company; the bid was launched after the closing of the merger (30 November 2011), but the highest price paid was calculated taking into account purchases made by the bidder in the twelve months prior to the announcement of the execution of the merger agreement (20 December 2012). This way, the (higher) price agreed by the bidder for target shares in a shareholders' agreement signed on 31 May 2011 (*i.e.*, before the launch of the bid, but after the announcement of the prospective merger) was not taken into account for setting the bid price. For reference, see SAN 1136/2014 (whereby the Audiencia Nacional confirmed that the highest price paid rule had been applied correctly by Mapfre and the supervisory authority) and STS 3052/2015 (whereby the *Tribunal Supremo* overturned the decision and established that minority shareholders were entitled to receive a consideration not lower than the price agreed by the bidder in the shareholders' agreement).

tion for such separate transaction is not consideration for the target shares, the parties would exclude it from the calculation of the highest price paid for the shares of the target company. For example, when negotiating the purchase of the controlling block, the acquirer may secure a discount on the price of that stake, which in turn lowers the per-share price to be offered in the subsequent mandatory bid. To compensate for this discount, the seller receives equivalent economic benefits through one or more side agreements — either directly with the acquirer or with parties acting in concert with it. Both the acquirer and the seller can thus benefit from collusion: the acquirer may obtain control at a lower price, while the seller gets to sell its stake at its preferred price thanks to the side deal. Those who lose out are the minority shareholders of the target who receive a low-ball offer. Also, collusion imperils the overall efficiency and transparency of the takeover market and of capital markets in general.

We begin with a brief description of selected cases of collusion in different jurisdictions. We then investigate the problem with collusion from the perspective of the efficiency of the market for corporate control and of the effectiveness of takeover rules in general. Finally, we look into the remedies to collusion provided under EU and national takeover laws, taking a stand on how the 'equitable' price should be restored in order to protect the overall efficacy of the mandatory bid rule (MBR) regime and deter inefficient transfers of corporate control.

### 1.1. France: The rescue of Groupama by Caisse des Dépôts et Consignations and the overlap between acting in concert and 'collusion'

In 2011, to overcome a state of financial distress, the French insurance company Groupama entered into a memorandum of understanding with the French Deposit and Consignment Office (*Caisse des Dépôts et Consignations* or CDC), whereby the parties agreed to effect a two-step transaction. In the first step, CDC subscribed for preference shares issued by GAN Eurocourtage, a wholly-owned subsidiary of Groupama with a capital injection of €300 million. In the second step, CDC contributed 55.58% of the capital and voting rights of its listed real estate subsidiary Icade to its own wholly-owned subsidiary, Holdco SIIC. In parallel, Groupama contributed to Holdco SIIC 43.94% of the capital and voting rights of Silic, another listed real estate company, on the basis of an exchange ratio of five Icade shares for four Silic shares. As a result of the contribution by Groupama, Holdco SIIC acquired a major stake in Silic, which triggered the MBR under French takeover law (Article 234-2 of the General Regulation of the AMF). However, because Holdco SIIC was acting in concert with CDC and Icade, and the three companies were thus under a joint and several obligation to launch the mandatory bid, the bidder was ultimately Icade (whose securities, unlike Holdco SIIC's, were listed on Euronext Paris), which made an exchange offer for all Silic shares, at an implicit exchange ratio of five Icade shares for four Silic shares.

While the French supervisory authority (*Autorité des marchés financiers* or AMF) concluded that both the nature and the amount of consideration were compliant with French takeover law, some minority shareholders brought an action before the Paris court of appeal for the annulment of AMF's decision, claiming, among other things, that 'collusion' among the parties violated the highest price paid rule under French law (Article 234-6 of the General Regulation of the AMF).[3] In particular, they argued that the subscription for the preference shares of Gan Eurocotage by CDC was aimed at providing additional advantages to Groupama without affecting the price to be offered in the mandatory bid of Silic.

The Paris Court of Appeal did not refute that the transaction fell within the scope of Article 234-6 of the General Regulation of the AMF, but concluded that the joint application of the three replacement criteria provided by law, on the basis of the so-called multi-criteria approach,[4] did not justify an adjustment of the bid price in the specific case.[5] Under such approach, the three criteria that French regulation enumerates for adjusting the bid price (namely, generally accepted objective valuation criteria, the characteristics of the target company and the market for its securities) cannot be taken separately; rather, they each have to be jointly applied. Consequently, minority shareholders cannot invoke the most favorable parameter (in the specific case, the average market value of the target's shares), because the supervisory authority is required to combine them all. Such a ruling was eventually confirmed by the French Supreme Court.[6]

[3] The rule provides that: "The AMF may request or authorise a price modification if this is warranted by a manifest change in the characteristics of the target company or in the market for its securities, and notably … if the price mentioned in the first paragraph results from a transaction that includes related items involving the offeror, acting alone or in concert, and the seller of the securities acquired by the offeror over the last twelve months. In these cases … the price is determined based on generally accepted objective valuation criteria, the characteristics of the target company and the market for its securities" (English translation available on the AMF website).

[4] For reference, see H. Le Nabasque, *Solidarité résultant d'une action de concert et obligation de déposer un projet d'offre publique d'acquisition*, in *Revue des sociétés*, 2015, p. 185.

[5] CA Paris, 27 June 2013, cases 2012/08248 and 2012/08324.

[6] Cass. com., 25 November 2014, case no. 13-21.71. For a critique, see S. Torck, *Offre publique obligatoire d'ICADE sur SILIC: quelques propos dissidents ausujet de l'arrêt de la Chambre commerciale du 25 novembre 2014*, in *Droit Des Sociétés*, 2015, p. 31.

The argument used by the Court of Appeal (and approved by the Supreme Court) raises questions about how to effectively remedy collusion, something we will investigate in section 4 below.

### 1.2. Italy: The takeover bid for Camfin and the debate on intent to evade the highest price paid rule under Italian law

In 2013, in the context of a corporate group reorganisation, the family holding company of Italian businessman Marco Tronchetti Provera (Marco Tronchetti Provera & C Spa, or MTP) purchased at €0.80 per share, through newco Lauro Sessantuno Spa (Lauro 61), approximately 12% of Camfin Spa (Camfin) – a company holding more than 26% of Pirelli & C Spa (Pirelli). The seller, Malacalza Investimenti Srl (MCI), was the holding company of another Italian businessman, Vittorio Malacalza. As a result, with almost 61% of voting rights of Camfin, MTP acquired legal control of the company (it already held *de facto* control), thus triggering the MBR pursuant to Article 106 of the Italian Legislative Decree 58 of 24 February 1998 (Consolidated Law on Finance). Consequently, on 5 June 2013, Lauro 61 informed the market that it would launch a takeover bid for Camfin at €0.80 per share.

In connection with the transaction, MCI disclosed that it had sold its stake in Camfin, and also announced that it had reinvested the proceeds to purchase slightly less than 7% of Pirelli, at the price of €7.80 per share. The sellers of the Pirelli stake were Allianz Spa (Allianz) and Fondiaria Sai Spa (FonSai), who obtained prior approval to sell their shares from their counterparts in a lock-up agreement that included Camfin, the 'chair' party under such agreement.

Before the completion of the mandatory bid, upon request from some minority shareholders, the Italian supervisory authority (Consob) established that the transaction constituted collusion under Italian takeover law, because MCI had sold its stake in Camfin to Lauro 61 at a discounted price, getting in return a discount to purchase Pirelli shares. Therefore, Consob imposed to raise the bid price to €0.83 per share, pursuant to Article 106, paragraph 3, of the Consolidated Law on Finance.[7]

The transaction planners sought the judicial annulment of Consob's decision before the *TAR Lazio*,the Lazio Regional Administrative Court. The petitioners

[7] Consob Decision 18662 of 25 September 2013.

claimed, among other things, that to impose an increase in the bid price, the supervisory authority should have proved that the parties involved in the transaction (including Allianz and FonSai) had *intention* to circumvent takeover regulation. The judges dismissed such claims, adopting an objective notion of collusion, which disregards intent of the participants as a requirement for the purpose of price adjustment; according to such notion, it is sufficient that their conduct results in the attribution of additional advantages to the seller that are not included in the price of the takeover bid.[8] The matter was also submitted to the European Court of Justice, which concluded that Italian rules on collusion do conform with EU law,[9] so long as their actual interpretation "can be deduced in a sufficiently clear, precise and foreseeable manner" from national law.[10] Nevertheless, on appeal the Council of State reversed *Tar Lazio* and thus annulled Consob's decision on price adjustment, affirming that collusion requires "an agreement of all parties aimed at circumventing the rules governing the formation of the bid price."[11]

This stance from Italian Council of State was widely criticised, because it adopts a too-narrow notion of collusion that makes it extremely hard for investors to obtain a remedy,[12] thus paving the way for an easier circumvention of the highest price paid rule.[13]

8 TAR Lazio, 19 March 2014, judgement numbers 3009, 3010, 3011, 3012.

9 The court, in particular, affirmed that the notion of collusion adopted by Consob and TAR Lazio is abstractly compatible with the requirements of the Takeover Directive, according to which "Member States may authorise their supervisory authorities to adjust the price" set pursuant to the highest price paid rule "in circumstances and in accordance with criteria that are clearly determined" (Article 5, Paragraph 4, second subparagraph; on the matter see section 3 below), even though (i) it does not refer to precisely identified conduct; and (ii) the same word "collusion" has a different meaning in other areas of national law.

10 EU Court of Justice, 20 July 2017, case no. C-206/16.

11 Consiglio di Stato, judgement no. 6330 of 13 November 2018.

12 Compare with A. Abu Awwad, *Collusione e rettifica del prezzo nell'OPA obbligatoria*, in *Rivista della regolazione dei mercati*, 2019, p. 179; F. Cadorin, *Opa collusiva, poteri della Consob e tutela degli investitori*, in *Giurisprudenza commerciale*, I, 2020, p. 416.

13 Nevertheless, despite the narrowing of its scope, collusion claims are still brought, as the takeover for Ansaldo STS shows. In that case, the supervisory authority found that the seller of Ansaldo's controlling stake, Finmeccanica, had received additional advantages by the means of the parallel sale of the Ansaldo-Breda division to the prospective acquirer (Hitachi) at a price above its fair market value. Consequently, Consob adjusted upwards the bid price, pursuant to Article 106, paragraph 3, of the Consolidated Law on Finance (see Consob Decision 19507 of 3 February 2016). Finmeccanica appealed Consob's decision before TAR Lazio, but the Tribunal confirmed that the combination of agreements between the acquirer and the seller fell within the notion of collusion, even under the stricter interpretation of the Council of State in the Camfin case (see TAR. Lazio, 26 January 2019, judgement no. 1032).

### 1.3. Germany: Collusion in voluntary takeover bids and the *Celesio* case

Collusion generally occurs in the context of the MBR, as a way for acquirers to reduce acquisition costs by deviating from the highest price paid rule. But collusion may in principle occur in voluntary bids as well, to prevent the application of the so-called best price rule in such context.

According to the EU Takeover Directive,[14] a bidder is free to set the price of a voluntary bid; but if it offers higher consideration to any target shareholder (either during or after the offer period), the best price rule requires an increase of the offer price for all other target shareholders.[15] The German version of the rule also covers prior purchases of shares, providing that the price to be offered in a voluntary bid must be at least equal to the price paid by the bidder for target shares before, during or after the bid.[16] In addition, German law stipulates that: "Agreements under which the assignment of shares can be requested shall be treated as equivalent to a purchase of shares" (the so-called 'equivalence rule').[17]

Within such legal framework, in 2013 US health service provider McKesson disclosed that it had signed with Haniel & Cie a share and purchase agreement to acquire a 50.01% stake in Celesio, a pharmaceutical wholesale distributor based in Germany, at €23 per share, and that it would voluntarily bid for all remaining shares at the same price. In parallel, the bidder also extended an offer to all the holders of convertible bonds, at substantively equivalent terms. The deal was conditional on a 75% acceptance threshold.

However, activist US hedge fund Elliott managed to secure slightly more than 25% of the voting rights of Celesio, from purchasing both shares and convertible bonds, thus gaining a *de facto* veto power on the bid. Despite the fact that McKesson sweetened its offer by adding €0.50 per share, Elliot decided to hold out, and the bid eventually failed.

A few days after, Elliott sold its shares to Haniel, which then transferred its whole stake to McKesson, at €23.50 per share. In addition, the latter purchased Elliott's convertible bonds, in order to secure more than 75% of Celesio shares on a fully di-

[14] Compare with Article 3, Paragraph 1, Subparagraph (a) of the Takeover Directive.

[15] See, eg, Rule 6.2(a) of the Takeover Code for the UK and Article 42, paragraph 2, of the Regulation implementing Italian Legislative Decree 58 of 24 February 1998, concerning the discipline of issuers (Consob delegated regulation on issuers) for Italy.

[16] See Sections 3 to 7 of the German Offer Regulation (*WpÜGAngebV*); previous purchases are considered in Section 4 of the Regulation.

[17] Compare with Section 31(6)(1) of the German Takeover Act (*WpÜG*).

luted basis. Then, having been exempted by the supervisory authority (BaFin) from the one-year cooling-off period, McKesson launched a second voluntary bid for Celesio's shares, at the price of €23.50 per share, which was eventually successful.

In light of these events, the German Small Shareholder Association required BaFin to open an investigation into the matter, claiming that Elliott had secured an additional advantage through the sale of convertible bonds. As BaFin declined to intervene, affirming that the purchase of convertible bonds was not relevant for the application of the best price rule, some minority shareholders sued McKesson. While the Regional Court of Frankfurt am Main supported the position taken by BaFin, stating that a derivative purchase of convertible bonds is not an 'agreement' for the purposes of the equivalence rule,[18] the Higher Regional Court of Frankfurt am Main overturned the decision and established that the target shareholders were entitled to receive an additional payment of €7.45 per share.[19]

The litigation was appealed to the Federal Court of Justice, which confirmed that a derivative purchase of convertible bonds carried out in the six months prior to publication of an offer document does qualify, in principle, as an 'agreement' for the purposes of the equivalence rule.[20]

The case shows that, even in the absence of specific provisions addressing collusive agreements (see section 4 below), anti-circumvention rules (such as the German 'equivalence rule') can be invoked to protect the effectiveness of the highest price paid rule.[21]

## 2. THE CASE AGAINST COLLUSION

There are two principal reasons why collusion is problematic: first, it prevents the highest price paid rule from expressing the 'equitable price'; secondly, it endangers the overall effectiveness of the MBR regime.

18 See Regional Court of Frankfurt am Main, 2 December 2014.

19 See Higher Regional Court of Frankfurt am Main, 19 January 2016.

20 See Federal Court of Justice, 7 November 2017.

21 For a deeper analysis, please refer to J. Grant, T. Kirchmaier and C. A. Nigro, *Convertible bonds and the best price rule: the Celesio case*, in J. Grant, *European Takeovers: The Art of Acquisition* (2nd edition), Globe Law and Business, 2018, p. 39; as well as P. Agstner and C. A. Nigro, *Obbligazioni convertibili e corrispettivo dell´opa volontaria nell'esperienza tedesca (con uno sguardo al diritto italiano)*, in *Rivista del diritto societario*, 2021, p. 753.


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## 2.1. The impact on the efficiency of the market for corporate control

As shown in the cases above, collusion reduces the price that will be offered in the mandatory bid and, from this perspective, it is detrimental to minority shareholders, because they would not receive the full consideration obtained by the seller of the control block. But there is more: collusion also alters the very function of the highest price paid rule, which under the Takeover Directive is meant to set the 'equitable' price for the target shares.[22]

Often, the 'equitability' of the price fixed pursuant to the highest price paid rule is explained with the principle of equal treatment of shareholders, according to which all shareholders should be able to exit at the same conditions.[23] But this is a largely unsatisfactory explanation.

In fact, no rule or standard in EU law demands that all shareholders must participate in any sale-of-control transaction on the same terms as the control seller.[24] As for the principle of 'equivalent treatment' set out in Article 3 of the Takeover Directive, it only requires that all the offerees are treated equally *within* the offer process (both in voluntary and mandatory tender offers). Therefore, it can hardly be regarded as a basis for the 'equal opportunity rule' under Article 5. Even at the national law level, when a principle of equality is affirmed or implied in the legal system, it only applies to the relationship between the *company* and its shareholders, without extending to relationships among shareholders, or between existing shareholders and future controllers.[25]

After all, the rule, while requiring the acquirer of a controlling stake to launch a bid for the remaining shares at 'the highest' price paid in the previous months, does not go the extra step of ensuring equal treatment for those shareholders who sold their shares

[22] See Article 5, paragraph 4 of the Takeover Directive: "The highest price paid for the same securities by the offeror … shall be regarded as the equitable price."

[23] Compare with J. Winter *et al*, *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, 2002, p. 49. The document, also known as the 'Winter Report', was released in order to provide the European Commission with independent advice on issues related to takeover bids for the submission of a proposal for an EU Directive on the matter.

[24] EU Court of Justice, 15 October 2009, case no. C-101/08.

[25] See R. Skog, *Does Sweden Need a Mandatory Bid Rule? A Critical Analysis*, in *SUERF Studies*, 1997, p. 39; M. Pagano, F. Panunzi and L. Zingales, *Osservazioni sulla Riforma della disciplina dell'opa, degli obblighi di comunicazione del possesso azionario e dei limiti agli incroci azionari*, in *Rivista delle società*, 1998, p. 153; E. Wymeersch, *Takeovers from a Comparative Perspective*, in *Seminario internazionale in materia di Opa. Atti del convegno (Roma, Palazzo Giustiniani, 29 maggio 1998), Quaderni di Finanza Consob*, n. 32, 1999, p. 62.

in the relevant period prior to the mandatory bid at the various market prices.[26] In other words, without remedying this disparity between pre-mandatory bid and mandatory bid selling shareholders, the 'equitable' price cannot purport to protect *equal treatment* of shareholders. Thus, we must investigate alternative rationales.

In that spirit, it is worth noting that the MBR requires payment of the *highest* per share price the acquirer agreed to pay over a specified timeframe. This implies that the acquirer will not be obligated to pay more than it has already agreed to pay for the same securities, thus making the overall cost of the takeover predictable. As a result, if a prospective acquirer anticipates being unable to cover the acquisition cost as calculated under this rule, the law essentially disincentivises them from crossing the ownership threshold that would trigger the MBR. Therefore, the mere fact that the bid must be addressed to all the holders of the target shares should deter a prospective acquirer from pursuing the acquisition whenever the rationale for the deal is to extract significant private benefits of control at the expense of minority shareholders.[27] Indeed, if all shareholders were to tender their shares under the offer, the acquirer would be left with no minority shareholders to exploit.[28] From this perspective, the highest price paid rule plays a key role in impeding inefficient acquisitions or transfers of corporate control under European takeover regulation, because its economics imply that the only transactions to take place are those whereby the acquirer expects to increase the value of target shares.[29]

[26] This may occur in both contestable and non-contestable companies. In the former, the acquirer normally reaches the relevant stake as a result of a series of purchases on the stock exchange at gradually increasing prices, so that the 'highest price' is likely to be the amount paid upon the latest purchase; in the latter, the acquirer generally buys the controlling stake from the existing blockholder, but he/she may also happen to have bought additional shares on the market, or entered into separate agreements with other significant shareholders, possibly at a higher/lower price, in the same period. In both cases, the law allows these forms of 'unequal treatment' of shareholders.

[27] About the notion of private benefits of control, see E. Elhauge, *The Triggering Function of Sale of Control Doctrine*, in *University of Chicago Law Review*, 1992, p. 1465; for their impact on control premiums, compare with R. J. Gilson and J. N. Gordon, *Controlling Controlling Shareholders*, in *University of Pennsylvania Law Review*, 1999, p. 794; for the scale of the phenomenon across different jurisdictions, see A. Dyck and L. Zingales, *Private Benefits of Control: An International Comparison*, in *The Journal of Finance*, 2004, p. 537.

[28] See L. Enriques, *Mercato del controllo societario e tutela degli investitori: la disciplina dell'OPA obbligatoria*, 2002, p. 32; M. Gatti, *Opa e struttura del mercato del controllo societario*, 2004, p. 282; E. P. Schuster, *The Mandatory Bid Rule: Efficient, After All?*, in *Modern Law Review*, 2013, p. 553.

[29] For a formal demonstration, see L. A. Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, in *The Quarterly Journal of Economics*, 1994, p. 957, where the author explains that a transaction on the market of corporate control is efficient if, and only if, the aggregated value of the shares of the target company is higher after its completion (p. 963) and shows that the "equal opportunity rule", though discouraging some efficient transactions, prevents virtually all inefficient transfers of corpo-

In short, to prevent inefficient transactions on the market of corporate control, the rule gives the acquirer the chance to predict, and even determine, the overall cost of the takeover, which is a function of the highest price actually paid to shareholders who accepted to sell their shares for that price. In this respect, the highest price paid reflects the contractual balance achieved between the parties of a specific transaction — or, put it differently, the case-specific exchange value of the target shares.

This exchange value typically equals or exceeds the exchange value that other shareholders attach to target shares. In concentrated-ownership companies, the seller of the controlling stake expects a premium to compensate for the loss of private benefits of control.[30] In contrast, in dispersed-ownership companies — where control may be acquired through a series of stock market purchases at progressively higher prices — the seller of the marginal share (i.e., the one whose sale causes the control threshold to be crossed) is usually the shareholder who values their shares the most.[31]

All in all, the price under the highest price paid rule should be considered 'equitable' because, while deterring inefficient transfers or acquisitions of corporate control, it also provides minority shareholders with a consideration not lower than the exchange value of the target shares.

However, in the case of collusion, this mechanism breaks down. When part of the consideration for the controlling interest is disguised as payment for a separate transaction, the highest price formally paid by the acquirer no longer reflects the true value of the target shares. Since the bid price is lower on a per-share basis than the real consideration paid to the seller of the controlling stake, the bidder may afford the takeover even without expecting to increase the value of target shares. In this scenario, the MBR would fail to prevent inefficient transfers of corporate control.[32]

rate control (p. 972). Consider, however, that the mandatory bid rule is ineffective when it comes to curbing the so-called "creeping acquisitions", as explained by L. Enriques and M. Gatti, *Creeping Acquisitions in Europe: Enabling Companies to Be Better Safe than Sorry*, in *Journal of Corporate Law Studies*, 2015, p. 76.

30 See R. J. Gilson and J. N. Gordon, *Controlling Controlling Shareholders*, in *University of Pennsylvania Law Review*, 2003, p. 794.

31 Compare with L. A. Stout, *How Efficient Markets Undervalue Stocks: CAPM and ECMH under Conditions of Uncertainty and Disagreement*, in *Cardozo Law Review*, 1997, p. 486.

32 For further details, see F. Cadorin, *OPA obbligatoria e prezzo "equo"*, Milano, Giuffrè, 2023, p. 149; Id., *Opa collusiva, poteri della Consob e tutela degli investitori*, in *Giurisprudenza commerciale*, 2020, I, p. 421.

### 2.2. The impact on the overall effectiveness of takeover rules

There is yet another overarching rationale supporting devices to correct deviations from the highest paid price rule. A firm enforcement of such a rule protects the overall effectiveness of the MBR regime, which in turn helps strengthening investor trust in capital markets. Effective enforcement of the highest paid price rule also deters prospective acquirers from the temptation of low-balling investors via alternative transaction structures. Otherwise, if transaction planners felt it easy to escape from the highest price paid rule, they would take their chances and, as a result, market participants would lose trust in the underlying rules, stocks would systematically discount the risk of value transfers detrimental to minority shareholders upon a change of control, and the cost of capital in the given market would increase. In sum, remedying collusion and other deviations fosters stricter compliance with the MBR, enhances legal certainty, and strengthens investor reliance on enforcement of the rules of the game.[33]

## 3. HOW DOES EU AND NATIONAL TAKEOVER LAW HANDLE COLLUSION?

EU law acknowledges the risks involved in a deviation from the correct operation of the highest price paid rule and addresses them in the Takeover Directive. As recommended in the Winter Report,[34] Article 5 provides that "Member States may authorise their supervisory authorities to adjust the price" set pursuant to the highest price paid rule "in circumstances and in accordance with criteria that are clearly determined" (paragraph 4, second subparagraph). In this regard, the Directive sets out, by way of example, a list of "circumstances" that can be taken into

[33] See M. Gatti, *Mancata promozione di OPA obbligatoria e risarcimento del danno,* in *Giurisprudenza commerciale*, 2005, II, p. 791 (footnote 57), as well as A. Perrone, *Informazione al mercato e tutele dell'investitore*, Milano, Giuffrè, 2003, p. 208 and D. Preite, *Il conflitto di interessi del socio tra codice e disciplina del mercato mobiliare*, in *Rivista delle società*, 1988, p. 399 (addressing self-dealing).

[34] See J. Winter *et al*, *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, 2002, p. 50: "the group holds the view that the Directive should: on the one hand, contain a rule whereby the highest price paid, as defined above, by the offeror is assumed to be an equitable price in a mandatory bid in normal circumstances; on the other hand, explicitly state that Member States are permitted to define both the situations in which this presumption may be displaced and the criteria which may be applied by supervisory authorities in their decision to retain a price higher or lower than the highest price paid."

account for the price adjustment, such as market manipulations or other exceptional occurrences,[35] but leaves the task to national laws for their actual definition. Unlike the Winter Report,[36] the Takeover Directive does not explicitly mention *collusion* among those "circumstances" but considers the case where "the highest price was set by agreement between the purchaser and a seller".

Defining such "circumstances" has been implemented differently by member states. While some (*e.g.*, Germany)[37] do not empower their national supervisory authority to adjust the mandatory bid price, most jurisdictions do. But even in this latter category, not every jurisdiction takes collusion into account: for instance, the UK Takeover Code – largely taken as a model for the Takeover Directive[38]– does not cover collusion among the "[c]ircumstances which the Panel might take into account when considering an adjustment of the highest price".[39]

In any event, most national laws and regulations do consider some kind of collusive arrangement for purposes of bid price adjustment. Italy specifically refers to "collusion between the bidder, or persons acting in concert with the bidder, and one or more of the sellers",[40] thereby using the same formulation that is found in

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[35] Compare with Article 5, paragraph 4, second subparagraph: "To that end, [Member States] may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued."

[36] See J. Winter *et al*, *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, 2002, p. 50: "The group, nonetheless, considers that the highest price paid rule may not, in particular circumstances, achieve an equivalent treatment of holders of securities. Such circumstances include, but are not limited to, the following situations: the highest price paid was set by collusion (*i.e.*, an agreement with the vendor aimed at evading the highest price paid rule…"

[37] For reference see Section 31 of the German Securities Acquisition and Takeover Act (*WpÜG*) and Sections 3 to 7 of the Ordinance on the content of the offer document, the consideration in the case of takeover offers and mandatory offers and the exemption from the obligation to publish and submit an offer (*WpÜGAngebV*). However, even in the absence of specific provisions addressing collusive agreements, BaFin applied the "equivalence rule" to protect the effectiveness of the highest price paid rule in the *Celesio* case (see section 1.3 above).

[38] See M. Ventoruzzo, *Europe's Thirteenth Directive and US Takeover Regulation: Regulatory Means and Political Economic Ends*, in *Texas International Law Journal*, 2006, p. 191.

[39] See Note 3 to Rule 9.5 of the Takeover Code.

[40] Italian Consolidated Law on Finance provides that the Italian Supervision Authority (Consob) "shall regulate situations in which … subject to provision with just cause by CONSOB, the takeover bid is promoted at a price higher than the highest price paid, provided such a measure is necessary for investor protection purposes and … there is evidence of collusion between the bidder, or persons acting in concert with the bidder, and one or more of the sellers" (Article 106, paragraph 3; English translation available on the CONSOB website).

the Winter Report's recommendations.[41] Some jurisdictions, such as France[42] and Ireland,[43] consider other agreements between the prospective bidder and the seller, while others (Spain[44] and Belgium)[45] focus on the presence of additional advantages, not included in the per-share price formally paid for the controlling stake.[46] Yet, despite differences in formulation ("other agreements", on the one hand, and "advantages", on the other hand), at closer inspection both appear to be part and parcel of the same phenomenon. In fact, while the mere existence of other agreements between the prospective bidder (or persons acting in concert with them) and the seller is not inherently relevant, it becomes significant when such agreements grant the seller additional advantages that are not formally reflected in the bid price.[47] Conversely, 'additional advantages' can only arise through the presence of a side agreement.

Ultimately, irrespective of the wording used by the applicable rules, what matters for the purpose of bid price adjustment is the effect of the overall transaction on the application of the highest price paid rule: when the highest price (formally) paid does not fully reflect the exchange value that the acquirer actually attaches to the target shares, supervisory authority in various jurisdictions intervene to restore the 'equitable' price.

41 Nonetheless, a dispute arose on the meaning of the term 'collusion' in this context: see section 1.2 above.

42 See note 3.

43 See Rule 9.4, Paragraph (d), Subparagraph (i) of the Irish Takeover Rules: "If the bargain is linked to any other transaction, contract or arrangement, the acquirer shall notify the Panel of that fact and of the relevant details and the Panel will determine the applicable acquisition price" for the purposes of the mandatory bid.

44 The Spanish Royal Decree 1066/2007 provides that the national supervisory authority (CNMV) may modify the price set according to the highest price paid rule, *inter alia*, when "the acquisitions during the reference period include some compensation in addition to the price paid or agreed" (Article 9, paragraph 4, as translated by the authors).

45 Under Article 55 of the Royal Decree of 27 April 2007 on Takeover Bids, the Belgian national supervisory authority (FSMA) "can authorise or demand a change in the price if … there is evidence that certain transferors of the securities concerned have obtained, in addition to the said consideration, other specific advantages, whether directly or indirectly" (English translation available on the FSMA website).

46 Similarly, Article 47-*octies* of the Regulation implementing Italian Legislative Decree 58 of 24 February 1998, concerning the discipline of issuers (Consob delegated regulation on issuers) clarifies that "The offer price shall be increased by CONSOB pursuant to Article 106, subsection 3, paragraph d), no. 2 of the Consolidated Law on Finance if a higher price than that declared by the bidder is paid as a result of verified collusion between the bidder or the persons acting in concert with them and one or more sellers" (English translation available on the CONSOB website).

47 See section 1 above.

## 4. HOW TO RESTORE THE 'EQUITABLE' PRICE

The Takeover Directive leaves wide-ranging discretion to national laws over the criteria to be applied by supervisory authorities in adjusting the bid price. In fact, Article 5 only provides that member states "may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis" (paragraph 4, second subparagraph). In other words, national legislatures (or regulators, as applicable) are free to determine which parameters their supervisory authority must follow.

Accordingly, in UK[48] and Ireland[49], as well as in Belgium,[50] the applicable rules do not define any criterion or parameter for bid price adjustment: in these countries, the takeover authority is left with the task to restore the 'equitable' price drawing on other rules and principles under their takeover laws.

Conversely, other jurisdictions provide some guidance on the matter. For instance, France establishes a set of replacement criteria in case of deviation from the correct operation of the highest price paid rule, while Italy and Spain seek to eliminate the impact of such a deviation. In France, when 'collusion' (or a different deviation under national law) is established, the highest price paid rule no longer applies, and the bid price is set according to an alternative rule, based on tentatively 'objective' valuation criteria.[51] Under the Italian and Spanish regimes, the highest price paid rule still applies, but any additional benefits obtained by the seller of the controlling stake must also be calculated and included.[52]

[48] Note 3 to Rule 9.5 of the Takeover Code provides that "The price payable in the circumstances set out above will be the price that is fair and reasonable taking into account all the factors that are relevant to the circumstances. In any case where the highest price is adjusted under Rule 9.5(c), the Panel will publish its decision".

[49] See note 43.

[50] Pursuant to Article 55 of the Royal Decree of 27 April 2007 on Takeover Bids (see note 45), "The FSMA can impose certain conditions together with its decision on a change in price. The FSMA's decision, and any conditions imposed, will be published."

[51] See Article 234-6 of the General Regulation of the AMF (see note 3): "In these cases, or in the absence of transactions by the offeror, acting alone or in concert, in the securities of the target company over the twelve-month period referred to in the first paragraph, the price is determined based on generally accepted objective valuation criteria, the characteristics of the target company and the market for its securities". Consider that the same criteria apply if the acquirer did not buy any share in the target company in the preceding period.

[52] For reference, check Article 9, paragraph 4 of the Spanish Royal Decree 1066/2007 (mentioned in footnote 44 above), which provides that "In this case, the bid price may not be lower than the highest price resulting from including the amount corresponding to such compensation" (trans-

The first solution is certainly more adherent to the text of the Takeover Directive, which in fact suggests applying "objective valuation criteria generally used in financial analysis", such as the average market value of the shares or the break-up value of the company. Nevertheless, such criteria raise some issues: first, their definition (and in some instances combination)[53] is not clear; second, it is almost impossible to determine an 'objective' fundamental value for shares at any given time;[54] third, and more importantly, such criteria do not seem entirely suitable for restoring an 'equitable' price.

In fact, the bid price is 'equitable' if, and to the extent that, it reflects the exchange value that the acquirer attaches to the target shares (see section 2.1 above). However, a price set according to 'objective valuation criteria' would not necessarily meet this value, which can be affected by 'subjective' factors too, such as private benefits of control.[55] Therefore, if objective criteria apply instead of the highest price paid rule, the adjusted bid price may at times still be lower than the 'equitable' price; in such scenario, an inefficient acquisition could take place despite the MBR, as the acquirer would ultimately obtain control of the company at a discounted value.[56]

lated by the authors), and Article 47-*octies* of the Consob delegated regulation on issuers (mentioned in footnote 46 above), which similarly prescribes that "in this case, the offer price is equal to the verified price".

53 See, for instance, the puzzling results of the application of the multi-criteria approach under French law in section 1.1 above.

54 On the matter see, eg, L. A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, in *Yale Law Journal*, 1990, p. 1235; Id., *How Efficient Markets Undervalue Stocks: CAPM and ECMH under Conditions of Uncertainty and Disagreement*, in *Cardozo Law Review*, 1997, p. 475 (with a focus on stock markets), as well as M. Maugeri, *Partecipazione sociale, quotazioni di borsa e valutazione delle azioni*, in *Rivista del diritto commerciale*, 2014, p. 93 (on the existence of multiple notions of fair value). In the same vein, some dicta in Delaware case law on appraisal rights show that any attempt to ascribe a precise value to a company is vain or even pointless: see, for instance, *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640 at * 2 (Del. Ch. 19 August 2005) and *Cede & Co and Cinerama, Inc. v. Technicolor, Inc.,* 2003 WL 25579991 at 2* (Del. Ch. 1 January 2003). Unsurprisingly, Delaware case law on appraisal rights abandoned discounted cash flows analysis as a default mechanism. See *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017) and *DFC Global Corp. v. Muirfield Value Partners*, L.P., 172 A.3d 346 (Del. 2017) (both establishing that when a merger results from a robust, arm's-length process involving informed parties and no conflicts of interest, the deal price may serve as the most reliable indicator of fair value in appraisal proceedings).

55 Cf R. J. Gilson and J. N. Gordon, *Controlling Controlling Shareholders*, in *University of Pennsylvania Law Review*, 2003, p. 794. Other 'subjective' factors that may be taken into account are synergies achievable from the integration of the target company in the acquirer's group, as well as information and forecasts not disclosed to the public.

56 Actually, it is also possible that the price determined according to 'objective valuation criteria' is higher than the 'equitable' price, such as when the acquirer knows that the target company is overvalued by the market, on the basis of information only available to him (and to the existing blockholder). In this scenario, the risk of a disproportionate upward adjustment of the bid price might prevent an inherently efficient transfer of corporate control to take place.

Conversely, if additional advantages paid to the seller of the controlling stake are included in the calculation of the adjusted bid price, the impact of collusive agreements on the application of the highest price paid rule can be neutralised, and bid price and exchange-value of the target shares will equate. In this scenario, because of the price adjustment, acquirers are required to provide minority shareholders with the full value they attach to the target shares. Therefore, in non-value-increasing deals, the risk of an upward adjustment of the bid price as a result of collusion should prevent the acquirer from pursuing the acquisition by such means.

This means that the second solution, adopted by Italy and Spain, is preferable when it comes to restoring the 'equitable' price — a price incompatible with inefficient transfers of corporate control. Nevertheless, application issues may still loom, given the difficulty of quantifying the economic impact of the side deal. Hence, competent supervisory authorities should exercise all their investigative powers to unfold what really happened during negotiations to find out if there were, for example, any suspicious shifts in the values attributed, respectively, to the relevant stake and to the assets transferred or services provided through the side agreements.[57]

## 5. CONCLUSION

Collusion refers to a transaction structure in which part of the consideration for the controlling interest — agreed upon between the acquirer and the seller — is formally allocated to a separate transaction, thereby reducing the price that must be offered in the subsequent mandatory bid. Such a structure deprives minority shareholders of the opportunity to divest their shares at an 'equitable' price. In doing so, collusion makes the overall MBR regime less trustworthy for investors and alters the very function of the highest price paid rule in the context of the MBR, which is to deter inefficient transfers of corporate control.

Under the Takeover Directive, most jurisdictions address the problem by empowering their supervisory authority to adjust the mandatory bid price when they find that the acquirer entered into one or more side contracts with, or gave any other

[57] For a case in point, see Consob Decision 18662 of 25 September 2013 mentioned in section 1.2 above, where the Italian supervisory authority discovered (from the correspondence between the parties) that MCI only accepted to sell its stake in Camfin at the (discounted) price proposed by MTI when it became clear that some other Pirelli shareholders were interested in selling their own shares at a price that reflected the same (discounted) valuation.

advantage to, the seller. Supervisory authorities are thus required to take action in the event that the price paid in the mandatory bid does not fully reflect the exchange value the acquirer attaches to the target shares.

In such cases, some jurisdictions require that the bid price be adjusted based on fair market value or other ostensibly objective valuation methods. However, these approaches may fall short of restoring an 'equitable' price, properly understood. This is because they often fail to account for private benefits of control and other subjective factors that can materially influence valuation from the acquirer's perspective. Conversely, to truly neutralise the distorting effects of collusion in the application of the MBR — thereby reinforcing investor trust and deterring inefficient acquisitions — the adjusted 'equitable' price should include any additional advantages granted to the seller of the controlling stake in the separate transaction.

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