Enforcement of Takeover Law

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Peter Agstner
Free University of Bozen-Bolzano

Dörte Poelzig
University of Hamburg and ECGI

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We are especially grateful to the participants of the ECLE Workshop on 20 Years Takeover Directive for their valuable comments on an earlier draft of this paper. Italian regulation on academic evaluation requires some form of identification of each author's individual contribution to a law joint paper. Exclusively for this purpose, we mention that Sects. IV.1 were written with the prevalent contribution of Peter Agstner; Sects. IV.2 with the prevalent contribution of Dörte Poelzig. The authors equally contributed to other Sects.

Abstract

The paper examines in a comparative perspective the enforcement regime of the EU takeover law, focusing in particular on the debate on public vs private enforcement. For this purpose, a detailed in-depth analysis is conducted with reference to the Italian and German enforcement regime of the duty to bid. As policy proposal, the paper suggests that a rule on civil liability for a breach of the mandatory bid rule should be included in the directive.

Keywords: Takeover directive, minority protection, minimum harmonization, comparative law, efficiency of capital markets

JEL Classifications: K10, K22, G10, G30

Peter Agstner*
Associate Professor of Business Law
Free University of Bozen-Bolzano, School of Economics and Management
Universitätsplatz 1
39100 Bozen-Bolzano, Italy
phone: +39 0471 013288
e-mail: Peter.Agstner@unibz.it

Dörte Poelzig
Professor for Private Law and Trade and Company Law
University of Hamburg
Rothenbaumchaussee 33
20148 Hamburg, Germany
e-mail: doerte.poelzig@uni-hamburg.de

*Corresponding Author

Enforcement of EU Takeover Law*

*Peter Agstner - Dörte Poelzig***

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I. Introduction

Enforcement of takeover law varies considerably between Member States in the EU. Traditionally, EU law creates obligations for private parties, such as the mandatory bid rule in the Takeover Directive (TOD), and leaves the enforcement of these obligations to the national law of the Member States. While some Member States have focused on public enforcement mechanisms, others have implemented private law to enforce the mandatory bid rule. However, the written law is only worth as much as it is actually enforced. Different enforcement systems

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* This paper is part of a series of publications marking the 20th anniversary of the Takeover Bids Directive. A joint book publication, organized by the ECLE Group (https://europeancompanylawexperts.wordpress.com), is in preparation.

** Peter Agstner is Professor for Business and Insolvency Law at the Free University of Bozen-Bolzano (Faculty of Economics and Management). Dörte Poelzig is Professor for Private Law, Commercial and Company Law at the University of Hamburg and Research Member at the ECGI. We are especially grateful to the participants of the ECLE Workshop on 20 Years Takeover Directive for their valuable comments on an earlier draft of this paper. Italian regulation on academic evaluation requires some form of identification of each author's individual contribution to a law joint paper. Exclusively for this purpose, we mention that Sects. IV.1 were written with the prevalent contribution of Peter Agstner; Sects. IV.2 with the prevalent contribution of Dörte Poelzig. The authors equally contributed to other Sects.

in the Member States lead to inconsistent application of takeover law. Harmonised law on enforcement of takeover law is not only important for overcoming fragmentation and creating a single capital market; rather, a coordinated and efficient enforcement mechanism is crucial to ensure the attractiveness of capital markets to issuers and investors.[1] Since the study by La Porta/Lopez-de-Silanes/Shleifer at the latest, it has been known that laws mandating or facilitating private enforcement through liability rules benefit stock markets.[2]

This chapter consists of four main sections. Section II introduces the EU law on enforcement of minority shareholder rights. In Section III, the advantages and disadvantages of private and public enforcement are presented, followed by an outline of various enforcement models in Italian and German law in Section IV. It will then be examined whether and to what extent European liability law in the TOD can and should be harmonised.

II. EU Law on Enforcement

Like many recent European legal acts, the Takeover Directive says little about enforcement matters. It mainly leaves it to the Member States. According to Art. 17 TOD, Member States shall determine the sanctions to be imposed for infringement of the national measures adopted pursuant to this Directive and shall take all necessary steps to ensure that they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Especially, the principle of effectiveness requires a minimum level of sanctions. In other words, the Directive only generically requires Member States to safeguard minority shareholders but does not say anything in relation to the concrete instruments or mechanisms available for this purpose.[3] Different factors seem to contribute to such legal uncertainty. First, the TOD does not affect the power of Member States to designate the (public or private) authority competent to supervise bids and to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings (Recital 8; Art. 4(1) and (6) TOD), neither does it indicate the kind of remedy concretely available (subjective public right and/or individual

[1] R. Veil/M. Wiesner/M. Reichert, 'Disclosure and Enforcement under the EU Listing Act' (2022) 19 European Company and Financial Law Review 445, 503.

[2] R. La Porta/F. Lopez-de-Silanes/A. Shleifer, 'What Works in Securities Laws?' (2006) 61 The Journal of Finance 1 et seq.

[3] Cf. H. Fleischer, '§ 1 WpÜG', in N. Paschos and H. Fleischer (eds.), Handbuch Übernahmerecht nach dem WpÜG (Munich: C.H.BECK, 2017), § 1 mn. 70; M. Ventoruzzo, 'Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe' (2008) 11 University of Pennsylvania Journal of Business Law 135; very critical M. Winner, 'Does the European Union have a mandatory bid rule?', in R. J. Gilson, M. Isakson, E. Lidman, J. Munck and E. Sjöman (eds.), Festskrift till Rolf Skog (Stockholm: Norstedts Juridik AB, 2021), p. 1194 ('Rather, the European principle allows legislators – after paying lip-service to the protection of securities holders – to deviate from the core points of the MBR. I find it difficult to call this a success').

civil claim).[4] Second, at the supranational level traditionally, except for antitrust law matters[5] and in the recent past for the General Data Protection Regulation (GDPR) or Markets in Crypto-Assets Regulation (MiCAR), we observe a strong resistance by the European Court of Justice and the European Commission to impose on Member States an obligation to recognise civil law claims in favour of investors,[6] here probably exacerbated by the fact that a general principle of equal treatment of minority shareholders upon a change of control does not apply.[7] All taken together, this might well explain the profoundly different paths taken by the judicial interpretation prevailing in some Member States.[8]

III. Public versus Private Enforcement

The following analysis is focused on two paradigmatic experiences characterised by conflicting enforcement models made available to minority shareholders. On the one hand, the private enforcement instruments recognised by the dominant Italian case law; on the other hand, the

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[4] Art. 17 of the TOD only states that 'the sanctions thus provided for shall be effective, proportionate and dissuasive'.

[5] Case C-453/99, Courage Ltd v. Bernard Crehan [2021] ECR I-6314: for a comment, G. Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe' (2006) 206 Archiv für die civilistische Praxis 352, 404 et seq.; D. Poelzig, Normdurchsetzung durch Privatrecht (Tübingen: Mohr Siebeck, 2012), p. 141 et seq.; followed in the case law by Case C-295/04 to C-298/04, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA, Nicolò Tricarico and Pasqualina Murgolo v. Assitalia SpA [2006] ECR I-6641. See also Antitrust Damages Directive 2014/104/EU, which states (Recital 3) that 'national courts thus have an equally essential part to play in applying the competition rules (private enforcement)'.

[6] For such a restrictive approach, heavily dependent upon the principles of equivalence and effectiveness of the national sanctionary apparatus, Case C-219/15, Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH [2017] ECLI:EU:C:2017:122; Case C-604/11, Genil 48 SL and Comercial Hostelera de Grandes Vinos SL v. Bankinter SA and Banco Bilbao Vizcaya Argentaria SA [2013] ECLI:EU:C:2013:344, with reference to the MiFID I Directive 2004/39/EC). In the literature, P. Pohlmann, 'Rechtsschutz der Aktionäre der Zielgesellschaft im Wertpapiererwerbs- und Übernahmeverfahren' (2007) 36 Zeitschrift für Unternehmens- und Gesellschaftsrecht 1, 7 et seq.

[7] Case C-101/08, Audiolux SA e.a v. Groupe Bruxelles Lambert SA (GBL) and Bertelsmann AG [2009] ECR I-09823: for a comment, F. M. Mucciarelli, 'Equal treatment of shareholders and European Union law' (2010) 7 European Company and Financial Law Review 158 et seq.; on this topic also P. L. Davies, 'The Notion of Equality in European Takeover Regulation', in J. Payne (ed.), Takeovers in English and German Law (London: Bloomsbury Publishing, 2002), p. 9 et seq.

[8] For first indications, cf. P. Giudici, 'Private Law Enforcement in a Formalist Legal Environment: The Italian Sai-Fondiaria Case' (2008), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103985; R. Veil, 'Enforcement of Capital Markets Law in Europe – Observations from a Civil Law Country' (2010) 11 European Business Organization Law Review 409; T. Tridimas, 'Financial regulation and private law remedies: an EU law perspective', in O.O. Cherednychenko and M. Adenas (eds.), Financial Regulation and Civil Liability in European Law (Cheltenham/Northampton: Edward Elgar, 2020), p. 47 et seq.

public enforcement-centred approach adopted by the German regulator.[9] But before diving into details, a preliminary notation is essential to better frame and understand the mentioned juxtaposition. In fact, at the statutory level, the relevant legislation generally provides enforcement mechanisms of the duty to bid, the activation of which is mainly delegated to public supervisory authorities. Typically, such safeguards consist of the freezing of the voting rights attached to the shares held by the predator and in the application of administrative fines. All these sanctionary devices are meant to force the predator to comply with the mandatory bid requirements.[10] No private right of action is granted to minority shareholders for the immediate protection of their interests.[11] The merits of public enforcement are the following: firstly, supervisory authorities are vested with all the powers necessary for the purpose of carrying out their duties, especially investigatory powers (see Art. 4(5) TOD); secondly, public authorities are able to impose targeted and balanced sanctions in individual cases.

However, public enforcement mechanisms, due to common incentive problems as well as the risks of regulatory capture, may have no teeth and thus prove ineffective in sanctioning violations or abuses.[12] Public authorities are not able to control the whole market and often do not learn about violations. In order to avoid under-enforcement, it may therefore be vital to complement and integrate the regulatory architecture with private enforcement devices available to minority shareholders for the protection of their interests.[13] Such a mixed law

[9] For a slightly incorrect assessment, S. Balthasar, 'Die Preisregeln des deutschen Übernahmerechts', in R. Veil, H. C. Grigoleit and M. Habersack (eds.), Öffentliche Unternehmensübernahmen (Tübingen: Mohr Siebeck, 2022), p. 130–131, who asserts that in other Member States, unlike Germany, the issue of civil claims brought by the target's minority shareholders plays no substantial role in practice: such an assumption, as we will see, might be true in some respects, for example, for France and Spain, but certainly not for Italy. For comparative references, P. Agstner/D. Marchesini Mascheroni, 'Breach of the Mandatory Bid Rule' (2020) 17 European Company and Financial Law Review 726, 744 et seq.

[10] For this argument, see explicitly the German Federal Supreme Court in the case BKN: BGH, 11 June 2013 - II ZR 80/12, (2013) Zeitschrift für Wirtschaftsrecht, 1565, mn. 22 ('the law contains sufficient means of exerting pressure on the controlling party to force the latter to publish a mandatory bid').

[11] See Cass. 10 February 2016, no. 2665, (2016) Banca borsa e titoli di credito II, 375, 377 (sanctions posed by law 'do not have any impact on the damages suffered by the minority shareholders').

[12] Cf. G. S. Becker/G. J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 The Journal of Legal Studies 1 et seq.; on the phenomenon of regulatory capture, G. J. Stigler, 'The Theory of Economic Regulation' (1971) 2 The Bell Journal of Economics and Management Science 3 et seq.; R. A. Posner, 'Theories of Economic Regulation' (1974) 5 The Bell Journal of Economics and Management Science 335, 341 et seq.; in a broader perspective, arguing that a system of takeover regulation that provides parties with the ability to challenge regulatory decisions in courts is bound to cause delays and uncertainty in the takeover process, J. Mukwiri, 'Negative Implications of Greater Access to the Courts in the Takeover Process' (2023) 20 European Company and Financial Law Review 358, 369 et seq.

[13] For an overview on the optimal enforcement structure, with sometimes different accents, cf. H. E. Jackson/M. Roe, 'Public and Private Enforcement of Securities Laws: Resource Based Evidence' (2009) 93 Journal of Financial Economics 207 et seq.; S. Shavell, 'The Optimal Structure of Law Enforcement' (1993)

enforcement system would allow for a decrease in the enforcement costs due to the supportive intervention by minority shareholders and the correlated higher probability to detect, prosecute and sanction violations of the law. In fact, minority shareholders have superior knowledge and informational advantages due to 'closeness' to the infringement event (i.e. breach of the MBR).[14] Moreover, at least institutional investors have sufficient incentives to enforce their claims. And last but not least, while public authorities are limited by the principle of territoriality and are not in a position to take extraterritorial action against foreign companies, private claims can also be enforced across borders on the basis of international private law.

Clearly, there are drawbacks here as well, since only institutional investors are likely to take legal action, while other minority shareholders suffering only dispersed damages may be rationally apathetic.[15] This problem is accentuated by the fact that, at least in most continental European jurisdictions, the securities class action, if available, does not work efficiently, thus preventing a useful aggregation of individual claims.[16] Last but not least, for private parties it may be difficult to prove a breach of the duty to bid – for example, that the offeror holds securities giving him/her control of a company (see Art. 5(1) TOD) or that the offeror paid a higher price for the same securities before the bid (see Art. 5(4) TOD).

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36 The Journal of Law & Economics 255 et seq.; M. Polinsky/S. Shavell, 'The Economic Theory of Public Enforcement of Law' (2000) 38 Journal of Economic Literature 45 et seq.; R. La Porta/F. Lopez-de-Silanes/A. Shleifer, 'What Works in Securities Laws?' (2006) 61 Journal of Finance 1 et seq.; J. C. Coffee Jr, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229 et seq.; D. Poelzig, 'Normdurchsetzung', p. 18 et seq., 375 et seq.; L. Klöhn, 'Private versus Public Enforcement of Laws – A Law & Economic Perspective', in R. Schulze (ed.), Compensation of Private Losses. The Evolution of Torts in European Business Law (Berlin: Springer, 2011), p. 34, 179 et seq.; R. Veil/A. Brüggemeier, 'Kapitalmarktrecht zwischen öffentlich-rechtlicher und privatrechtlicher Normdurchsetzung', in H. Fleischer, S. Kalss and H.-U. Vogt (eds.), Enforcement im Gesellschafts- und Kapitalmarktrecht (Tübingen: Mohr Siebeck, 2015), p. 277 et seq.; G. Wagner, 'Rechtsdurchsetzung im Kapitalmarktrecht: Public versus Private Enforcement', in M. Casper, L. Klöhn, W.-H. Roth and C. Schmies (eds.), Festschrift für Johannes Köndgen (Cologne: RWS, 2016), p. 649, 664 et seq.

[14] S. Shavell, 'Liability for Harm versus Regulation of Safety' (1984) 13 The Journal of Legal Studies 357, 359–360 ('private parties should generally enjoy an inherent advantage in knowledge'); Giudici, 'Private Law Enforcement', p. 26 ('minority shareholders are ... the best private enforcers').

[15] D. Poelzig, 'Normdurchsetzung', p. 381 et seq.

[16] Ibid., p. 384 et seq.; in the Italian case law, see recently, Trib. Milan, 11.1.2023, (2023) Le Società 1262 et seq., where the first-instance judges excluded that a tendering shareholder could bring a class action to enforce the alleged collusion perpetrated by the bidder to obtain full control at an inadequate price. For the somehow different situation in the UK, see, also for empirical data, F. Restrepo, 'The Capital Market Effects of Introducing Private Rights of Action in Securities Regulation: Evidence from the United Kingdom' (2023) 66 The Journal of Law & Economics 183 et seq.

IV. Enforcement Models

Let us now see the different trajectories followed by the two selected model samples – namely, the Italian and German enforcement systems of the duty to bid. This will allow, in a second step, to ascertain whether further harmonisation efforts are recommendable in order to contribute to an efficient capital market, also considering other regulatory measures taken at the Community level.[17]

1. Mainly Private-Driven Enforcement Model: The Case of Italy

The origins of the Italian mandatory bid rule go back well before the coming into force of the TOD, with a first embryonic regulation contained in the Law no. 149 of 1992 on public takeovers.[18] Today, the relevant Italian Consolidated Financial Service Act (CFSA), differentiating on the basis of the ownership structure and the size of the company, establishes as the threshold for the launch of a mandatory bid the holding of 25 or 30 per cent of the share capital or the voting rights[19] in the general meeting of the listed target company.[20] The CFSA sanctions the breach of

[17] Reference here goes in particular to 'adjacent' enforcement systems: for details, see Section V. 2.

[18] On this regulation, R. Weigmann, 'Le offerte pubbliche d'acquisto', in G. E. Colombo and G. B. Portale (eds.), Trattato delle società per azioni, 19 vols. (Turin: UTET, 1993), vol. 10**, p. 355 et seq.; for historical references also C. Mosca, 'L'offerta pubblica di acquisto obbligatoria', in M. Cera and G. Presti (eds.), Il Testo unico finanziario, Mercati ed emittenti, 2 vols. (Bologna: Zanichelli, 2020), vol. 2, p. 1400 et seq.

[19] In this regard, of relevance is the provision in Art. 127-quinquies CFSA, which allows the articles of association to provide for double voting rights in favour of long-term shareholders (i.e. holding uninterruptedly shares for at least 24 months). Now, with the entering into force of the so-called Legge Capitali of 5 March 2024, no. 21, this threshold has been raised for non-listed joint-stock companies to ten votes per share, with maintenance of these shares even after the initial public offering (Art. 13, modifying Art. 2351(4) Civil Code). In addition, the current wording of Art. 14(1)(b) of the mentioned law, by modifying Art. 127-quinquies CFSA, allows listed companies adopting the increased voting mechanism to provide in the articles of association (opt-in) that, in addition to the ordinary double voting right, such rights may be further increased to the extent of one vote per share for each period of 12 months of continuous share ownership, up to a maximum of 10 votes per share (so-called step-up mechanism); in such latter case, dissenting shareholders have a withdrawal right.

[20] See Art. 106(1) CFSA. Actually, the relevant threshold may vary depending on the ownership structure and the size of the company. The current legislation, indeed, lays down a differentiated system of thresholds for listed companies, with the aim of simplifying entering into the capital market for all enterprises, including SMEs. Thus, in addition to the threshold of 30 per cent, Art. 106(1-bis) CFSA, with reference only to 'companies other than SMEs', introduced a new and alternative trigger event, i.e. mandatory takeover bid must be made even if the bidder comes to own by purchase a stake exceeding 25 per cent of the share capital and no other shareholder holds a larger holding. As for SMEs, the articles of incorporation may establish a threshold different from the ordinary one, but this contractual threshold must be between 25 and 40 per cent of the share capital (Art. 106 (1-ter)). For a comment, C. Mosca, 'L'offerta pubblica', p. 1406 et seq.; this regulatory approach received positive evaluation also by German scholars: D. A. Verse, 'Pflichtangebot – Status quo und Reform 20 Jahre nach Inkrafttreten des WpÜG', in

the MBR by freezing the exercise of the overall voting rights held by the bidder and by imposing the compulsory sale of the shares exceeding the relevant threshold within twelve months (Art. 110). The supervisory authority CONSOB, alternatively to the requirement of a compulsory sale, may order the launch of a mandatory bid at the price established by the same authority (Art. 110(1-bis) CFSA);[21] at the same time, though, the public watchdog has not the power, otherwise exceeding the scope of application of the aforementioned provision, to simply impose a price adjustment in the case of the takeover bid having already been made by the predator.[22] Moreover, administrative and criminal fines are applied (respectively, Art. 192 and Art. 173). In contrast, no statutory reference is made to a shareholder's right to claim for damages.[23] Thus, no private enforcement of minority shareholders' rights in the case of violation of the duty to bid was in place, neither at the statutory level nor in the judicial application.

a) The 'Disruptive' Fondiaria-SAI Case: Factual Background

The restrictive approach to private enforcement of the duty to bid substantially changed, at least at the judicial level, with the 'disruptive' Fondiaria-SAI case, considered by many the most interesting dispute in the securities law area of the last decade.[24] The case's origins go back to 2001 when SAI, a large Italian insurance company, by acting in concert with Mediobanca,

R. Veil, H. C. Grigoleit and M. Habersack, Öffentliche Unternehmensübernahmen (Tübingen: Mohr Siebeck, 2022), p. 59, 70.

[21] This provision was introduced in 2007 by the Legislative Decree 19 November 2007, no. 229. Generally, in the literature on CONSOB's power to adjust the takeover price, C. Mosca, 'L'offerta pubblica', p. 1426 et seq.; F. Cadorin, 'OPA obbligatoria e prezzo «equo»' (Milan: Giuffrè, 2024), p. 95 et seq. Even further goes the French case law, where in two prominent cases (Hyparlo and Billon, both pronounced in 2005 by the Paris Court of Appeal) the judge ordered (injonction judiciaire) in lieu of the public supervisory authority, AMF, the execution of a mandotory bid. For a comment, see A. Pietrancosta, 'L'exécution forcée d'une offre publique obligatoire: des injonctions judiciaires prononcées dans les affaires "Hyparlo" et "Billon"' (2010), available at: www.lexbase.fr (accessed 11 April 2024).

[22] N. de Luca, 'OPA a prezzo incongruo e azioni risarcitorie di classe. Le azioni non sono beni di consumo, l'azionista non è consumatore, l'offerente non è professionista' (2023) Le Società 1266, 1272.

[23] Giudici, 'Private Law Enforcement', p. 27 ('The law is mute on whether or not minority shareholders are entitled to damages'). For an overview on the sanctionary apparatus provided by the CFSA, cf. F. M. Mucciarelli, 'Le offerte pubbliche d'acquisto e di scambio', in Renzo Costi (ed.), Trattato di diritto commerciale (Torino: G. Giapachelli Editore, 2014), p. 202 seq.; L. Enriques, 'Mercato del controllo societario e tutela degli investitori' (Bologna: Il Mulino, 2002), p. 211 et seq.; C. Mosca, 'L'offerta pubblica', p. 1462 et seq.

[24] Cf. Agstner/Marchesini Mascheroni, 'Breach of the Mandatory Bid Rule' (2020) 17 European Company and Financial Law Review 734 et seq.; P. Giudici, 'Il private enforcement in caso di elusione dell'obbligo di offerta pubblica di acquisto' (2013) Le Società 180 et seq.; C. Mosca, 'Acquisti di concerto, partecipazioni incrociate e responsabilità per inadempimento dell'obbligo di opa' (2007) 52 Rivista delle società 1290.

committed to buying a large stake in Fondiaria, another large Italian insurance company. Such a purchase by SAI would have triggered the mandatory takeover rules. In order to avoid this obligation, SAI and Mediobanca engaged five intermediaries (including JP Morgan and Commerzbank), which bought the stake on behalf of SAI in February 2002. The five intermediaries claimed to have acted independently, despite the large premium they were paying on the shares. The public watchdog CONSOB received many complaints but did not carry out an investigation. SAI's and Fondiaria's shareholders agreed to merge with resolutions of 19 September 2002 and, shortly afterwards, SAI bought from the white knights their stake in Fondiaria. Following this, the antitrust authority, and not the financial markets supervisory authority, opened proceedings against all the companies involved in order to assess the impact of the resulting concentration on the insurance market, hereby discovering the existence of secret agreements, which also involved SAI's controlling party, Premafin. In this scenario, CONSOB tried to take corrective actions and stated that SAI and Mediobanca had concerted the acquisition of Fondiaria and that the white knights were actually SAI's proxies. Given the infringement of the mandatory bid rules, CONSOB forced Mediobanca and Premafin to sell some of their shares in the new company FonSai. However, as a result of the above-mentioned merger and the legal impossibility of invalidating the operation,[25] Premafin had already achieved its final goal and remained in control of FonSai, as planned from the very outset of the transaction.

b) The Different and Varying Court Rulings with the Final Recognition of Private Enforcement Rights

These facts initiated a huge wave of judicial litigation among FonSai and Mediobanca on one side, and the harmed minority shareholders of Fondiaria on the other. The fundamental issue focused on whether the financial market regulation (i.e. the CFSA) excludes or limits the possibility for an individual investor to trigger separately private law remedies for the protection of her interests.[26] The line of reasoning embraced at first by the Italian courts, at least until the arrival of the case before the Supreme Court, was not very linear and sometimes even contradictory. In fact, while the first-instance Tribunal of Milan recognised a contractual right for minority shareholders to receive the mandatory takeover offer,[27] the Court of Appeal took the

[25] Art. 2504-quater Civil code.

[26] For the relationship between civil/company law and capital market law, see in the ECJ's case law the Case C-174/12, Alfred Hirmann v. Immofinanz AG [2013] ECLI:EU:C:2013:856.

[27] Tribunal Milan, 26 May 2005 no. 6688, Giurisprudenza commerciale 2005, II, 753. In the first instance, judges shared the view that MBRs form a compulsory part of the company contract functional to assuring equality among shareholders. In their opinion, by signing the articles of incorporation everyone agrees to become entitled to rights as well as to be subject to obligations ex lege. One of these is the obligation to promote a takeover bid upon fulfilment of the conditions set forth in Art. 106 CFSA. However, minority shareholders could claim for redress only if the damage caused by the failure to bid persisted in spite of the activation of the public enforcement remedies. In contrast, if similar sanctions re-establish the status

diametrically opposite view and charged the bidder with a pre-contractual tort liability.[28] In the Court of Appeal's opinion, in the absence of a duty to purchase, there is no obligation to pay damages. Thus, the freezing of voting rights and the duty to sell the exceeding shares are the only applicable sanctions in the event of a breach of the MBR.[29]

Only with the decisions delivered by the Supreme Court of Cassation starting from 2012 was a definitive solution to the long and controversial debate on the consequences of the breach of the mandatory takeover bid duty provided.[30] The Supreme Court rejected both approaches previously sustained by the Court of Appeal and agreed with the Tribunal's view by ascribing a contractual liability to the bidder. However, a different line of argumentation was followed in order to support this conclusion. Specifically, the Supreme Court granted minority shareholders an individual contractual right to receive the offer and highlighted that the liability arising for the debtor who does not exactly fulfil the duty imposed by law is contractual not only in the event of this obligation resulting from a contract, but even as a result of the incorrect performance of a pre-existing obligation. According to this approach – the so-called social contact theory, which goes back to fundamental studies of eminent German private law scholars[31] – a qualified or special relationship between the parties is already in existence before

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quo ante, nothing will be owed to the target shareholders. After this decision, the Milan Tribunal essentially confirmed its view in different subsequent rulings.

[28] Milan Court of Appeal, 15 January 2007 no. 54. In general, it is debated whether the pre-contractual liability is contractual or tort. Recently, the Italian Supreme Court, with reference to different factual backgrounds, has sometimes opted for the contractual nature of the culpa in contrahendo: cf. Supreme Court of Cassation, 20 December 2011, no. 27648; Supreme Court of Cassation, 12 July 2016, no. 14188, Europa e diritto privato 2017, 1129, with comment by Antonio Albanese; in other cases, on the contrary, the pre-contractual liability was qualified as liability in tort: Supreme Court of Cassation, 25 January 2012, no. 1051.

[29] With a ruling made a few months later (20 December 2007 no. 3425), confirmed also by decisions of 27 February 2012 no. 712 and of 12 April 2013 no. 1584, the mentioned Court of Appeal adopted an even stricter view (so-called lex perfecta theory), thus excluding both the contractual right to receive the bid and the pre-contractual shareholders' claim for breach of legitimate expectations relied on in the launch of the offer.

[30] Supreme Court of Cassation, 10 August 2012, no. 14400; identical decisions were delivered by Supreme Court of Cassation, 10 August 2012, no. 14392; and by Supreme Court of Cassation, 10 August 2012, no. 14399; following, among others, Supreme Court of Cassation, 26 September 2013, no. 22099; Supreme Court of Cassation, 13 October 2015, no. 20560; Supreme Court of Cassation, 10 February 2016, no. 2665.

[31] Cf., H. Stoll, 'Abschied von der Lehre von der positiven Vertragsverletzung' (1932) 136 Archiv für die civilistische Praxis 257, 287; H. Dölle, 'Außergesetzliche Schuldpflichten' (1943) 103 Zeitschrift für die gesamte Staatswissenschaft 72; K. Larenz, 'Culpa in contrahendo, Verkehrssicherungspflicht und "sozialer Kontakt"' (1954) 9 Monatsschrift für deutsches Recht 515. Today, with the reform of the German law of obligations of 2002, the mentioned principles have been codified in §§ 241(2) and 311(2-3) Bürgerliches Gesetzbuch (BGB). Similarly, Grant Gilmore (ed.), The Death of Contract (Columbus: Ohio State University

the occurrence of the breach. Because of the said proximity, the bidder owes a duty of protection to the minority shareholders, who are entitled to rely on conduct that is reasonable and in good faith demanded from the bidder. Since this relationship already exists before the violation of the obligation to offer occurs, it follows that the bidder's liability has a contractual character and the same applies to the compensation for damages.

2. Mainly Public-Driven Enforcement Model: The Case of Germany

In Germany, the relevant normative framework is constituted by the Wertpapiererwerbs- und Übernahmegesetz (WpÜG), the German Securities Acquisition and Takeover Act, which came into force in 2002 and was amended in 2006 to implement the TOD.[32] § 35(2) WpÜG provides that a mandatory takeover bid has to be made if the bidder acquires control over the target company – that is, the direct or indirect holding by the bidder of at least 30 per cent of the voting rights in the target company according to § 29(2) WpÜG. Once this threshold is crossed, the bidder, within seven days at the latest, has to inform the market and must submit within the following four weeks to the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht or BaFin) the required offer document (§ 35 WpÜG).

a) Public Enforcement

In the event of violation of this obligation, various administrative sanctions apply. First, fines of up to 5 per cent of the company's revenues and up to ten million euros can be imposed (§ 60(4) WpÜG). Besides this, the BaFin can enforce the duty to publish a mandatory takeover bid by means of an order (§ 4(1) WpÜG). However, target shareholders have no subjective public right of action against the supervisory authority.[33] Paragraph 4(2) WpÜG expressly stipulates that the

Press, 1974), p. 88, pictures such quasi-contracts as 'a sort of no-man's land lying between contract and tort'.

[32] For a general overview on the development of German takeover law, see e.g. H. Fleischer, '§ 1 WpÜG', in N. Paschos and H. Fleischer (eds.), Handbuch Übernahmerecht nach dem WpÜG (Munich: C.H.BECK, 2017), § 1 mn. 1 et seq.; H. Hirte/H. Gildehaus, 'Einleitung', in H. Hirte, C. Seibt, S. Mock and S. Schwarz (eds.), Kölner Kommentar zum WpÜG (Cologne: Carl Heymanns Verlag, 2022), 3rd ed., Einl. mn. 35 et seq.; for some empirical data, Verse, 'Pflichtangebot, p. 59, 61 et seq.

[33] Oberlandesgericht (Higher Regional Court) Frankfurt a.M., 27.05.2003 - WpÜG 1/03, (2003) Zeitschrift für Wirtschaftsrecht 1297 (ProSiebenSat.1 I); Oberlandesgericht (Higher Regional Court) Frankfurt a.M., 09.10.2003 - WpÜG 3/03, (2003) Zeitschrift für Wirtschaftsrecht 2206 (ProSiebenSat.1 II); Oberlandesgericht (Higher Regional Court) Frankfurt a.M., 08.01.2018 - WpÜG 1/17; in the literature, A. Cahn, 'Verwaltungsbefugnisse der Bundesanstalt für Finanzdienstleistungsaufsicht im Übernahmerecht und Rechtsschutz Betroffener' (2003) 167 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 265.

authority shall only act in the public interest and not on behalf of the individual investor.[34] Hence, they do not have the right to force the BaFin to take action.[35] Shareholder protection at the administrative level is excluded.

b) Private Enforcement

Therefore, it is decisive whether the target shareholders enjoy a private right of action in the event of a breach of the mandatory bid rule.[36] Besides the administrative sanctions, the WpÜG contains some private enforcement instruments: most importantly, pursuant to § 59 WpÜG, all rights deriving from the shares held by the predatory party are suspended, including pre-emptive rights and the right to dividend. Furthermore, the predator is obliged to pay interest (i.e. five percentage points above basic interest rates on the mandatory bid price) to the offerees for the period of the violation of the duty to make a compulsory tender offer (§ 38 WpÜG).[37] However, there is no written individual private right of action for minority shareholders in the event of a violation of the mandatory bid rule. Therefore, reference has to be made to a line of judgments starting in 2013 with the BKN leading case,[38] followed soon afterwards by the Postbank decision[39] and ending – for the moment – with the two Celesio rulings of 2017 and 2021, respectively.[40] The type of breach of duty is decisive for the question of private claims.

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[34] The ECJ has declared this to be in conformity with EU law ECJ, 12 October 2004, Case C-222/02, Peter Paul, Cornelia Sonnen-Lütte, Christel Mörkens v. Bundesrepublik Deutschland [2004] ECLI:EU:C:2004:606.

[35] U. Noack/D. Zetzsche, '§ 4 WpÜG', in E. Schwark and D. Zimmer (eds.), Kapitalmarktrechts-Kommentar, 5th ed., (Munich: C.H.BECK, 2020), § 4 mn. 21.

[36] Generally on this topic, cf. D. Horcher, 'Zivilrechtlicher Rechtsschutz im Übernahmeverfahren', in R. Veil, H. C. Grigoleit and M. Habersack (eds.), Öffentliche Unternehmensübernahmen (Tübingen: Mohr Siebeck, 2022), p. 265 et seq.; Nietsch, '§ 29 WpÜG', in N. Paschos/H. Fleischer (eds.), Handbuch Übernahmerecht nach dem WpÜG (Munich: C.H.BECK, 2017) § 29 mn. 6 et seq.

[37] In detail cf. J. Ekkenga/C. Schirrmacher, '§ 35 WpÜG', in M. Beurskens, U. Ehricke and J. Ekkenga (eds.), Wertpapiererwerbs- und Übernahmegesetz (Munich: C.H.BECK, 2021), 2nd ed., § 35 mn. 101 et seq.; M. Nietsch, '§ 29 WpÜG', in N. Paschos and H. Fleischer (eds.), Handbuch Übernahmerecht nach dem WpÜG (Munich: C.H. BECK, 2017), § 29 mn. 1 et seq.; D. Poelzig, 'Normdurchsetzung', p. 226 et seq.; M. Santelmann, '§ 59 WpÜG', in R. Steinmeyer (ed.), WpÜG. Kommentar (Berlin: Erich Schmidt Verlag, 2019), 4 ed., § 59 mn. 4 et seq.

[38] BGH, 11.06.2013 – II ZR 80/12, (2013) Zeitschrift für Wirtschaftsrecht 1565.

[39] BGH, 29.07.2014 – II ZR 353/12, (2014) Zeitschrift für Wirtschaftsrecht 1623; today again in the Postbank 'saga', BGH, 13.12.2022 - II ZR 14/21, BGHZ 235, 295 (on acting in concert matters).

[40] BGH, 7.11.2017 – II ZR 37/16, BGHZ 216, 347 (Celesio I); and BGH, 23.11.2021 – II ZR 312/19, BGHZ 232, 46 (Celesio II); see also BGH, 23.5.2023 – II ZR 219/21, 2024 Zeitschrift für Gesellschafts- und Unternehmensrecht (ZGR) 637 (Stada).

aa) Failure to Make a Mandatory Offer (Art. 5(1) TOD)

If the bidder violates his or her duty to make a mandatory bid, the shareholders of the target company have no right to claim. This was subject of the BKN case. In this case, the Federal Supreme Court (Bundesgerichtshof or BGH) was confronted with the following facts. The plaintiff was an offshore investment company with headquarters in the Turks and Caicos Islands, while the defendant was a US investment fund. The target company, BKN International AG, also had an office in Cologne, Germany. The plaintiff argued that the investment fund had crossed the 30 per cent threshold several times. Furthermore, it was asserted that the investor's wife, because of her holding in the target company, had acted in concert with the defendant. Hence, assuming a violation of the duty to bid, the plaintiff claimed the payment of 987,000 euros as consideration for the transfer of 300,000 shares held in the target company and, subordinately, the same amount as interest on capital.

Against this factual background, the Federal Supreme Court expressed the following principles. First, the shareholders of the target company have no right to counter-performance if the bidder violates his or her duty to make a mandatory bid. The right to interest payment requires equally that a tender offer has been launched, though on delay.[41] Second, it is stated that § 35 WpÜG does not represent a protective law (Schutzgesetz) in the sense meant by § 823(2) BGB, and therefore does not justify an ensuing tort liability of the bidder.[42] In the motivation of the judgment, the Federal Supreme judges particularly stressed that the WpÜG is primarily capital-market-law-centred.[43] The merely reflexive shareholder protection is proved by the fact that the supervisory authority performs its tasks only in the public interest (§ 4(2) WpÜG). Thus, the German Takeover Act is not primarily directed at the protection of the shareholder's interest but serves the efficient functioning of the securities market.[44]

bb) Breach of the Minimum Price Rule (Art. 5(4) TOD)

In contrast, shareholders have a claim if the offeror has made an offer in accordance with Art. 5(1) but has not offered a price that meets the minimum requirements under Art. 5(4) TOD. This point of view was shared in the later cases Postbank, Celesio I and Celesio II. Although concerning voluntary bids, the principles of law established in these decisions are applicable also to

[41] For the inapplicability of § 38 WpÜG in the case of a tender offer not being launched at all, see already BGH, 18.09.2006 - II ZR 137/05, BGHZ 169, 98 (WMF).

[42] BGH, 11 June 2013 - II ZR 80/12, (2013) Zeitschrift für Wirtschaftsrecht, 1565, mn. 36.

[43] BGH, 11 June 2013 - II ZR 80/12, (2013) Zeitschrift für Wirtschaftsrecht, 1565, mn. 19.

[44] BGH, 11 June 2013 - II ZR 80/12, (2013) Zeitschrift für Wirtschaftsrecht, 1565, mn. 20. In the literature, D. Poelzig, 'Normdurchsetzung', p. 233 ('Instrumente der Marktregulierung zum Schutz funktionsfähiger Kapitalmärkte'). Still, one might reply that if the shareholders are not protected ex ante, then they are less incentivised to invest in the company, thereby undermining the efficient functioning of the capital market.

(incorrect) mandatory tender offers.[45] The quaestio iuris dealt with by the courts concerned, therefore, not the violation of the duty to bid, but the application of the minimum price rules in the case of a takeover bid having actually been made. Accordingly, shareholders who accepted the (voluntary) takeover bid have a right to claim for the minimum price on the basis of Art. 5(4) TOD. This specified, in the Postbank dispute, the plaintiff Effecten-Spiegel-AG, which had accepted the (voluntary) takeover offer made by Deutsche Bank AG on the shares of Postbank AG at the price of 25 euros per share, sued Deutsche Bank for the payment of the difference between the offered price and the alleged higher amount due to the plaintiff (57 euros per share) on the basis of a mandatory takeover bid that should have been previously made because of an assumed change of control. The right to claim is based on the contract between the bidder and the shareholder which accepted the bid. Consequently, the Federal Supreme Court granted such entitlement only to the target shareholders which had tendered their shares to the bidder.[46] This opinion was finally confirmed in the two Celesio judgments.[47]

cc) Reluctance to Use Private Enforcement

In conclusion, it can be said that, although the German takeover regulation provides for private enforcement instruments, above all the suspension of shareholders' rights, it denies the individual private right of actions of the duty to bid and limits the target shareholders' claims to the right to get adequate consideration for the shares tendered. According to this regulatory philosophy, public enforcement measures offer instead an adequate toolset to ensure the

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[45] For this opinion D. Horcher, 'Zivilrechtlicher Rechtsschutz', p. 283; Nietsch, '§ 29 WpÜG', in N. Paschos and H. Fleischer (eds.), Handbuch Übernahmerecht nach dem WpÜG (Munich: C.H.BECK, 2017) § 29 mn. 22.

[46] BGH, 29.07.2014 – II ZR 353/12, BGHZ 202, 180, mn. 23.

[47] In the Celesio cases, concerning the voluntary takeover of Celesio AG by McKesson, the legal question was whether the price paid by the bidder for the purchase of convertible bonds from another shareholder is material for the purposes of the best price rule; the German Federal Supreme Court answered the question affirmatively, thus condemning McKesson to pay an additional sum of 7.45 euro to the plaintiff Magnetar, a US hedge fund. With the Celesio II ruling, the Supreme Court excluded a pre-contractual secondary obligation (vorvertragliche Nebenpflicht) by the bidder towards the target shareholders. For a comment, cf. M. Brellochs, 'Zur Angemessenheit der Gegenleistung im Übernahmerecht', (2018) 47 Zeitschrift für Unternehmens- und Gesellschaftsrecht 811 et seq.; T. Tröger, 'Keine private Durchsetzung der Preisregeln im Übernahmerecht' (2022) Zeitschrift für Unternehmens- und Gesellschaftsrecht 433 et seq.

efficient functioning of the market for corporate control. Certainly, some scholarship expresses dissenting views,[48] but the outlined judicial practice seems settled.[49]

V. Harmonisation of the Private Enforcement Regime in the TOD

At this point, the central question becomes whether, in view of the different national law-in-action approaches outlined above, new EU legislation introducing a common rule of civil liability in the event of a breach of the MBR is advisable (or feasible) or not.[50]

1. Civil Liability as an Enforcement Instrument

Raising such an issue seems legitimate and sensible if one only considers that the TOD elevates the protection of minority shareholders to an explicit regulatory goal, whose fulfilment must therefore be assured in a satisfactory manner. However, the practical experience shows that this is not always the case. In fact, there might well be a concrete risk of under-enforcement, as the Fondiaria-SAI case distinctly showed, with the violation of mandatory takeover bid rules thus remaining undetected. The same applies for German law, where in the Postbank case the breach of the mandatory bid rule initially remained undetected and was only uncovered by the later voluntary takeover bid.[51] Hence, private remedies may play an important deterrence role, thus delivering a significant, preventive incentive for lawful behaviour on the capital market.[52]

[48] Cf. J. Ekkenga/C. Schirrmacher, '§ 35 WpÜG', in Beurskens/Ehricke/Ekkenga (eds.), Wertpapiererwerbs- und Übernahmegesetz (Munich: C.H.BECK, 2021) 2nd ed. § 35 mn. 104–108; W. Meilicke/F. Meilicke, 'Die Postbank-Übernahme durch die Deutsche Bank – eine Gestaltung zur Vermeidung von Pflichtangeboten nach § 35 WpÜG?' (2010) Zeitschrift für Wirtschaftsrecht 558, 566; S. Balthasar, 'Die Preisregeln', p. 116, 128 et seq.; K. Hasselbach, '§ 35 WpÜG', in H. Hirte, C. Seibt, S. Mock and S. Schwarz (eds.), Kölner Kommentar zum WpÜG (Cologne: Carl Heymanns Verlag, 2022), 3rd ed., § 35 mn. 294; C. Seibt, 'Rechtsschutz im Übernahmerecht' (2003) Zeitschrift für Wirtschaftsrecht 1873–1874; T. Tröger, 'Keine private Durchsetzung', 438, 444.

[49] For a good overview, D. Horcher, 'Zivilrechtlicher Rechtsschutz', p. 285 et seq., 290. Interestingly, the Austrian scholars, traditionally strongly influenced by their German peers, unanimously recognise private minority shareholder protection in the case of a breach of the duty to make a mandatory takeover bid pursuant to § 22 Übernahmegesetz (ÜbG): cf. M. Winner, 'Gedanken zum Sanktionensystem im Übernahmerecht. Festheft für Peter Doralt zum 80. Geburtstag' (2019) Der Gesellschafter 121; C. Diregger, S. Kalss and M. Winner (eds.), Das österreichische Übernahmerecht (Vienna: Linde, 2007), 2 ed., § 158 mn. 337.

[50] For such a question with reference to the MAR, V. D. Tountopoulos, 'Market Abuse and Private Enforcement', (2014) 11 European Company and Financial Law Review 332.

[51] BGH 29.07.2014 - II ZR 353/12, BGHZ 202, 180 (Postbank).

[52] P. Giudici, 'Private Law Enforcement', p. 18 et seq.; D. Markworth, 'Marktmissbrauchsverordnung und effet utile' (2019) 183 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 67; for an in-depth analysis of the regulatory function of private law, A. Hellgardt, Regulierung und Privatrecht (Tübingen:

Furthermore, the confidence-building function of private liability cannot be neglected, insofar as it ensures also in this field that investors can rely on being compensated for their losses in the case of violation of the duty to bid. Facilitating private enforcement through liability rules benefits stock markets.[53] From this perspective, a liability rule is not intended to serve individual protection alone, but rather must be seen as an additional instrument for the protection of the market as an institution.[54]

2. Policy Indications from 'Adjacent' Enforcement Systems?

Although this evidence clearly speaks in favour of harmonising private enforcement rules, at the EU level, as already mentioned, it is not necessary for Member States to grant a private right of action to minority shareholders for the immediate protection of their interests.[55] In order to better understand the logic and rationality of such a policy choice and subsequently assess the opportunity of revising the same, it seems useful to look at 'adjacent' enforcement regimes. In many legislative acts with a focus on capital markets, enforcement is exclusively based on public law instruments: for example, the Market Abuse Regulation (EU) No 2014/596 (MAR), like its predecessor,[56] by relying on specific and severe administrative and also criminal sanctions,[57] omits any reference to a private right of action against those responsible for market abuses. The same is true for the Securitisation Regulation (EU) No 2017/2402. Hence, both the availability and the degree of private enforcement fall entirely within the domain of national laws.[58] The

Mohr Siebeck, 2016), p. 47 et seq.; D. Poelzig, 'Normdurchsetzung', p. 361 et seq.; R. Veil/A. Brüggemeier, 'Kapitalmarktrecht zwischen öffentlich-rechtlicher und privatrechtlicher Normdurchsetzung', p. 278 ('Haftungsrecht soll auch präventiv wirken'); for a systematic overview, G. Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe', (2006) 206 Archiv für die civilistische Praxis 352.

[53] R. La Porta/F. Lopez-de-Silanes/A. Shleifer, 'What Works in Securities Laws?', (2006) 61 The Journal of Finance 1.

[54] For such reasoning, referred to the MAR but valid also for the present discussion, D. Markworth, 'Marktmissbrauchsverordnung und effet utile', 61.

[55] See Section II.

[56] Market Abuse Directive 2003/6/EC (Art. 14); in the case law, Case C-174/12, Alfred Hirmann v. Immofinanz AG [2013] ECLI:EU:C:2013:856 mn. 40.

[57] Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (CRIM MAD): for a comment, E. Basile, 'Criminal Sanctions', in M. Ventoruzzo and S. Mock, Market Abuse Regulation (Oxford: OUP, 2022), 2nd ed., p. 175 et seq.

[58] Cf. D. Busch, 'The private law effect of the EU market abuse regulation' (2019) 14 Capital Markets Law Journal 296, recalling the Immofinanz, Genil and Nationale-Nederlanden cases; Markworth, 'Marktmissbrauchsverordnung und effet utile', 46 et seq., 49, 66; C. Thomale, 'Appendix to Art. 30 MAR – Private Enforcement', in S. Kalss, M. Oppitz, U. Torggler and M. Winner (eds.), EU Market Abuse Regulation (Cheltenham: Edward Elgar, 2021), p. 364 et seq., 367; V. D. Tountopoulos, 'Market Abuse and Private

restrictive approach is certainly not imposed by limitations resulting from the application of Art. 114(1) TFEU (principle of approximation of laws) or Art. 5(3) TEU (principle of subsidiarity).[59] Instead, it seems to correspond to a specific policy choice.[60]

In fact, in other legislative acts, such as Art. 11 of the Prospectus Regulation (EU) No 2017/1129 (PR) and, similarly, Art. 7 of the Transparency Directive (EU) No 2004/109 (TD),[61] it is stated in a quite laconic and programmatic way[62] that Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to the persons responsible for the infringement of the protected interests, thereby leaving the design of the civil liability regime (i.e. issues of causality, assessment of damages, etc.) to the individual Member States.[63] In this way, Member States, also in order to reflect their specific institutional settings, retain significant autonomy as to the 'how' – but no longer as to the 'whether' – to enforce civil liability by means of a private right of action. Because of this minimum degree of harmonisation, we still see a disparate implementation of civil law enforcement instruments in the Member States.[64]

Enforcement', 305 et seq., 322 et seq.; very critical towards the absence of a harmonised framework of private liability D. Poelzig, 'Private enforcement', 801, 816, 846 seq. ('funktionale Subjektivierung'); R. Veil, 'Private Enforcement in European Capital Markets Law', in B. Gsell and T. M. J. Möllers (eds.), Enforcing Consumer and Capital Markets Law (Cambridge: Intersentia, 2020), p. 405, 421–422; for comparative references, J. W. Flume, 'Private Enforcement of the Market Abuse Regulation in European Law, Austria and Germany', in M. Ventoruzzo and S. Mock (eds.), Market Abuse Regulation (Oxford: Oxford University Press, 2022), 2nd ed., p. 75 et seq.

[59] Generally on these principles, A. F. P. Brüggemeier (ed.), Harmonisierungskonzepte im europäischen Kapitalmarktrecht (Tübingen: Mohr Siebeck, 2018), p. 43 et seq.; T. Kahnert (ed.), Rechtsetzung im Europäischen Gesellschaftsrecht (Tübingen: Mohr Siebeck, 2012), p. 19 et seq.

[60] C. Thomale, 'Appendix to Art. 30 MAR', p. 364–365.

[61] Art. 7 was not amended by Directive 2013/50/EU of 22 October 2013.

[62] M. Ventoruzzo, 'Like Moths to a Flame – International Securities Litigation after Morrison: Correcting the Supreme Court's Transactional Test' (2012) 52 Virginia Journal of International Law 405, 413 ('vague European rule').

[63] Cf. P. Giudici, 'Private Enforcement of Transparency', in V. D. Tountopoulos and R. Veil (eds.), Transparency of Stock Corporations in Europe, (London: Bloomsbury Publishing, 2019), p. 297, 298 et seq.; O. Mörsdorf, 'Private enforcement im sekundären Unionsprivatrecht: (k)eine klare Sache?' (2019) 83 Rabels Zeitschrift für ausländisches und internationales Privatrecht 797, 831 et seq.; R. Veil/A. Brüggemeier, 'Kapitalmarktrecht zwischen öffentlich-rechtlicher und privatrechtlicher Normdurchsetzung', p. 294; M. Wundenberg, 'Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht' (2015) Zeitschrift für Unternehmens- und Gesellschaftsrecht 124 et seq., 160.

[64] For this account and critical towards such enforcement architecture, R. Veil/M. Wiesner/M. Reichert, 'Disclosure and Enforcement', 503 et seq.; D. Busch, 'The influence of the EU prospectus rules on private law' (2021) 16 Capital Markets Law Journal 3 et seq.

However, younger legislative acts foresee an EU-law-based civil liability regime, such as in Art. 35a Rating Regulation (EU) No 462/2013, Art. 11 PRIIPS Regulation (EU) No 1286/2014 and, most recently, in the Markets in Crypto-Assets Regulation (EU) No 2023/1114 (Arts. 15, 26, 52 MiCAR). In these newer legislative packages, an EU standard for civil liability in financial market law has been emerging. The civil liability rules are inter alia open to other claims under national law, are of mandatory character and refer to national law for the scope of liability and statute of limitations. In these cases, Member States lack not only the autonomy to decide 'whether', but to a large extent also 'how', to implement civil liability for violations of the law.[65]

A look at 'adjacent' enforcement regimes reveals: while the European legislator was initially rather reluctant towards private enforcement of its own financial market regime,[66] there has been greater willingness to introduce specific and (more) detailed civil liability to enforce capital market regulations in more recent legislation. With reference to level 1 acts of European capital markets law, we witness not only an advanced harmonisation of public enforcement in MAR, PR and TD, but now also more harmonisation of private enforcement. In fact, while civil liability is either absent or relegated to a secondary role in older legal acts, in newer legal acts private enforcement plays an equal role. This constant policy approach reflects the fact that the EU legislator is free either to formulate the investor protection regulations it has enacted as subjective rights and thus subject them to a compulsory enforcement regime under private law or, alternatively, to regulate the enforcement standard itself conclusively, eventually with sole recourse to sanctions under public law.[67] Moreover, there is a strong tendency in EU law to mix public and private enforcement.

3. Consequences for the TOD

In the light of this development towards more private enforcement, it is worth considering whether a bidder's civil liability for the breach of the mandatory bid requirements should explicitly be introduced in the TOD. An argument in favour of civil liability is that otherwise there is a risk of under-enforcement. Public authorities are not able to completely monitor the whole market. In contrast, aggrieved minority shareholders often learn about violations much more quickly and directly. Especially, in cross-border cases, which are typical for capital markets, public authorities reach their limits. Due to the principle of territoriality they are not allowed to take investigative or sanctioning measures abroad. Private international law, on the other hand, offers a possibility of enforcing claims across borders. All in all, an effective enforcement system requires not only public law instruments but also a civil liability. A regulation at the EU level is

[65] Critical towards the MiCAR enforcement regime, recently, P. Maume, 'The Regulation on Markets in Crypto-Assets (MiCAR): Landmark Codification, or First Step of Many, or Both?' (2023) European Company and Financial Law Review 243, 273 et seq. ('a missing puzzle piece').

[66] For this statement, C. Thomale, 'Appendix to Art. 30 MAR', 361–362.

[67] For this view, O. Mörsdorf, 'Private enforcement im sekundären Unionsprivatrecht', 832.

needed because otherwise it is to be feared that different levels of enforcement – as we can well see from the comparison of Italian and German law – lead to uneven application of the TOD.[68]

If we decide to introduce civil liability in the TOD, the next policy step requires ascertaining whether an eventual harmonisation effort should be directed towards the design of a detailed liability basis under EU law – as in the younger legal acts, such as MiCAR, PRIIPS Regulation or Rating Regulation – or towards harmonising national law through a rather vague rule – as in the TD or PD. The first option (i.e. a detailed EU-law-based liability rule) would ensure a homogeneous level playing field with reduction of transaction costs of cross-border activities;[69] on the other hand, it might risk distorting the multi-layered sanctionary framework – ranging from administrative to criminal law, and sometimes involving private law – which at national level eventually proves to be already effective, proportionate and dissuasive (Art. 17 TOD), and thus ultimately compatible with the effet utile principle (Art. 4(3) TEU). This has particularly been stressed by the German courts that consider their enforcement system to be effective and sufficient.[70] Thus, a detailed EU-law-based liability rule, such as in the Rating Regulation, PRIIPS Regulation or MiCAR, should only be preferred if, at the same time, the law on public enforcement in the TOD were also harmonised at the EU level.[71] This is the only way to ensure that over-enforcement and frictions between public and private enforcement are avoided. However, given the tortuous gestation of the TOD, a detailed rule on civil liability and a holistic harmonisation of public and private enforcement do not seem realistic at this point.[72]

[68] The legislative competence of the EU harmonising private enforcement for the purpose of building a Common Market can be envisaged in Art. 114 and Art. 115 TFUE: for this opinion, M. Wundenberg, 'Perspektiven', 149–150; R. Veil/M. Wiesner/M. Reichert ert, 'Disclosure and Enforcement', 457; referring also to Art. 50(2)(g) TFEU, T. Kahnert (ed.), Rechtsetzung im Europäischen Gesellschaftsrecht: Harmonisierung, Wettbewerb, Modellgesetze (Tübingen: Mohr Siebeck, 2012), p. 13 et seq.

[69] For the debate on pros and cons of harmonisation versus regulatory competition, cf. in the vast literature W. Bratton/J. McCahery/S. Picciotto/C. Scott (eds.), International Regulatory Competition and Coordination (Oxford: Oxford University Press, 1996); L. Enriques/M. Gatti, 'The Uneasy Case for Top-down Corporate Law Harmonization in the European Union' (2006) 27 University of Pennsylvania Journal of International Economic Law 939; C. Gerner-Beuerle, 'United in Diversity: Maximum versus Minimum Harmonization in EU Securities Regulation' (2012) 7 Capital Market Law Journal 317 et seq.; H. Fleischer/K. U. Schmolke, 'The Reform of the Transparency Directive: Minimum or Full Harmonisation of Ownership Disclosure?' (2011) 12 European Business Organization Law Review 121, 134 seq.; T. Kahnert, 'Rechtsetzung im Europäischen Gesellschaftsrecht', p. 109 et seq.

[70] BGH 29.07.2014 - II ZR 353/12, BGHZ 202, 180, mn. 21 (Postbank).

[71] For this view also M. Wundenberg, 'Perspektiven', 160.

[72] For the same opinion also M. Winner, 'Übernahmerecht – Die Europäische Perspektive', in R. Veil, H. C. Grigoleit and M. Habersack (eds.), Öffentliche Unternehmensübernahmen (Tübingen: Mohr Siebeck, 2022), p. 139 ('ein einheitlicher Rechtsrahmen ohnehin nicht erreicht werden kann'); M. Winner, 'Does the European Union have a mandatory bid rule?', p. 1195; more generally on the full harmonisation Lamfalussy procedure in the capital market, T. M. J. Möllers, 'Vollharmonisierung im Kapitalmarkt', in B. Gsell and C.

Therefore, a (merely) programmatic rule of the kind provided for in the PR and the TD appears to be the preferable solution. Though not assuring absolute legal certainty, a programmatic rule still could be valued – de lege ferenda – as a significant step forward in harmonising a core MBR issue.[73]

VI. Conclusion and Outlook

(1) Like many other EU capital markets directives adopted before the financial market crisis, the TOD is silent on private enforcement. In particular, it does not provide for a private right of action for minority shareholders in the event of a breach of the mandatory bid rule. The Directive only provides for public enforcement, such as administrative fines.

(2) The analysis of the Italian and German law has revealed that there is a significant lack of homogeneity in civil liability at the national level. Some Member States, such as Italy, provide for private enforcement by giving shareholders the right to claim damages for breach of the duty to bid. Others, such as Germany, rely mainly on public enforcement and are rather reluctant to provide for private rights of action for minority shareholders. However, an uneven level of (private) enforcement carries the risk that the harmonised rules on duties will be applied unevenly across the Member States.

(3) Therefore, this chapter suggests that a rule on civil liability for a breach of the mandatory bid rule should be included in the Directive. Whereas supervisory authorities have the necessary investigative powers and the ability to impose targeted and proportionate sanctions in individual cases, public enforcement mechanisms may be ineffective due to incentive problems, the risk of regulatory capture, and the principle of territoriality. In contrast, minority shareholders may have informational advantages and sufficient incentives to enforce their claims. Finally, private claims can also be enforced across borders on the basis of international private law.

(4) From a policy perspective, when considering the remedies available to ensure a more uniform level playing field, which is ultimately the objective of the minimum harmonisation directive on

Herresthal (eds.), Vollharmonisierung im Privatrecht (Tübingen: Mohr Siebeck, 2009), p. 247 et seq. See also the more cautious approach of A. Recalde/M. Winner, 'Public Takeovers', in R. Veil (ed.), Regulating EU Capital Markets Union (Oxford: Oxford University Press, 2024), p. 444 et seq.

[73] Generally favourable to further harmonisation of private enforcement at the EU level, R. Veil/M. Wiesner/M. Reichert, 'Disclosure and Enforcement', 452 et seq., 456 ('it is sensible to further harmonise private enforcement of European capital markets law instead of choosing regulatory competition as an alternative strategy'); R. Veil, 'Private Enforcement in European Capital Markets Law – Perspectives for a Reform at the Example of the Obligation to Disclose Inside Information', in B. Gsell and T. M. J. Möllers (eds.), Enforcing Consumer and Capital Markets Law (Cambridge: Intersentia, 2020), p. 423; D. Busch, 'The influence of the EU prospectus', 30; in a long-run perspective, once supervisory law is fully harmonised, M. Wundenberg, 'Perspektiven', 152 et seq.

cross-border takeover bids, it was decided to avoid solutions that could lead to the opening of a Pandora's box. Thus, further harmonisation efforts of the TOD, irrespective of their very difficult, if not unlikely, political feasibility, should in any case be carefully weighed on a case-by-case basis against the benchmark of the efficient functioning of the internal market for corporate control. Therefore, following the examples offered by adjacent regulations (i.e. the PR and TD), we recommend the introduction of a programmatic rule recognising a private right of action against the bidder for failure to launch a mandatory bid.[74]

[74] Italian regulation on academic evaluation requires some form of identification of each author's individual contribution to a joint law paper. Exclusively for this purpose, we mention that Section IV.1. was written with the prevalent contribution of Peter Agstner, and Section IV.2. with the prevalent contribution of Dörte Poelzig. The authors equally contributed to other sections.

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