ECONOMIC AND LEGAL ANALYSIS OF DEFENCE STRATEGIES AGAINST HOSTILE TAKEOVERS IN THE GERMAN MARKET

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International Business Abstract

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Abstract

Due to the economic weakening of companies as a result of the COVID-19 pandemic, it is expected that the activities on the takeover market will increase in the future. Chinese companies in particular are expected to play an important role. The takeover market is a highly regulated legal area under German law and every takeover is therefore accompanied by a time-consuming and cost-intensive process. Of the expected takeovers, the majority will be friendly takeovers, but not every takeover will be consensual. The aim of this thesis is to analyse the appropriateness of measures taken by companies to fend off a hostile takeover from a legal and economic perspective and to recommend a course of action.

The work, which is based on theoretical literature, explains the fundamentals of hostile takeovers, such as the German capital market, which the takeover market is part of. Subsequently, the legal framework of hostile takeovers is explained and the process as well as the financing of the takeover are explained. The measures are explained and incorporated into this framework. The WpÜG already severely restricts the measures, most of which originate in the United States of America, especially through §33 WpÜG, and thus often lose their deterrent factor.

This showed that it is not possible to define a recommendation for action that is suitable for all companies. Rather, the particularities of the individual companies, especially their financial strength, must be taken into account and included in the strategy. It is advisable to assess the current market and the risk potential on a permanent basis and to prepare measures in advance in order to be prepared in the event of a potential bid.

Keywords	Mergers & Acquisition, Hostile takeover, Defence strategies, German capital market, German Securities Acquisition and Takeover Act (WpÜG)
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Contents

List of Abbreviations

AktG	Aktiengesetz (ger – meaning: German Stock Corporation Act)
Art.	Article
BGB	Bürgerliches Gesetzbuch (ger. – meaning: German Civil Code)
BörsG	Börsengesetz (ger. – meaning: German Stock Exchange Act)
cf.	carried forward
cl.	clause
DepotG	Depotgesetz (ger. – meaning: German Securities Deposit Act)
EEA	European Economic Area
e.g.	exempli gratia (lat. – meaning: for example)
EStG	Einkommensteuergesetz (ger. – meaning: German Income Tax Act)
et seqq.	et sequentes (lat. – meaning: following)
e.v.	Eingetragener Verein (ger. – meaning: Registered Association)
ger.	German
HGB	Handelsgesetzbuch (ger. – meaning: German Commercial Code)
i.e.	id est (lat. – meaning: meaning)
IPO	initial public offering
KAGB	Kapitalanlagegesetzbuch (ger. – meaning: German Investment Companies Act)
KAGG	Gesetz über Kapitalanlagegesellschaften (ger. – meaning: German Investment Company Act)
KapMuG	Kapitalanleger-Musterverfahrensgesetz (ger. – meaning: Capital Investor Model Case Act)
KstG	Körperschaftsteuergesetz (ger. – meaning: German Corporation Tax Act)
KWG	Kreditwesengesetz (ger. – meaning: German Banking Act)
lat.	Latin

Mar	Marktmissbrauchsverordnung (ger. – meaning: German Market Abuse Regulation)
MDax	Mid-Cap-DAX
M&A	Mergers and Acquisition
para.	paragraph
SDax	Small-Cap-DAX
SME	Small and Mid-sized Enterprise
StGB	Strafgesetzbuch (ger. – meaning: German Criminal Code)
Subpara.	subparagraph
TecDax	Technology DAX
UBGG	Gesetz über Unternehmensbeteiligungsgesellschaften (ger. – meaning: Law on Private Equity and Venture Capital Companies)
UmwG	Umwandlungsgesetz (ger. – meaning: German Transformation Act)
VAG	Versicherungsaufsichtsgesetz (ger. – meaning: German Insurance Supervision Act)
VerkProspG	Verkaufsprospektgesetz (ger. – meaning: German Sales Prospectus Act)
VermAnlG	Vermögensanlagengesetz (ger. – meaning: German Investment Act)
WpHG	Wertpapierhandelsgesetz (ger. – meaning: German Securities Trading Act)
WpPG	Wertpapierprospektgesetz (ger. – meaning: German Securities Prospectus Act)
WpÜG	Wertpapiererwerbs- und Übernahmegesetz (ger. – meaning: GermanSecurities Acquisition and Takeover Act)
WpÜG-AVO	WpÜG-Angebotsverordnung (ger. – meaning: German Securities Acquisition and Takeover Act Offer Ordinance)

1 Introduction

Every company that is listed on the stock exchange has the potential to be taken over by another firm. The former American speciality is also taking place in the European and German markets nowadays. Even if there are considerable differences, the topic should not be underestimated, especially due to globalisation, and should therefore be of particular relevance.

Headlines such as "German corporations become bargains in the Corona crisis" (Altmaier, 2020) can be found in the trade press, especially at the beginning of the Corona crises. The German media regularly reports on threatened takeovers of German companies, especially by Chinese firms. That this concern is not unfounded is shown by the continuing popularity of German firms as the most frequent takeover targets for Chinese companies and investors in the European region (Ernst & Young, 2021). In times of financial crises, increased takeover activity can be expected. Since the German economy was already considerably weakened by the situation and the stock market prices of the companies also fell with the onset of the current crisis, they offer a high potential for companies that want to achieve the highest possible increase in value through a company takeover. While it can be assumed that takeovers will decline, especially in the heavily influenced months, the number of takeovers will increase significantly in the following months (Gall, 2020). Consequently, the relevance of takeovers and the associated measures will increase in the future. Even though takeovers are wanted and often offer an increase in potential, not every takeover is desired or intended. In particular, the board of directors, which is regularly replaced in the case of unsolicited takeovers, will try to prevent such takeovers.

This raises the question of what opportunities exist for companies to defend themselves against hostile takeover bids? Can a company protect itself against takeovers in advance or are only restrictive measures promising success? And what legal framework regulates these processes?

In order to do justice to the complexity of the topic, the following thesis first defines takeovers and distinguishes between friendly and hostile takeovers. The process of a hostile takeover as well as defence measures against a hostile offer will be examined. The focus lies on German law, since according to Art. 4 Rome I Regulation is used as the connecting factor if there is no choice of law. This means, according to Art. 4 para.2 in conjunction with Art. 19 Rome I Regulation, the purchase of shares falls within the jurisdiction of the place of residence of the party rendering the performance under the law of obligations (seller). This refers to the moment of the conclusion of the contract (Martiny, 2010). The place of residence must also be the habitual residence, which is described in terms of section 19 para. 1 cl. 1 Rome I Regulation as the place in relation to legal persons and companies where the head office is located (ROM I, 2008). As a result, the choice of law for German businesses will regularly fall under German law.

A company acquisition can be carried out in two different ways. It can be contested through an asset deal, in which only the company assets are purchased and a transfer to the acquirer takes place, or through a share deal. A share deal is where the participation right in a company is bought, here the values are included and are not separated (Heckschen, 2019). Due to the complexity and the scope of the thesis, it refers to the purchase of participation rights and the consideration of asset deals is excluded.

Basically, any company can be taken over, if the fungibility of company shares is ensured. Therefor the legal form of the target company is of minor (Klein, 1997). Since the takeover often refers to joint-stock companies that trade their shares as securities, other potential company forms are not considered. By purchasing shares, investors and companies have the opportunity to buy a company share in the form of securities (Deutsche Börse AG, 2019).

1.1 Research objectives and questions

The following paper analyses the strategies that are used to prevent and defend hostile takeovers by the target company. The concentration is on the German market with reference to German takeover legislation and the German capital market.

The fundamental question is:

- What strategies are potentially effective for a company to defend itself against a hostile takeover in the German market?

At the same time the following questions are posed:

- How is a hostile takeover defined and for what reasons and motives are takeovers carried out?
- Does a German market for hostile takeovers exist and which legal rules regulate this market?
- What opportunities and risks arise from defensive strategies?

For this purpose, the basics of hostile takeovers will be outlined before analysing the German market for takeovers. In particular, the special features of the German legal system with regard to takeovers will be addressed and the capital market will be examined in more detail. Subsequently, the processes of a hostile takeover are illustrated, followed by an analysis of the defence strategies. An evaluation of the measures from an economic and legal point of view is then carried out. After a recommendation for action, a final conclusion is drawn.

The objective of this paper is to analyse and evaluate the defence measures, taking into account the chances of success, the economic risks and the legal regulation.

1.2 Research methods

In order to evaluate and provide an appropriate analysis of the above-mentioned question, scientific literature and statutory regulations are used as a basis. Due to the context of the thesis, and the rarity of the occurrence of the described process, this is a literature-based approach.

In particular, specialised journals, legal commentaries, reference books, reports, dissertations and websites were used as a basis. A special focus is given to current literature, as jurisdiction changes regularly and therefore facts are reassessed. As many findings have general applicability and have not been refuted, initial literature is also considered. A problem arises as surveys on hostile takeovers are not regularly and extensively collected, which means that many studies are based on theories and a limited number of takeovers that have been widely documented in the media. Therefore, observations serve to draw indirect conclusions (Spindler T. M.-A., 2020).

As the field of mergers and acquisitions is a combination of economics and law, and the legal level forms the basis and framework of the analysis, the legally based literature is of special significance.

The terms "mergers and acquisitions", "Securities Acquisition and Takeover Act", "company acquisition" and "Stock Corporation Act" served as keywords. Literature from the University and State Library of Düsseldorf, the library portals of the Niederrhein University of Applied Sciences and the HAMK Häme University of Applied Sciences were used for the literature research.

2 Fundamentals of hostile takeovers

For a specific analysis of the defensive measures, it is first necessary to determine a common understanding of hostile takeover and to define which parties are involved in this process as well as the motives behind the takeovers.
German companies are rarely the target of a hostile takeover. The main reasons for this reluctance are manifold: the structure of a public limited company in Germany is different from that in other countries and the number of listed companies is smaller (Schanz, Feindliche Übernahmen und Strategien der Verteidigung, 2000). Nonetheless, it is repeatedly evident that German companies are also targets of a takeover. Chinese companies demonstrate strong interest in investing in German companies (Ernst & Young, 2021).
In the following, the term hostile takeover is defined and the companies that are particularly susceptible to this process are explained. Furthermore, the motives behind takeovers will be examined.

2.1 Definition of hostile takeovers

A hostile takeover is a more specialised form of acquisition (Rempp, 2019). An acquisition is the process in which a company or a part of a company is bought up. The aim is to be able to control the performance elements or resource utilisation of the company (Kenning, 2018). The legal definition of section 29 para. 1 WpÜG refers to a takeover as an offer whose objective is to gain control (WpÜG, 2001).

A takeover presupposes that the number of voting shares held by the acquiring company guarantees the exercise of control by the company in the general meeting. According to section 133 para. 1 AktG, decisions are determined by the majority of votes cast at the general meeting. The underlying principle is that the acquiring company can control and direct the resolutions at the latest when it holds more than 50 % of the shares and therefore the majority of the voting shares of a company. Since section 133 para 1 AktG refers solely to the shareholders that are actually present, in practice 50 % of the shares are not required. The 24 largest companies in Germany stated that the average actual attendance at the general meeting of shareholders with a majority of free float is 60 % and therefore a significantly lower stake of around 37.5 % is frequently sufficient to gain control over the resolutions of the general meeting (Schuster, 2003). From a purely legal point of view, the takeover of control takes place as soon as a share of 30% of the voting rights in the target company is attained (WpÜG, 2001).

It is important to distinguish between a friendly and a hostile takeover. A friendly takeover requires that the offer of the buying company takes place in consensus with the management of the company to be acquired (Breuer, Freundliche Übernahme, 2018). A hostile takeover can be undertaken after a friendly takeover fails (Cascante & Tyrolt, 2019).

The acquisition is a hostile takeover if the acquisition is made against or without the consent of the executive bodies of the target company (Hundt D. S., 2018). Consequently, a hostile takeover can also be defined as a takeover of control against or without the will of the administrative body (Engelhard, 2018).

The term "hostile" in this context refers to the rejection and is meant in an unbiased manner. Despite criticism, the term hostile takeover has become entrenched in today's literature and is only used neutrally as a terminus technicus (Schuster, 2003).

The decisive factor is the administrative body that rejects the offer, i.e., the board of directors or the management must reject the offer, regardless of the decision-making right of the body (Hundt D. S., 2018).

There is neither a legally standardised definition of a hostile takeover, nor has a continuous data collection on previous hostile takeovers been conducted. As a result, a large number of studies are based on few but publicly known hostile takeovers that have been documented in the media (Spindler T. M.-A., 2020).

2.2 History of takeover activities

The market for mergers and acquisitions has a long history and is particularly strong in the United States of America. In Germany, on the other hand, the market is comparatively small. In the 1970s, the interest of large investors in German companies increased. Companies such as Krupp Hüttenwerke and Daimler Benz AG received offers (Beisel, 2016). Although there has been an increase in takeovers since the 1990s, the market for takeovers has stabilised at just over 2,000 takeovers per calendar year (Statista Research Department, 2021). In comparison, America has around 20,000 deals per year, about 10 times as many as Germany. This is also reflected in the share of the global M&A market by value of the acquisitions: in 2012 North America has a share of 42.2 %, while the eurozone only accounts for 13 % (Statista Research Department, 2013).

This is also evident in hostile takeovers. Hostile takeovers were long considered a speciality of the American market and had been a common procedure for several years before they first appeared on the German market. With the offer of Siemens AG to Eagle Star Insurance, German companies joined in hostile takeovers. Afterwards, German companies were also targeted (Schuster, 2003). Still, the German market has been very quiet so far, with only 17 hostile takeovers taking place between 1985 and 2018 (Rudden, 2021). A closer look at the period between 2001 and 2011 reveals the extent of the phenomenon: of a total of 160 bids that have been made, only 7 have been categorised as hostile (Spindler T. M.-A., 2020). The low number of hostile takeovers can be ascribed, among other things, to the fact that there is a buyer's market in Germany. In an economy characterised by small and medium-sized enterprises and many family businesses, such as the one that exists in Germany, a buyer's market can be attributed to the fact that no suitable and willing successors can be found (Beisel, 2016).

Presumably the best-known M&A deal, and by far the one with the highest transaction volume, is the one between the buyer company Vodafone and the target company Mannesmann, which was completed in 1999 with a transaction volume of almost 205 billion euros (Statista Research Department, 2020). This takeover received considerable media attention, but this was in the interest of both sides. The share price rose and so did the price for Mannesmann shares, but on the other hand the required number of voting rights was also attained (Schuster, 2003).

Since no uniform statutory provision had been created up to this point to regulate such takeovers, the takeover promoted the creation of a uniform set of rules (Beisel, 2016). This regulation was established in the German Securities Acquisition and Takeover Act „Wertpapiererwerbs- und Übernahmegesetz“ (WpÜG) which was issued in 2001 (WpÜG, 2001).

2.3 Motives for hostile takeovers

The reasons for corporate acquisitions are diverse and varied and differ only marginally from investment motives (Becker, Ulrich, & Botzkowski, 2016). They can basically be summarised in three superordinate categories: strategic, monetary or personal (Wirtz, 2003).

2.3.1 Strategic motives

In a survey conducted by Deutsches Aktieninstitut e.V. and White & Case LLP, more than 61 % of respondents cited increasing competition and pressure to consolidate with other companies as the main drivers for acquisitions. In order to remain competitive and to be able to increase competitiveness, acquisitions therefore seem to be a strategic imperative (Hemeling, et al., 2018).

The objective of creating and exploiting synergies in the event of a takeover is a strategic motive. The establishment of synergy concepts is based on the work of Ansoff. Synergies in the takeover context can be defined as change effects resulting from merger or acquisition activities (Wöginger, 2004). According to Wirtz, synergy effects can be expressed in the terminology of the net present value method as follows:

$$"\sum_{t=0}^{T} A_t + \sum_{t=0}^{T} B_t \neq \sum_{t=0}^{T} (A + B)_t"$$

(Wirtz, 2003, p. 58)

A_t and B_t describe the respective return flows of the individual companies at time t. $(A+B)_t$, on the other hand, indicates the return flow of the merged companies. It becomes evident that the return flows differ. Synergies can have both a positive and a negative influence on the returns (Wirtz, 2003). In the case of an acquisition, the companies should exceed the combined values of the individual companies and thereby ensure an improved group result (Reichert, 2011).

Synergies can manifest themselves in various ways, for instance through economies of scale, which states that a cost degression occurs through a larger company size, which, inter alia, arise through the fixed costs distributed over a higher number of units in the areas of procurement, logistics and production. Furthermore, synergies can be achieved through the concept of economies of scope, in which a cost advantage is assumed for heterogeneous product types (Pausenberger, 1993; Wirtz, 2003). The synergy hypothesis is viewed critically in many respects. For instance, the costs of integrating the new company are higher than the savings that can be achieved (Williamson, 1988).

The market dominance theory also offers an explanation for the motivation of a takeover. In the legal sense, market power is the scope of action that companies obtain when they have such a substantial share of competition that the competition can no longer control the company (Bundeskartellamt, 2012). The aim of a company and background of the theory is to obtain a greater influence on the individual parameters of the competition through a higher level of market share and to be able to determine distinctive factors such as price and quality without having to exert a considerable influence (Schmal, 2016).

2.3.2 Monetary motives

Financial motives can be another driving factor for takeovers. The bidder expects the acquiring company to increase its own value or to profit from the takeover through positive financial aspects. These are often tax motives or capital market-related advantages (Wirtz, 2003).

Fiscal advantages arise when the merger of the companies has to pay less taxes than the companies collectively. This can be achieved if a profit-making company buys a company that is making losses and the merged companies are a fiscal unity, an offsetting can take place, thereby alleviating the tax burden (Glaumer & Hutzschenreuter, 2010). In addition, but not conclusively, there is the possibility of using unused loss carry-forwards of the target company, in which the bidding company offsets the achieved profits by using the loss carry-forwards to reduce tax. In this regard, it must be noted that the German legislator already restricted this through section 10 EStG and section 8 KStG (Eisenbarth, 2013).
The best-known motive for buying up companies is asset stripping. This describes a process in which a company is bought up by corporate raiders and shortly afterwards broken up and sold in individual parts (Weisner, 2000).
Target companies are taken over by bidding companies if the latter estimate the potential value of the company to be higher than the current actual use of the assets allows. The bidder perceives a more efficient use of the resources and wants to take advantage of this. This will increase the enterprise value of the target company in the long term (Arlinghaus & Balz, 2003).

Financial motives are underlying most company takeovers. The acquiring company expects to increase its own value or to profit from the takeover through positive financial aspects.

2.3.3 Personal motives

Personal motives also play a role in takeovers. It is assumed that the management pursues personal interests that substantiated a company takeover. The aim can be to increase the sphere of influence and thereby gain power and prestige. A higher salary can also be the goal (Meckl & Lucks, 2013). These personal motives can be summarised under the empire building theory (Weisner, 2000).

Another motivation is the free cash flow hypothesis. According to this hypothesis, acquisitions are made in order to prevent a loss of substance through distribution to the shareholders. Free cash flow is used to acquire new companies. Consequently, no outflow of funds takes place, e.g., distributions to shareholders (Meckl & Lucks, 2013).

2.4 Delimitation of companies at risk for takeover

The factors that ultimately determine the risk of a potential hostile takeover are numerous. There are factors that cannot be influenced by the company as well as those that are specific to the firm. In a 2018 study by Deutsches Aktieninstitut e.V. in cooperation with White & Case LLP, 43 companies from the TecDax, SDax, MDax and the Dax 2018 stated that 9 % of the companies preclude a takeover and 65 % consider a takeover to be very unlikely (Hemeling, et al., 2018).

Even if a takeover is considered very unlikely and the number of takeovers in the German market also argues against a takeover, any company can become the target of a takeover. The goal therefore should be to conduct a risk analysis in advance and thereby be conscious of the potential risks beforehand. Ideally, a defence manual should be formulated that contains a strategy and recommendations for action in the event of a takeover bid (Hemeling, et al., 2018).

Since unspecific factors apply to most companies and cannot be influenced internally, the corporate environment must be examined regularly. If the current economic situation is generally characterised by high liquidity, the risk increases as financial investors become more willing to invest (Brühl, 2003). The market in which the company operates is another determining parameter. If the market is highly competitive and the industry as a whole is very dynamic, takeovers are more likely (von Buddenbroock, 1999).

Other favourable factors are company-specific. Companies that have a diversification advantage, knowledge or experience that a company seeks to acquire, high liquidity or untapped credit options, and other specific internal advantages, are especially attractive for a takeover, despite all the measures taken (von Buddenbroock, 1999; Yamaguchi , 2005; Brühl, 2003). Also, those companies that have a low total capitalisation, hidden reserves that are not anchored in net operating assets, or a high and sustainable cash flow are interesting (Yamaguchi , 2005; Cascante & Tyrolt, 2019; Brühl, 2003).

If a company is traded at a price that is significantly below the estimated value of the financial investors, it is more likely that a bid will be placed (von Buddenbroock, 1999). The same applies to a low and below industry average price-earnings ratio, which reflects the relationship between the share price and the actual net profit of the share (Heldt, Kurs-Gewinn-Verhältnis, 2018; Yamaguchi , 2005). Investors seek to buy shares at a low ratio in order to get the highest possible profit out of a company whose shares were bought at the lowest feasible price (Heldt, Kurs-Gewinn-Verhältnis, 2018). The shareholder structure also has an impact on the risk of the acquisition. If the shares of a company are in high free float, the level of influence is lower or shareholders hold blocks of shares that are ready for sale, which can be bought up easily and quickly, making it simple to gain control over the target comany (Hemeling, et al., 2018; von Buddenbroock, 1999). In order to be as hedged as possible, it is therefore advisable to have an anchor shareholder or to have its shares in low free float (Hemeling, et al., 2018).

These various, but not conclusive, aspects need to be considered in order to assess the feasibility of both friendly and hostile takeovers. Moreover, defensive measures against a hostile takeover can be aligned with the target.

2.5 Hostile takeover stakeholders

Several parties are usually involved in a takeover. These include the target company, its executive bodies and shareholders, as well as the bidder company and its executive bodies, the bank, or the banking consortium, which may be involved for financing purposes. Advisors are also often part of the process. The two main parties involved are the target company and the bidder company.

The Target Company pursuant to section 2 para. 3 WpÜG is a company limited by shares or a partnership limited by shares domiciled in Germany as well as a European domiciled company (WpÜG, 2001). If the takeover is successful, a bundling of previously dispersed shares takes place. The shares are then held in a concentrated form by one shareholder or a group of shareholders. This is referred to as a block (Schuster, 2003).

According to the legal definition in section 2 para. 4 WpÜG, the bidder can be a corporation, a natural person or a legal entity (WpÜG, 2001). Since there is a considerable need for capital, the bidding company is regularly a company (Schmieder, 2008). Communities can also act jointly as bidders. A distinction must be made between the concept of a voluntary bidder and a mandatory bidder. The bidder concept of a voluntary offer, which is always referred to when a takeover bid or an offer is made with respect to the securities, is defined as the offeror who makes or intends to make the bid. Often, an acquisition company is formed, which in the case of a voluntary offer, is classified as the bidder, irrespective of the persons involved. In the case of mandatory offers, the offeror is the party obliged to publish the offer documents pursuant to section 35 para. 2 cl. 1 WpÜG (Santelmann, 2019).

The target company and the bidder are not identical, the only exception being the repurchase of own shares as defined in section 71 et seqq. AktG. This does not constitute an offer within the scope of the WpÜG. What is doable, are management buy-outs. This occurs when a member of the board of directors makes a takeover bid (Santelmann, 2019).

3 A German market for acquisitions

As a result of globalization, markets are becoming more correlated. The takeover market is no exception, especially since many takeover attempts occur on a cross-border scale. Nevertheless, the individual market must be examined in order to evaluate and understand the economic structure, geopolitical and financial/capital market characteristics (Düsterhoff & Kunisch, 2016).

While the unique aspects caused by the separation of Germany and the subsequent reunification were a key factor for a long time, the strong influence of the EU and the geographic location are the main features of today's business environment. Germany frequently assumes the role of a link for companies to expand into Eastern European countries, due to its location. Moreover, being surrounded by trading partners, Germany offers fast access to the borders and important partners. This led among other factors to the strong export position of Germany (Düsterhoff & Kunisch, 2016).

The structure of the German economy also has special aspects that need to be taken into account. Germany is known for its corporate landscape, which consists predominantly of small and medium-sized enterprises (SME). In 2018, Germany has a share of approximately 99.4 % of SMEs in the non-financial business economy. Correspondingly, only 0.6 % of companies are large enterprises (Rudnicka, Verteilung Unternehmen in Deutschland nach Unternehmensgröße 2018, 2020). The ownership structure of German companies shows another peculiarity. Even though there is an increasing trend toward corporate enterprises and the use of European legal forms, the share of listed companies is very low (Düsterhoff & Kunisch, 2016). Out of 3.29 million companies in 2019 that are subject to taxation in Germany, only around 7,622 are joint-stock companies (Rudnicka, Anzahl der Unternehmen in Deutschland nach Rechtsform 2019, 2021).

The "Deutschland AG", a term for the intertwining of the shareholdings of large German stock corporations, which created a network of financial dependency, also had an enormous impact on takeovers (Bundeszentrale für politische Bildung, 2016). Whereby these ties have been increasingly loosened in recent years (Ringe, 2015; Düsterhoff & Kunisch, 2016).

Companies that for a long time were highly financed by outside capital and had difficulty obtaining capital from the capital market have been transformed by the establishment of a new framework. Thus, the German market, which has long been financed by banks, has become a market financed by the capital market (Spindler T. M.-A., 2020).

3.1 The German capital market

Defining the capital market is problematic, as there is no standardised usage of the term. The capital market can be classified as a sub-segment of the financial markets that exist alongside the foreign exchange market and the money market (Spindler T. M.-A., 2020).

Capital is defined as assets from which a return is generated. This can be in the form of real goods, also referred to as physical or real capital, or in money and securities, also referred to as monetary or financial capital. Consequently, the capital market only covers finance and therefore does not include actual goods markets (Oulds, 2019).

The capital market in the narrower sense can be regarded as the sub-sector of the financial market that includes issues, permanent capital investments such as shares and long-term credit trading (Spindler T. M.-A., 2020). The capital market can be differentiated into primary and secondary markets. If the securities are initially created in the primary market by concluding the issuance contract under securities law, they can be sold again on the secondary market after the issuance phase (Oulds, 2019).

In other words, on the primary market, the capital market securities are placed with the corresponding investors; this is done by issuing securities after they have been created through a contract of issue with the issuance of a certificate between the issuer and the purchaser (Oulds, 2019).

The secondary markets comprise the onward transfer of securities. It is also referred to as the circulation market, where the securities circulate only among investors. The issuers, on the other hand, are rarely represented (Lehmann, 2021).

The capital market is accessible to a comprehensive range of investors through the involvement of credit institutions. In this context, a distinction can be made between the capital market and the money market. The money market in Germany is regularly a market for large industrial companies, federal banks and credit institutions, where, in addition to trading in euros in the narrower sense, trading in commercial paper also takes place. The foreign exchange market also needs to be discerned from the capital market. Foreign exchange markets are the totality of contacts among foreign exchange traders of credit institutions with foreign exchange dispositions and other foreign exchange traders (Oulds, 2019).

The optimal functioning of the capital market is essential for the economy and therefore for the national economy. The goal is to achieve the best possible output by using the available resources. Through the ideal use and allocation of limited resources, in this case money, a maximum output and consequently the greatest value creation is achieved (Samuelson & Nordhaus, 1987).

In order to protect this market, to guarantee an efficient functioning of the markets, a comprehensive regulation must be created. Capital market law was compiled for this purpose.

Achieving this goal is fraught with difficulties, as capital market law is shaped by a very inhomogeneous set of norms. This impression is reinforced by the fact that there is no uniform and generally applicable definition of capital market law (Spindler T. M.-A., 2020). The following chapters refer to Kümpel's definition of capital market law:

„The entirety of legal provisions, terms and conditions and recognised standards governing the organisation of the capital market, the market-related services of securities service providers (banks) and the market-related duties of conduct of market participants or other third parties." (Haarmeyer, Hillebrand, Kleinert, & Mayer, 2020, marg. no. 2105)

This includes the German Securities Trading Act (WpHG), the German Securities Prospectus Act (WpPG), the German Securities Acquisition and Takeover Act (WpÜG), the German Stock Exchange Act (BörsG), the German Sales Prospectus Act (VerkProspG), the German Investment Companies Act (KAGG), the German Investment Companies Act (KAGB), the German Investment Act (VermAnlG) as well as the Law on Private Equity and Venture Capital Companies (UBGG). It also covers the laws of the German Capital Investor Model Case Act (KapMuG), the German Stock Corporation Act (AktG), the German Securities Deposit Act (DepotG), the German Commercial Code (HGB), the German Banking Act (KWG), the German Criminal Code (StGB), the German Insurance Supervision Act (VAG), or the tax laws that are within the intersection of these laws (Spindler T. M.-A., 2020).

The aim of capital market law is to create functional protection for the capital market, while also ensuring investor rights. Functional defence is intended to protect the markets, on which, aforementioned, the national economy depends. In this way, companies capable of operating on the capital market can cover their financial needs. Protection is also significant since it is partly a supplement to or a substitute for old-age provision. Investor protection here serves to defend investors as a collective so that there is trust in the markets, thereby protecting the function of the market. The safeguard of individual investors, on the other hand, was initially implemented through jurisdiction. Legal regulations have granted investors claims for damages in the event of a breach of duty (Buck-Heeb, 2011).

3.1.1 Development of the German capital market

From a historical perspective, it is advisable to look at the period from 1986 onwards. With the introduction of the European capital market directives, which were then transposed into German law, the first efforts to strengthen the capital market were observed in the following years (Groß, 2009). In this context, European law can be understood as the driving force behind German law; in 2011, 80 % of national directives were determined by the European legislator (Hopt K. , 2000; Buck-Heeb, 2011). In total, four major steps were taken by 2002. (Spindler T. M.-A., 2020).

The liberalisation of the capital market is one of these steps. The reason for the liberalisation of the capital market was the existing equity gaps, which threatened German SMEs in particular (Spindler T. M.-A., 2020; Frankfurter Allgemeine Zeitung, 2004). For example, German companies had on average a lower equity ratio than comparable British companies (Deutsche Bundesbank, 1984). Liberalisation in general is described as the process of abolishing legal regulations in order to promote competition or facilitate entrances into new markets (Bundeszentrale für politische Bildung, 2016). For the capital market, liberalisation meant moving away from one-dimensional stock trading, which was primarily for large investors who had blue-chip stocks, to a new much more functional notion of the stock market, intended for a wider circle of investors and issuers. By establishing a new framework, trading segments could be given a new flexibility, whereby the regulated market could be included as a stock exchange segment through section 71 et seqq. BörsG (old version). In addition, based on a European initiative, the trading of securities as well as the participation in the capital market was facilitated for the inner-European area. The management of the stock exchange was reformed, whereby an orientation towards a more market-economy perspective was achieved and a further essential step towards liberalisation was taken. Location-based trading was also abolished with the introduction of electronic trading. Investment law and futures trading also underwent a reformation (Spindler T. M.-A., 2020).

The introduction of market transparency can be seen as the second development that shaped the capital market as it is known today. This went along with the implementation of investor protection (Spindler T. M.-A., 2020). Market transparency describes the knowledge of processes related to the market, including the conditions of the market and the behaviour of other economic entities. Full transparency is regularly said to exist when all essential information is known, whereby interaction processes can be better understood (Piekenbrock, 2018). In this process, protective norms and claims for damages in particular have found their way into the core area of the regulatory objective of capital market law (Veil, 2014; Spindler T. M.-A., 2020). This was implemented by the introduction and expansion of the Securities Sales Prospectus Act “Wertpapier-Verkaufsprospektgesetz” and the Act on Securities Trading “Wertpapierhandelgesetz”.

Capital market supervision also underwent a reformation. The supervisory board structure, which initially consisted of a stock exchange and a state supervisory board, was broken up and a federal authority was created in 1995 (Spindler T. M.-A., 2020; Bundeszentrale für politische Bildung, 2016). This was achieved with the introduction of the Federal Supervisory Office for Securities Trading (Bundeszentrale für politische Bildung, 2016). The regional supervision was not abolished by this. Due to constant changes, including new technologies and the increasingly important factors of globalisation, adjustments had to be made.
The Fourth Financial Market Promotion Act of 2002 revised the protection standards for financial institutions (Heldt, Finanzmarktförderungsgesetze, 2018). In the same year, various authorities merged with the Federal Supervisory Office for Securities Trading to form the Federal Financial Supervisory Authority. It became clear, that a centralised control structure was created to supervise the capital market and to be able to guarantee a smooth and orderly process (Spindler T. M.-A., 2020).

Overall, capital market law has developed over a period of more than a decade, with investor protection and market transparency as its main goals.

3.2 Legal framework for a hostile takeover

The German market for hostile takeovers is to be classified within this regulated capital market. With the introduction of the German Securities Acquisition and Takeover Act (WpÜG) in 2001, uniform legislation was created and the resulting framework conditions for the market for hostile takeovers were established (Steinmeyer, 2019). The legislator succeeds in achieving a reconciliation through neutral legislation between the interests of the bidder and those of the target company (Wollburg, 2011). On the one hand, the aim is to attract investors and thereby strengthen the German financial market, while at the same time preventing a dilution of the participants' assets. Especially takeover bids have a significant impact on the market value of shares, which can lead to enormous price losses or increases in some cases (Steinmeyer, 2019).

The material scope of application of the WpÜG only covers the public offer designed to acquire securities. In this process, a concentration procedure may be performed by which the bidder combines multiple packages of securities. An offer is a purchase or exchange offer within the scope of the German Civil Code, which requires a public declaration and is directed to the acquisition of securities. This not only specifies the form of the offer (cf. section 145 et seqq. BGB), but it also governs the conduct of the bidder and the addressee of the offer, the associated target company, and its bodies. This regulation refers in particular to the actions that serve as preparation for the offer, as well as the behaviour that accompanies the declaration (Wackerbarth, 2017).

It is applicable to target companies which have their registered office in the European Economic Area. Furthermore, the company's securities must be admitted to trading on an organised market. The company must be a public limited company, or a partnership limited (Pötzsch, Einleitung, 2013).

The WpÜG offers a scope of application that is one-sided, like it is classical for law of the conflict in economic matters and does not govern the case of an accumulation of laws or deficiencies in laws. Hopt identifies regulatory gaps in the international context and therefore addresses companies in which German investors have a stake, that are listed in Germany but are not located within the country, or companies that are listed in a non-EEA country but have their office in Germany. In these cases, the WpÜG regularly does not apply and hence fails to provide its protective function vis-à-vis the shareholders and the groups (Wackerbarth, 2017; Hopt K. J., 2002).

3.2.1 The organisational structure of a public limited company

But before the legal regulations regarding a takeover become relevant, the special feature of the organisational structure determined by German law must be taken into account. If a company wants to take over a public limited company, the distribution of competences is decisive.

In a joint stock company, there is first of all a functional and personal separation of the three administrative bodies: the executive board, the supervisory board and the general meeting (Blaum, 2021). The idea behind the functional separation is primarily the protection of the shareholders' interests from the executive board (Schindera, 2002). The supervisory board, which is at least partially elected by the general meeting in form of the shareholder representatives according to section 119 para. 1 cl. 1 AktG, in turn appoints the executive board according to section 84 para. 1 cl. 1 AktG (Breuer, Aktiengesellschaft (AG), 2020). The supervisory board is obliged to supervise the executive board. Due to this function, the supervisory board is not allowed to be entrusted with tasks of the executive board (section 111 para. 1 AktG, section 111 para. 4 cl. 1 AktG), but they can dismiss the executive board or individual members (Blaum, 2021). Its most significant function is advising the board of directors. Overall legal developments show that the rights of the supervisory board are being continuously strengthened. Consequently, the role of the supervisory board must not be underestimated (Vetter, 2017).

The executive board takes over the management of the public limited company pursuant to section 76 para. 1 AktG (Aktiengesetz (AktG), 1965). They act independently and at its own entrepreneurial discretion within the framework of the business judgment rule stipulated in section 93 para. 1 cl. 2 AktG (Aktiengesetz (AktG), 1965). The executive board may obtain recommendations for action but is not bound by any instructions (Blaum, 2021). The discretionary power is limited to the company's object and interest. In principle, the actions of the board of directors are subject to the neutrality requirement, but the interests of the company are more important as long as they are within the legal framework (Drinkuth, 2017). A public limited company is dependent on the board of directors. The board can consist of one or more persons. If the board is understaffed, it is no longer able to operate. In addition to managing the company, the board's main tasks comprise corporate planning, which includes setting corporate policy guidelines, corporate organisation, through the operational and organisational structure, and the management of the company (Arnold, Der Vorstand im Organisationsgefüge der Aktiengesellschaft, 2017).

The main body responsible for decision-making, is the general meeting. Among other things, the tasks of the general meeting include resolutions concerning inter-company agreements, demergers or mergers (Breuer, Aktiengesellschaft (AG), 2020). At the general meeting, shareholders are given access to documents and reports presented by the administration and have the right to speak and to ask. In addition, they can execute their voting rights or have a representative participate in the formation of the company's will (Marsch-Barner, Bedeutung und Zuständigkeit der Hauptversammlung, 2017).

Consequently, many factors influence the takeover and each of the three bodies is involved in the process in varying ways. When taking control, all powers of management and representation lie with the executive board and the general meeting can only take over management matters if this is explicitly requested by the executive board in accordance with section 199 para. 2 AktG. Otherwise, the general meeting is not allowed to take over any tasks of the executive board. The general decision-making powers are defined by the Stock Corporation Act, as well as individually by the articles of association limited by section 23 para. 5 AktG (Schuster, 2003).

3.2.2 Legal protection under the German Stock Corporation Act

The WpÜG regulates the takeover of joint-stock companies. Even though the legal principle states that special norms prevail over more general norms, the provisions of company law remain in place (Drinkuth, 2017).
According to section 93 para. 1 cl. 1 AktG, the executive board is obliged to act carefully and conscientiously. They should strive to avert damage and preserve benefits. This includes, among other things, a duty to monitor the organisation and decision-making processes. The board must behave in a legally compliant and proper manner and withstand the demands of diligent corporate management (Bürgers, 2017).
Furthermore, the board must be guided by the interests of the company. Since the corporate interest consists of a multitude of stakeholder interests, a weighting must be conducted. The

interests of the shareholders are given a special weighting. But it must be evaluated in a moderate shareholder value concept. Another factor, in the sense of section 91 para. 2 AktG, is the overall interest in long-term profitability. Altogether, a balancing process is required in which the interests of the shareholders are reconciled with the profitability objective and the interests of the stakeholders without disregarding the common good and the company's reputation (Seibt, 2020).

The jurisdictional regimes remain unaffected. The board of directors retains the power of management. The general meeting is only allowed to take over the competences of the board of directors if the latter explicitly demands this. The supervisory board may not assume these powers at all (Schuster, 2003).

3.2.3 Prohibition of preventing the takeover

According to prevailing opinion, the board of directors is subject to a duty of neutrality in conjunction with a potential takeover. The shareholders' freedom of decision is essential and must not and should not be influenced by the board. This is important as a significant conflict of interest may arise, thereby jeopardising a functioning and, in particular, regulated market for corporate control (Schlitt, 2017).

Therefore, the conduction of the management board in the event of a hostile takeover is limited by section 33 WpÜG (Krause, Pötzsch, & Stephan, 2020). Section 33 WpÜG is one of the most important provisions of the WpÜG, as it imposes a duty of conduct on the board of directors and at the same time contains a prohibition on defending action (Schlitt, 2017).

This is specified in section 33 para. 1 cl. 1 WpÜG, according to which the management board is explicitly prohibited from engaging in actions that could jeopardise the success of the offer. This is valid after it has been published that the bidder has decided that an offer to acquire control should be made. It is not relevant whether the success of the offer is actually inhibited, but only whether the action was capable of hindering the success of the bid. This does not include actions by the board of directors or the supervisory board that increase the cost of the takeover and make the takeover less attractive. These actions do not constitute a possible obstacle to the success of the offer as long as the offer is not subject to certain conditions (Krause, Pötzsch, & Stephan, 2020).

The objective suitability is considered, regardless of whether there is a subjective intention to prevent or whether the board of directors is aware of the decision (Buck-Heeb, 2011; Steinmeyer, 2019). Actions that fall within the scope of action of the board of directors under stock corporation law and measures for which the supervisory board has given its consent also constitute exceptions pursuant to section 33 para. 1 cl. 2 WpÜG (Steinmeyer, 2019). Consequently, the options for action are already severely limited before the relevant documents are published. The aim is to enable shareholders to make a decision without limitation (Buck-Heeb, 2011).

The norm covers all measures taken in response to the future or present offer, this includes repressive / ad hoc measures, but does not include takeover prophylaxis/ preventive defence measures, as they occur independently of explicit takeover activities (Paschos, 2017; Steinmeyer, 2019).

According to section 33 para. 1 WpÜG, the management board is entitled to take any action that the bidder takes. This is intended to create a degree of equitableness. Another exception is advertising measures through which other investors can be reached; these regularly do not pose a threat to the success of the takeover, as the freedom of decision is not affected (Steinmeyer, 2019).

3.2.4 Exemptions to the prohibition of the prevention of a takeover

The most important exception to section 33 para. 1 cl. 1 WpÜG is section 33 para. 1 cl. 2 WpÜG. Pursuant thereto, any action is permitted which a director acting in an orderly and conscientious manner would have taken if the company were not affected by a takeover bid. This includes both the search for another offer, which also includes contacting potential investors directly, and measures approved by the supervisory board (Bürgers, 2017; WpÜG, 2001). But it only extends to the competences that already lie with the board of directors and the supervisory board, but it does not intend to allocate any competences. In this context, the opinion that all defensive measures fall within the competence of the general meeting, which is partly held, must be rejected, as section 33 para. 1 para. 2 WpÜG would be undermined by this principle and section 33 WpÜG would be irrelevant (Steinmeyer, 2019) . Despite this, the board of directors is only allowed to act within the framework of the provisions of company law, i.e. they can only operate within their area of responsibility, the object of the company must be preserved and there is a prohibition of damage, i.e. no measures that reduce assets are permitted to be taken (Krause, Pötzsch, & Stephan, 2020).

The board of directors can continue to implement the corporate strategy pursued previously; this also includes extraordinary actions such as purchases and sales of assets, as long as they are in line with the strategy. Day-to-day business is also not affected by section 33 para. 1 cl. 1 WpÜG; among other things, existing legal obligations may continue to be fulfilled, business operations may be maintained if they correspond to the previous nature and scope (Steinmeyer, 2019; Krause, Pötzsch, & Stephan, 2020).

In addition, according to the third variant of section 33 para. 1 cl. 2 WpÜG, the board of directors is entitled to obtain the supervisory board's consent to measures that override the preventive requirement. Pursuant to section 183 BGB, the supervisory board must receive consent for this; subsequent approval is not permitted. Furthermore, no general consent can be given, rather the consent must extend to the explicit action (Bürgers, 2017).

According to section 33 para. 2 WpÜG, the board of directors is entitled to take defensive measures which do not belong to its competence but to the competence of the general meeting if the general meeting has already extended the competences of the board of directors by a resolution (so-called anticipatory resolution) prior to the potential offer (Drinkuth, 2017; Steinmeyer, 2019).

This ability is especially important as many companies were concerned that, unlike companies in other countries, they had very limited recourse to defend themselves and that even ad hoc measures could easily be overcome through shareholders seeking an action of voidance (Krause, Pötzsch, & Stephan, 2020).

Although, in a literal interpretation, it is only conceded that the anticipatory resolution must have been adopted prior to the offer. There is no reason for such a strong time limit, which is why the opinion is held that anticipatory resolutions can be passed for future offers and be applied to the current bid. But the board of directors has to provide a very explicit description of the use regarding the current offer (Krause, Pötzsch, & Stephan, 2020).

This anticipatory resolution is valid for a maximum of one and a half years and requires at least a 75 % majority. Pursuant to section 33 para. 2 WpÜG, this majority refers to the share capital represented in the assembly (Müller-Michaels, 2019). An exception to this rule occurs when the articles of association require a higher capital majority (Krause, Pötzsch, & Stephan, 2020).

Furthermore, any measure arising under an anticipatory resolution must be covered by the approval of the supervisory board (Buck-Heeb, 2011). In principle, anticipatory resolutions should be handled very carefully, as the effects are difficult to assess and even before the contents of the offer become known, the decision on the offer can already be limited by a corresponding resolution (Krause, Pötzsch, & Stephan, 2020).
With this resolution, the board has the freedom to react to a takeover bid with those measures that are covered by the resolution. The limits of the anticipatory resolution result from the Stock Corporation Act. According to this, the transfer may only be extended to the competences provided for by company law. This primarily includes, according to section 71 para. 1 no. 8 AktG, the repurchase of own shares, the use and creation of conditional or/and authorised capital according to section 202 AktG and section 192 AktG, the sale of shareholdings and at least partial representation, the management (conclusion, as well as cancellations) of company agreements (Müller-Michaels, 2019; Krause, Pötzsch, & Stephan, 2020).

3.2.5 Ad hoc approval through the shareholders' meeting

Furthermore, after the announcement of the offer, measures can be approved by the shareholders by means of an ad hoc approval determined in the general meeting. The general meeting can give its consent for all actions to be taken. These measures, similar to the anticipatory resolutions from section 33 para. 2 WpÜG, must be specifically named. In order to be able to convene a meeting as quickly as possible, the period of at least 30 days from section 123 para. 1 cl. 1 AktG is shortened to 14 days (Buck-Heeb, 2011).

3.2.6 Opt-In and Opt-Out

Opt-In and Opt-Out are amendments to the articles of association and are therefore measures that fall within the competence of the general meeting. These provisions of the articles of association, which result from section 33a para. 1 WpÜG, are usually used when there is an increased risk of a takeover. The general meeting can initiate a general meeting via the right of initiative by reaching a quorum according to section 122 para. 1,2 AktG. (Stephan, 2019).

Section 33a para. 1 WpÜG creates the possibility, referred to as opt-in or statutory prohibition of prevention, to change the statutory restrictions set out in section 3 WpÜG and to strengthen them by the stricter prohibition of prevention set out in section 33 para. 2 WpÜG (Noack & Zetzsche, 2020). Only the entire directive can be adopted, no leeway is granted. This prohibits any action that could prevent the success of the offer, with the exception of actions authorised by the general meeting and actions that are part of the ordinary course of business. In addition, the board of directors may take actions that are not in the ordinary course of business if they serve to implement the decision made by the shareholders regarding acceptance or rejection of the offer. The search for an alternative offer is also permitted pursuant to section 33 para. 2 WpÜG (Bastian, 2019).

The break-through rule or opt out of the strict prohibition of prevention leads to the opt in being resigned and section 33 WpÜG then applies. The withdrawal from the opt in is affected by an amendment to the articles of association. These amendments must comply with the same requirements as the amendment to the opt-in articles (Stephan, 2019).
So far, no German company has decided to use these facilities, which may be due to the fact that the effects are hard to assess (Stephan, 2019; Noack & Zetzsche, 2020).

4 The hostile takeover of a company

Hostile takeovers are a lengthy process that goes through various stages before the final decision is made whether to accept or reject the offer. This process is strongly defined and regulated by German legislation.

4.1 Takeover scenarios

The takeover bid can be approached in different ways. Depending on the strategy of the bidder company, it makes sense not to submit a tender offer directly. The target company must remain within the limits set by the WpüG and the AktG.

4.1.1 The tender offer

With regard to the purchase of shares, the tender offer constitutes a public takeover or acquisition offer (Göthel , 2015). A public offer under section 2 para. 1 WpÜG is defined as a purchase or exchange offer that relates to the purchase of securities (Brandt, 2019). The offer must be directed at a large number of security holders. The more persons are addressed, the more likely it can be considered a public offer, i.e. if a smaller number is specifically addressed, a case-by-case approach with reference to the protective purpose of the norm must be used. It is irrelevant in this respect whether the addressing is individual (in the case of registered shares) or general. If only explicit security holders are addressed, on contrast, an individual assessment must take place (Pötzsch & Favoccia, § 2 WpÜG, 2020).
According to section 2 para. 1 WpÜG, an offer must be made publicly. The offer is interpreted in the sense of civil law according to section 145 BGB, according to which the applicant is bound by the offer. In contrast to civil law, the exclusion of the right of revocation or withdrawal applies pursuant to section 18 para. 2 WpÜG. Consequently, the bidder company is bound to the offer by the acceptance by the shareholders (Brandt, 2019).

Offers can be differentiated between cash offers and exchange offers or a mixed form. In the case of a cash offer, a cash distribution is made in return. This is the simplest form of trade and is usually offered in a fixed price. A variable consideration determined by a price formula is also possible, as long as the price formula is sufficiently comprehensible, as stipulated in section 11 para. 1 cl. 3 WpÜG (Müller-Michaels, 2019). An exchange offer, on the other hand, involves liquid shares admitted to trading on a market organised in the European Economic Area being offered in return (Brandt, 2019; Müller-Michaels, 2019). Share swaps rarely take place, one reason being that the attractiveness of the offer decreases if the share price falls (Müller-Michaels, 2019).

One of the most important restrictions for takeover scenarios is derived from section 18 para. 1 WpÜG, according to which a takeover offer cannot be subject to conditions that can only be fulfilled by the acting party or closely related individuals (e.g., subsidiaries, persons acting in concert) or companies. Conditions that are dependent on the bidder's participation must also comply with the requirements of section 162 BGB (Müller-Michaels, 2019). Consequently, if

the condition is not fulfilled, due to the obstructive behaviour of the party to whose disadvantage this would have led and under the condition that this behaviour is contrary to good faith, the condition is considered fulfilled as a legal consequence (BGB).
In contrast, the offer can be dependent on official approvals, which in many cases include the approval of the cartel authority, banking or insurance supervisory permissions or foreign trade authorisations. The incorporation of a minimum acceptance threshold is also acceptable (Müller-Michaels, 2019). This threshold is particularly useful if a sufficient number of shares have not been purchased or secured through share purchases already made or through irrevocable undertakings, a preliminary agreement in which the shareholders unilaterally and irrevocably commit to accept the bidder's offer (Müller-Michaels, 2019; Karrer, 2018). As a rule, this threshold comprises the qualified or simple majority. A threshold of participation equal to 100 % is prohibited, as this is practically unattainable. Also approved is a clause known as the material adverse change or force majeure clause. It states that there must be no adverse change in the market environment of the public limited companies or within the public limited companies itself. The individual conditions that shall be included must be explicitly listed. Defence measures can also be proscribed by the offer, with a description of the measures to be prohibited (Müller-Michaels, 2019).

4.1.2 Open market purchases

Open market purchases are the most uncomplicated type. Shares are bought directly from the stock exchange. If this is done strategically and with caution, the price can be kept stable, and premiums can be kept low. This often makes open market purchases a long-term project, since a large number and a continuous purchase of shares would attract attention, it is reasonable to suspend the share purchase for a certain period of time. This can discourage free riders and the share price can fall and stabilise again (Schuster, 2003).

The shares are rarely bought directly by the company itself, rather several brokers are used to acquire the shares. But despite this concealment tactic, purchases of a large number of shares stand out. Whereupon arbitrage communities, a group of investors focused on short- and medium-term profits through quick purchases and resales of shares, become interested in those very shares, leading the share price to skyrocket. In the worst case, this can prevent the project from being successful, as the costs can increase considerably (Schuster, 2003).

Furthermore, section 43 para. 1 of the WpHG states that the purchaser must send a notification to the issuer within 20 trading days of exceeding the 10% threshold of voting rights arising from the shares, as long as the issuer is from the Federal Republic of Germany. Thereby, information must be provided regarding the objectives pursued, this includes, among other things, information on future intentions to acquire further shares, as well as on possible objectives regarding a replacement of the executive bodies (Wertpapierhandelsgesetz (WpHG), 1998).

In Germany, open market purchases are possible, but rarely occur. The risks involved in the process are too great. Through the 10% limit, the legislator also makes this process more difficult, so although 10% already represents a considerable number of shares, it is not enough to take control.

4.1.3 The proxy fight

Proxy fight is a process known mainly in the USA in which the bidder solicits proxies (Schockenhoff, 2015). A vote lent from one or more shareholders by the bidder is used at the general meeting to influence the management and decision-making of the company (Schuster, 2003).

Voting rights are an integral component of membership rights resulting from share ownership and describe the right to cast a vote and thereby participate in the decisions of the general meeting. In principle, the holder of the shares is also the holder of the voting right. If the shares are transferred to trustees, they receive the voting right (Spindler G. , § 134 AktG, 2020). Pursuant to section 134 para. 3 cl. 1 AktG, the voting right can also be assigned to someone else, who is then considered a representative within the meaning of section 34 para. 1 cl. 1 no. 6 WpHG. If there are no directives and the person to whom the right was transferred to can act at his or her own discretion, this is referred to as a voting proxy (Plückelmann, 2018).

Consequently, no own shares are bought in the proxy fight. Rather, an attempt is first made to reach the shareholders, which can regularly be accompanied by difficulties due to obligations of confidentiality (Schockenhoff, 2015). Companies with a high proportion of free float pose a considerable problem, as obtaining the contact information of small shareholders is a substantial effort (Spindler G. , § 134 AktG, 2020). Ultimately, the bidder can try to convince large depository banks or attempt to reach shareholders through public advertising (Schockenhoff, 2015; Schuster, 2003).

This process is a highly intricate operation that depends on many facts and is therefore not a long-term solution. The proxy fight method is a very unstable option. While it is possible to initiate votes that facilitate the change of control, long-term projects such as the replacement of the board are only possible with extensive effort. Lengthy processes are generally more difficult to implement, as the necessary voting power must be maintained throughout the entire process. Shareholders can withdraw their proxy. This creates a permanent risk of instability in the process (Schuster, 2003).

Because of legal obstacles and the complexity of the process, proxy fights are very rare in Germany (Schuster, 2003).

4.1.4 Additional takeover opportunities

Another possibility is block purchases. In this case, the shares are not purchased directly on the stock exchange, but in so-called packages, which are usually held by major shareholders. The packages comprise a large number of shares. This is mostly a very expensive takeover option, since a major shareholder who is willing to sell his shares has to be found first. The price of these packages can be considerably higher than the cumulative sum of the individual shares. This results from the fact that these packages are unique and the voting power that accompanies, drives up the price even further (Schuster, 2003). According to section 43 para. 1 WpHG, the buyer has a duty of notification when the 10% threshold is exceeded (Wertpapierhandelsgesetz (WpHG), 1998).

The creeping takeover is similar to the proxy fight and the package purchases. In this case, attempts are made to take control of the target company through purchases on and off the stock exchange. In this scenario, the obligation to report when the limits are exceeded also applies. Furthermore, the continuous buying of shares can be recorded as a decision pursuant

to section 10 WpÜG. This would require an immediate announcement of the decision. The risk of the share price rising also remains in this case (Bouchon & Müller-Michaels, 2015).
A measure that initially appears to be a friendly takeover is the "bear hug". Here, the board of the target company receives a request or an offer that is usually far above the share price. This is accompanied by a very short deadline. If this offer becomes known, other bidders become interested in the company (DePamphilis, 2014).
Furthermore, there is the mandatory offer pursuant to sections 35 et seq. WpÜG. A mandatory offer must be made by the bidder after gaining control of a company (Drinkuth, 2017). According to section 29 para. 2 cl. 1 WpÜG, control over a company is assumed if the bidder holds 30% of the voting power (Steinmeyer, 2019). The aim is to protect the shareholders who hold the remaining shares and therefore represent a minority (Brandt, 2019).

4.2 Procedure of a hostile takeover

The takeover process is very diverse, due to the different parties, approaches and goals that are connected. Nevertheless, the process can be divided into four steps. First comes the preparation phase, followed by the bidding phase. If the offer is accepted, the settlement takes place, after which the structural measures are taken (Drinkuth, 2017).

Before entering the concrete planning phase, it is necessary to decide on a goal. Therefore, a requirements profile is drawn up for a potential target, in which criteria can be defined according to their priority. "Killer criteria" can also be defined; if a company features these criteria, they are not considered as a takeover target. At the same time the extent to which the company is in a position to carry out a takeover is examined. It is important to take a critical position, especially with regard to the financial position of the company. If an integration of the target company into the bidding entity is desired, it must be evaluated to what extent this is possible under realistic circumstances. This includes an assessment of the management resources, the expertise required for this project and the ability to combine two corporate cultures. In the same step, the risks associated with any takeover are reviewed (Becker U. , 2016).

Now the planning phase starts. The decision of strategic points takes a decisive role in this phase. At the same time, the first legal issues become relevant. These legal issues comprise insider law issues that may include a duty of disclosure. A decision to make an offer that is not published can constitute insider information. This insider information relates to the shares of both the bidder and the target company. Insiders' knowledge, that is created by the bidder, is not problematic. But this information is not allowed to be disclosed as long as it has not been made public. In addition to the date on which the offer is to be decided, the form of the share purchase should also be settled. Furthermore, the bidder may decide that shareholders whose place of residence is outside the European Economic Area (EEA) may be excluded (Drinkuth, 2017).

Pursuant to section 10 para. 1 cl. 1 WpÜG, the decision to make an offer must be published without undue delay. There is often a separate interest in delaying the publication of the offer in order to either lose the surprise effect or to create an undesired time pressure (Düsterhoff & Kunisch, 2016). Through the publication of the decision, the four-week period begins, as stipulated in section 14 para. 1 WpÜG, in which the target company must send offer documents to the Federal Financial Supervisory Authority. Those offer documents do not yet constitute a binding offer. The offer documents are defined by law and serve the purpose of transparency and equalisation. The documents are intended to provide those shareholders of the target company who are addressed with all the information necessary to make an informed decision. If desired, a pre-acquisition of shares can already be executed at this time (Drinkuth, 2017). The documents are then checked by Federal Financial Supervisory Authority (BaFin) for deficiencies. If there are no insufficiencies, they are approved; otherwise, the defects must be corrected (Schröder & Niggemann, 2018).

The bidding phase begins afterwards. The bidder submits a binding offer during this phase. In accordance with section 10 WpÜG, this bid must be published without delay. A tentative offer as a merely non-binding invitation pursuant to section 17 WpÜG is prohibited. Section 11 para. 1 cl. 2 WpÜG defines the content-related principles. These are necessary and cannot be omitted. This information is exhaustive and includes, among other things, the type and level of the compensation, the conditions on which the offer depends, as well as a date for the acceptance period (Drinkuth, 2017; WpÜG, 2001). The due date of the compensation must also be specified in the offer documents pursuant to section 2 no. 4 WpÜG (Steinhardt, 2019). These documents must be complete, accurate and comprehensible (Drinkuth, 2017).

The acceptance of the offer is also subject to a time limit pursuant to section 16 para. 1 cl. 1 WpÜG. The time limit is generally limited to a period between four and a maximum of ten weeks. The shorter the acceptance period, the better the share price can be estimated and the risk of a collapse of the share price is lower. If the share price were to collapse, more shares could be offered to the bidder than the bidder needs and wants. If, on the other hand, the deadline is long, more offers will be accepted (Müller-Michaels, 2019). The deadline can be extended by the bidder, but this must already be noted in the bid with a reservation (Drinkuth, 2017).Pursuant to section 21 para. 1 cl. 1 no. 4 WpÜG, subsequent changes with respect to conditions may be made by the bidder from the submission of the offer until the last working day of the offer period, either individually or in their entirety. Changes may only be made with regard to the minimum acceptance threshold. The threshold can be reduced pursuant to section 21 para. 1 cl. 1 no. 3 WpÜG (Müller-Michaels, 2019).
Section 23 WpÜG requires the bidders to provide information about the procedure. This includes information on the number of securities attributable to the bidders, as well as the voting rights they hold. (Drinkuth, 2017).

The next stage is the decision-making phase of the target company. Here, defensive measures can be pursued. At the same time, the company may look for competing offers (Drinkuth, 2017).
If the offer is accepted and the bidder reaches the threshold set in the law whereby it obtains control over a company, the bidder must place a mandatory offer (Drinkuth, 2017; Steinmeyer, 2019).

4.3 Financing methods of hostile takeovers

The fact that acquisitions and especially hostile takeovers can quickly become extremely expensive was demonstrated in the case of the takeover of Vodafone and Mannesmann with a merger value of 180 billion euros (Hubik, 2015).
According to section 13 para. 1 cl. 1 WpÜG, the bidder, irrespective of the nature of the offer or the compensation, must have already taken the measures necessary to ensure the financing of the offer before publishing the offer documents. This does not imply the factual and

exhaustive availability of funding at this point in time, merely the ability to fulfil the liability at the time of maturity. The financing must extend to the maximum success. This means that the financing must be covered even if all shares of the addressed security holders are sold to the bidder. The potential acceptance ratio is not to be taken into account. Consequently, in the case of mandatory offers and takeover bids, the bidding company must mobilise financial resources sufficient to buy up all the shares not already held by itself (Steinhardt, 2019).

Although BaFin is generally very strict, some relaxations have been implemented. Shares held by subsidiaries of the bidder, for instance, do not have to be calculated in. But those shares of which investors have already received a rejection of the offer have to be included in the financing (Steinhardt, 2019).

The financing view of a takeover can be divided into two categories. A distinction must be made between a corporate transaction, which constitutes the most common scenario and a leveraged buy-out. A corporate transaction is defined as a bidder that is itself an existing company with its own business operations and assets. In a leveraged buy-out, a company with no business operations is used as a vehicle to take over the company. A mixed form is also possible (Ingenhoven & Eisen, 2019).

If the acquisition is a corporate transaction, strategic and business logic aspects are important for the decision of the credit provider. The most significant aspect is whether the bidder can use the acquired company to finance the acquisition and generate new inflows. Exceptions to this are corporates that have such a high level of liquidity, earnings and/or assets that the financing is already secured in advance or without the involvement of the target company. If a company is unable to finance the purchase independently, debt financing is utilised. These debt financing instruments are all characterised by the granting of a loan. Contractual credit financing is particularly advantageous because it is not dependent on the fluctuations of the capital market and it is negotiated within the framework of private autonomy and freedom of scope. The most common form is the syndicated loan (Ingenhoven & Eisen, 2019). A syndicated loan refers to a loan granted by a consortium of banks, i.e. several banks that have joined forces. In this case, the loans are granted collectively, since the volume or the risk is beyond the scope of one bank. It is also conceivable that the borrower requests a consortium of banks (Heß, 2018). The syndicated loan is, due to the fact that the volume is not limited, optimal for a company acquisition, as in addition to the financing of the purchase price payment, all other financing demands can be covered. The term of the loans is flexible, but regularly between five (corporate financing) and seven (leveraged financing) years (Ingenhoven & Eisen, 2019).

If a loan is contracted between a bank or financial institution and a company, this is referred to as a bilateral loan (Stauber, 2009). Bilateral loans are also an alternative form of financing, the distinctive characteristic is that the loan is not placed until maturity. In contrast to the usual commercial syndicated loan agreement document, bilateral loan agreements are usually developed in-house. They are intended mostly for low-volume corporate financing, but are also used, albeit much less frequently, by strong investment grade borrowers (Ingenhoven & Eisen, 2019).

Additional forms of credit include mezzanine loans and senior loans are also eligible (Ingenhoven & Eisen, 2019).

In addition to financing from loans, funding from bonds can also be considered. The bonds can be utilized in addition or on an exclusive basis (Holfter, 2012). Corporate bonds and hybrid bonds are also available as alternatives. A trend in favour of High Yield bonds can also be observed in Germany. In the most common cases, high-yield bonds are used for funding (Ingenhoven & Eisen, 2019). This type of bond is regularly labelled with a non-investment grade rating. They show a higher risk of non-payment, and therefore carry a high interest rate (Wulff & Kilgus, 2018). Additionally, certain covenants will determine the issuer's behaviour, which should ensure payment security. Furthermore, a minimum volume of 150 million euros is expected, and a term of between five and ten years with final maturity is standard (Ingenhoven & Eisen, 2019).

4.4 Consequences of a hostile takeover

If a hostile takeover succeeds, the goals being pursued can be realised.

If the goal is to create synergies, integration must take place as soon as possible. Integration can be divided into three phases. After the preparation, which ends with the announcement, the first phase begins. Now the planning phase commences; up to this point, the companies have been working independently of each other in operational terms. The time leading up to the closing and acceptance process ought to be used to clarify the most crucial decisions around the appointment of top management, the set-up or the operating model. It starts with the closure and should end with a unification of procedures and the integration of new processes. The target organisation should now be established. In the concluding stage, a transition to the day-to-day business must be found. The procedures should be adapted and aligned. The culture must also be homogenised to ensure a successful integration later on (Billing & Flötotto, 2019).

Especially in the 1980s, integration was not the focus. On the contrary, there were a large number of corporate raiders during this period. Their goal is to achieve the highest possible value out of companies that are undervalued (Smith & Lajoux, 2012). Rather, companies were taken over and broken up into individual divisions. Now the company can be plundered and the corresponding units, which have a special value, can be sold. This measure, meanwhile, has become rare and is now also regulated in America (Beisel, 2016).

5 Defensive measures against hostile takeovers

There are various methods of defending against takeovers. Most of them originated in America. The regulatory framework in United States of America is considerably more liberal than in Germany. Measures in Germany are limited and regulated by norms under company law (Drinkuth, 2017).

A distinction can be made between preventive defensive measures and repressive defensive measures. Preventive measures are those that are taken before a takeover offer is made and are intended to have a prophylactic effect. Repressive measures, or Ad-hoc-Measures on the other hand, are those that are undertaken as a reaction to an already pending offer (Steinmeyer, 2019).

5.1 Preventive defence strategies

The target of a company is, despite attractiveness for bidders, to be eliminated during the screening process for potential target companies, through known high-level resistance. This means that no action needs to be taken later in the process to ward off a hostile takeover (Schuster, 2003).

Preventive measures are not affected by the prohibition requirement under section 33, as already discussed in 3.2.2.1. Nevertheless, the general obligation applies that the measures must be covered by the company's interests and must not harm the company. Measures that serve purely to defend the company are often not in compliance with the company's interests, which is the reason why they often have to be supported by other objective goals (Steinmeyer, 2019).

The optimal time to carry out preventive measures is therefore an assessment of the legal limits and the economic interest. Consequently, measures can be taken from the earliest point in time with the establishment and the choice of the legal form of the company, up to a maximum of the point in time at which the decision on the offer is fixed (Schuster, 2003).

Commercial partnership limited by shares

Measures for protection can already be taken when the company is founded. If a limited partnership is chosen, it can later be converted into a commercial partnership limited by shares instead of a public limited company, or the legal form can be changed. A partnership limited by shares can be considered an intermediate form of a limited partnership and a public limited company (Schanz, Verteidigungsmechanismen gegen feindliche Übernahmen nach Umsetzung der Übernahmerichtlinie im deutschen Recht, 2007; Schuster, 2003). The commercial partnership limited by shares consists of one or more partners who are liable as general partners with all their assets (Berwanger, Kommanditgesellschaft auf Aktien (KGaA), 2018; Berwanger, Komplementär, 2018). In addition, limited liability shareholders are liable for the capital contributions evidenced by their shares (Berwanger, Kommanditgesellschaft auf Aktien (KGaA), 2018). The commercial partnership limited by shares is managed by general partners, who have far-reaching powers, including the right of veto, which can be used against the resolutions of the general meeting. In general, the rights of the supervisory board as well as the general meeting are much more limited, which is why the fully liable partners possess greater powers of intervention. The legal form allows a company to go public without the risk of a takeover (Koenen, 2007).

Staggered board

Usually, one of the main objectives of the acquiring company is to remove the executive board and the supervisory board of the previous organisation and replace them with a specially appointed executive board. This requires a majority in the supervisory board (Krause, Pötzsch, & Stephan, 2020). In principle, a short-term reshuffle in Germany is rather difficult to implement

due to legal provisions. The first distinction to be made is between the elected employee representatives and the shareholders. In order to remove shareholders from office before the end of their term, a general meeting is required in accordance with section 103 para. 1 cl. 1 AktG in which it is decided by a qualified majority that the shareholders are to be removed. The supervisory board, on the other hand, may dismiss the members of the executive board, but only upon presentation of a substantial reason, e.g. a vote of no confidence or gross breach of duty. The withdrawal of confidence must be decided by a simple majority and may not be done for any unobjective reason. A change of control is not an unobjective reason in this context and therefore generally allows for a dismissal (Müller-Michaels, 2019).
To prevent potential dismissal, the terms of office of the members of the supervisory board and the executive board can be staggered. This is called a staggered board. The staggering takes place insofar as the appointment period of the individual members lasts between three and five years, so that at no time do all terms of office expire (Müller-Michaels, 2019).

Golden parachutes

In order to be less attractive, exceptionally high severance payments can be agreed. The golden parachutes, as this measure is called, is a procedure carried out by the supervisory board whereby the members of the executive board receive a compensation payment in the event that a takeover bid is accepted, and if they resign from the executive board either voluntarily or under duress because of the takeover. This special feature is regularly agreed in the form of a change of control clause in the contract of the board members well before the occurrence of a possible offer and therefore does not apply within the scope of section 33 para. 1 cl. 1 WpÜG (Krause, Pötzsch, & Stephan, 2020).

Authorised capital

If authorised capital is created in advance, this can also be used as a defensive measure. According to section 202 AktG, the authorised capital may comprise a maximum of 50% of the share capital and may be created for a period of five years. New shares can be issued from this capital. In the event of a potential or actual takeover bid, a subscription right must be excluded (Brandi, 2017). The exclusion of pre-emptive rights protects existing shareholders from a potential dilution of capital. This protection can be excluded if the reason contains an objective justification (Heldt, Bezugsrecht, 2018).

Repurchasing own shares

Another way to prevent the takeover is to buy back own shares. By repurchasing own shares, the number of shareholders is reduced, which in turn reduces the scope for attack. In principle, the repurchase requires an authorisation by the general meeting pursuant to section 71, para. 1, no. 8 AktG, and even with the approval of the governing body, section 71, para. 1, no. 8 and paragraph 2, cl. 1 AktG stipulate a maximum value. According to section 71 para. 2 cl. 2 AktG, the company must have already formed the reserves required for the buyback. The maximum value extends to a buyback of ten per cent in relation to the share capital (Steinmeyer, 2019; Brandi, 2017). In the next step the target can resell the shares. To ensure that the shares are not sold to the bidder, they can be sold to known third parties. Here, the subscription right, which is a kind of preferential treatment, can be granted by the shareholders in case of a capital increase. Shareholders can either sell this subscription right or exchange it for new shares, which is excluded by a corresponding authorisation resolution described in section 71 para. 1 no. 8 cl. 5 (AktG) (Deutsche Börse AG, 2018; Brandi, 2017). If this process takes place during the time frame of section 33 WpÜG, it requires the approval of the supervisory board or admissibility after the general meeting (Brandi, 2017).

The sale of shares to known shareholders is referred to as a white squire in the context of share packages with a blocking minority (Schlitt, 2017). A blocking minority in a block of shares indicates that the owner has the possibility to prevent the most important decisions from being made. In Germany, the blocking minority for public limited companies is set at 25 % (FAZ.NET Börsenlexikon, n.d.).

Non-voting preference shares

The issuance of non-voting preference shares is another way to achieve a capital increase without significantly increasing the risk of a potential takeover (Schanz, Verteidigungsmechanismen gegen feindliche Übernahmen nach Umsetzung der Übernahmerichtlinie im deutschen Recht, 2007). This is only possible, if in return a certain advantage is received. This can be represented, for instance, by the extent of the profit distribution. The maximum issue of non-voting preference shares may correspond to half of the share capital according to section 139 para. 2 AktG. Preference shares may also be abolished and therefore regain voting rights if this has been decided by a special resolution of the general meeting amending the articles of association (Heider, 2019). If, in contrast, a benefit distribution or a subsequent fulfilment of the preferences is not possible and this lasts for a longer period of time, the voting right, which is limited by the preferences to a merely rudimentary voting right, is extended again to the full scope (Heider, 2019; Schanz, Verteidigungsmechanismen gegen feindliche Übernahmen nach Umsetzung der Übernahmerichtlinie im deutschen Recht, 2007).

Registered shares with restricted transferability

Registered shares with restricted transferability are another option. Issued shares are in principle freely transferable in accordance with the principle of agreement and transfer of movable property set out in sections 929 et seq. BGB, it is irrelevant whether they are bearer or registered shares (Bayer, 2019; Schuster, 2003). If the company's articles of association provide for a restriction on the transfer of registered shares pursuant to section 68 para. 2 cl 1 AktG, the shares cannot be transferred without the company's consent. Consequently, it is a kind of shackling of the shares to a holder, limiting the otherwise existing rights of the holder (Bayer, 2019; Bastian, 2019). To initiate a transfer, either an endorsement, an order paper in which the endorser (owner) transfers his ownership as well as the resulting rights to an endorser (third party), or an assignment must be drawn up (Maul, 2018; Helms, 2018). Furthermore, the consent of the public limited companies, which is given on the basis of a consideration of the criteria set out in the articles of association, the interests of the company and the shareholder in accordance with the equal treatment requirement under section 53a AktG, must be granted (Sudmeyer, 2018; Koch, 2021; Krause, Pötzsch, & Stephan, 2020). Neither a consent nor a refusal to consent requires an objective justification (Koch, 2021). If a refusal of consent takes place through a decision based on abuse, the company is liable to pay compensation to the holder of the share. Furthermore, according to section 894 of the Code of Civil Procedure, a judgment revokes the erroneous refusal and replaces it with a consent. In order to revoke or relax a restriction on transferability, a resolution amending the articles of association must be passed (Maul, 2018).

For a concrete takeover situation, this means that even in a takeover situation, consent to the transfer can be given to an acquirer who does not cooperate with the bidder and is against the bidder's offer, without this falling within the scope of section 33 para. 1 cl. 1 WpÜG. On the other hand, the refusal to consent to a transfer to the bidder is only permissible if the temporal scope of application has passed or if the exceptional circumstances set out in section 33 para. 1 cl. 2 WpÜG are fulfilled (Krause, Pötzsch, & Stephan, 2020).

Employee shares

Another measure to reduce the number of free additional shares is employee shares. Employee shares are one way of repurchasing shares. A company is allowed to acquire new shares without an authorisation resolution passed by the general meeting if these shares are made available to employees for purchase. The execution of the obligation transaction under the law of obligations must have an externally apparent and realisable intention to sell the shares to the employees at a later date. This intention is regularly expressed by a board resolution (Bezzenberger, 2020). It is assumed that the main objective of employee shares is not to raise capital, but rather to give employees the opportunity to participate in the company (Marsch-Barner, § 203 Ausgabe der neuen Aktien, 2017). In this context, an employee is anyone who, according to section 611a BGB is obliged by an employment contract to work under instructions. This must be externally determined. In return, the employee receives remuneration (BGB). This also includes executive employees. Members of executive bodies, on the other hand, are ineligible. The resolution must be concretised in the form of an issue to the extent that it is verifiable (Bezzenberger, 2020). Another possibility is the emission of new shares (Marsch-Barner, § 203 Ausgabe der neuen Aktien, 2017).
In the event of a hostile takeover, it is expected that employees will vote in favour of the existing board and against a takeover. In this way, employees mainly aim to secure their jobs (Schuster, 2003).

Poison pill

In particular in America, the poison pill has a special significance. A poison pill is a measure that only becomes apparent with the purchase but was already initiated beforehand. It reduces the profitability of the target company. The poison pill is not a single measure, but encompasses a range of possibilities, including restrictions on voting rights or the option to purchase new shares below market prices (Hundt S. , 2018). A restriction or exclusion of the securitised rights is also part of this. In Germany, this is prohibited by the principle of equal treatment, which results from section 53a AktG (Steinmeyer, 2019).

One form of poison pill used by DAX30 companies is the introduction of convertible bonds that contain a change-of-control clause with a right of termination (Falkenhausen & Klitzing, ZIP, 2006). Convertible bonds are corporate bonds but depending on the structure and the will of the investor, they can be converted into shares during a conversion period. In this case, the conversion ratio is already fixed in advance. In addition to the interest, the investors receive the option of conversion or can keep the bonds until the final maturity date (Deutsche Börse AG, 2019). A convertible bond is advantageous in two respects: firstly, convertible bonds can be offered at more favourable conditions for the company, and secondly, they can be provided with a clause that leads to early repayment in the event of a change of control (Habersack, 2021). Through the early repayment, a refinancing requirement becomes due. It is also possible to set incentives before the takeover in order to convince the bondholders to convert. This leads to a dilution and the bidders may have to buy up more shares in order to maintain voting power. Consequently, the bids must also include the bonds, which increases the cost of the acquisition (Falkenhausen & Klitzing, ZIP, 2006).

Voting trust agreements

Especially in the 1970s, the change of voting power enjoyed enormous popularity as a defensive measure. The change in voting power is achieved by limiting the influence of shareholders by introducing a maximum number of votes. This is by now only permissible in unlisted companies and inadmissible in listed companies (Würz, 2017).

There is still the possibility, within the limits set by section 405 para. 3 AktG, to set up voting trust agreements (Spindler G. , § 136 AktG, 2020). The aim is to achieve a concentrated effect in which the shareholders commit among each other to use the influence in a directed and concentrated manner (Arnold, AktG § 136 Ausschluß des Stimmrechts, 2018). Voting agreements are generally permissible as long as they are within the limits of good faith, morality and the fiduciary duty of a shareholder and are not excluded by the articles of association of the public limited company. Shareholders are obliged to use their voting rights in a way defined by the contract, to react to a person's vote or to abstain. The regularity, i.e. is the voting right influenced for individual or regular votes, is also included in this contract (Spindler G. , § 136 AktG, 2020; Hirschmann, 2017). Barriers arise, in particular, if a compensation is agreed upon. This is referred to as a vote purchase, whereby there is a risk that the conduct is only performed on the basis of the compensation (Spindler G. , § 136 AktG, 2020). Furthermore, a commitment to the instructions of the public limited companies, the corporate bodies, the executive board, representatives, authorised signatories or to voting proposals of these is not legally binding according to section 136 para. 2 AktG and therefore void. But if a commitment to individual members of the corporate bodies takes place, section 136 para. 2 AktG does only not apply if it is not a case of deliberate circumvention of nullity. This is assumed, if several contracts have been drawn up with members (Herrler, 2020; Spindler G. , § 136 AktG, 2020). Furthermore, the binding of a dependent company is also prohibited (Spindler G. , § 136 AktG, 2020). This means that according to section 17 AktG, all companies are included that are legally independent, but are both indirectly as well as directly under the dependent influence of the other company (Aktiengesetz (AktG), 1965).

Reciprocal shareholding

Reciprocal shareholding is another measure to provide prophylactic protection against takeover attempts. The aim behind this measure is to reduce the free float, thereby closing the shareholder circle (Schlitt, 2017). The system, on the other hand, only works if the target company can trust the third parties with whom reciprocal shareholding takes place. The shareholding should not exceed 25 % of the share capital in order to prevent a cross-shareholding according to section 19 para. 1 AktG. This can result in a complete loss of voting rights with regard to supervisory board elections and the loss of voting rights of shares exceeding 25% (section 328 para. 1,3 AktG) (Brandi, 2017; Schlitt, 2017).

Equity carve-out

If the public limited company has a subsidiary, the equity carve-out is an option. In this case, the subsidiary is taken public (Krause, Pötzsch, & Stephan, 2020). If a takeover of the parent company is attempted, then bidders must also make a compensation offer to the shareholders of the subsidiary. This makes the takeover considerably more costly (Schlitt, 2017).

5.2 Ad hoc measures against a hostile takeover

Ad hoc measures take place after it has already been announced that a bid will be submitted. It regularly has a more drastic effect on the company than preventive measures.

Asset lock-up

In an asset lock-up, assets are transferred from the target company to a legal entity (Drinkuth, 2017). Often a subsidiary is used for this purpose (Falkenhausen, NZW, 2007). This may require far-reaching measures, ranging from a restructuring to the implementation of a holding structure. This means that if a change in the articles of association is necessary (Krause, Pötzsch, & Stephan, 2020).

White knight

Pursuant to section 33 para. 1 cl. 2, 2nd alternative WpÜG, the management board is authorised to search for a potential additional bidder (Karrer, 2018). This also applies if the bidder's offer contains the condition that no competing bid is allowed (Krause, Pötzsch, & Stephan, 2020). The board's goal is to find another company that makes an offer for the target company that, at best, contains better offer conditions. On the one hand, the price is driven up by the competition to be sold, the conditions improve, and at best, a bidder is found with whom the company wishes to cooperate (Schlitt, 2017). Since the search is not dependent on the general meeting's approval, it is an exception to the repressive measures. It is not directed against a takeover per se, but rather to increase competition and thereby achieve the best possible conditions (Fuchs, 2006).

The search for a white knight does not prevent the success of the offer and does not restrict the shareholders in their decision whether to take up the offer; rather, it offers alternative courses of action and satisfies the interests of the shareholders for the highest offer feasible. It is disputed whether there is an obligation to search for white knights, but this is to be rejected in the normal case (Schlitt, 2017).

During the search, the board is given every opportunity to obtain another offer (Schlitt, 2017). For this purpose, the so-called white knight is provided with the information necessary for due diligence (Karrer, 2018). The search must explicitly pursue the goal of approaching another bidder and obtaining a further takeover bid; the mere search and passing on of information to supporters in the defence is not tolerated. If the potential white knight exploits the information in order to take advantage of rising prices or buys takeover-ready securities in order to lower the number, he is committing insider trading (Karrer, 2018). If the white knight makes an advance purchase of shares with the firm intention of a takeover there is no infringement according to Art. 14 subpara. c MAR (Schäfer, 2017).

In the search for the white knight, the target company is allowed to spend financial resources, among other things, to hire advisors, but what is not allowed is the financial support of the white knight. For example, the payment of advances or the approval of loans is not permitted under section 71a para. 1 cl. 1 AktG (Schlitt, 2017).

Crown jewels defence

The target company can attempt to reduce its attractiveness to the bidder. This is done either by increasing the share price and thereby increasing the costs associated with the takeover, or by selling assets that are of interest to the bidder. This strategy is also known as crown jewel defence (Krause, Pötzsch, & Stephan, 2020). These assets include, inter alia, subsidiaries, licences or patents. The target is either the assets themselves or the goal of creating a synergy with the company's own assets. In some cases, bidders hope to achieve a higher value of the asset, contrary to the balance sheet valuation (Ulbricht, 2006; Krause, Pötzsch, & Stephan, 2020).

In some cases, the threat of a sale is already sufficient, and the actual disposal of the assets is not necessary to diminish the interest in the target company (Steinmeyer, 2019). Where a divestment becomes inevitable, contracts with a repurchase agreement are regularly used. As a result, the target company outsources the assets and regains the assets after the takeover battle has ended where a divestment becomes inevitable, contracts with a repurchase agreement are regularly used. As a result, the target company outsources the assets and regains the assets after the takeover battle has ended (Schuster, 2003).

If a specific area is spun off, incorporated into a joint venture or made independent, the bidder is barred from exercising control over the area or object (Krause, Pötzsch, & Stephan, 2020; Ulbricht, 2006).

Pac-Man defence

Instead of using passive measures, the target company also has an aggressive way to defend itself against a takeover bid. The target company can make a counteroffer to the bidder's shareholders Instead of using passive measures, the target company also has an aggressive way to defend itself against a takeover bid. The target company can make a counteroffer to the bidder's shareholders (Steinmeyer, 2019). Usually, in response to a counterbid, the bidder pushes for an acceleration of the takeover process (Krause, Pötzsch, & Stephan, 2020).

Antitrust violation

An antitrust violation is a significant impediment to the takeover. If the board of directors sees an antitrust issue, it can draw this to the attention of the competent antitrust authority. As long as the information is true and complete and does not have a distorting effect, it will not be suppressed by section 33 para. 1 cl. 1 WpÜG (Krause, Pötzsch, & Stephan, 2020).

In the absence of antitrust concerns, the target company can trigger an issue under antitrust law by acquiring or merging with another company (Steinmeyer, 2019). For this purpose, a company is often acquired that competes with the bidder company (Kraft, Jäger, & Dreiling, 2003). This can be appealing if the acquisition is largely financed through debt financing, because firstly, an antitrust problem arises and the costs of the problem lead to a leverage of the target company (Schlitt, 2017).

A counterbid is a management measure and is not dependent on the resolution of a general meeting under stock corporation law. The resolution is required if the financing requires a cash capital increase or through new shares requiring a capital increase (Krause, Pötzsch, & Stephan, 2020).

According to section 19 para. 1 AktG, a reciprocal shareholding is deemed to exist if the target company acquires 25 % of the bidder's share capital. As soon as this comes to the knowledge of the bidder either by announcement or by notification of the target company, a kind of shift of rights takes place. As a result, the rights from the shares can only be used for a maximum of one quarter of all shares pursuant to section 328 para. 1 cl. 1 AktG (Schlitt, 2017).

Since a counteroffer does not jeopardise the success of the bidder's offer, since a hazard only exists if the implementation of the offer itself is threatened, which is not the case. Accordingly, a counteroffer is admissible (Krause, Pötzsch, & Stephan, 2020).

Statement pursuant to section 27 WpÜG

What the board of directors is not only entitled to do, but what the board of directors is rather obliged to do, is to issue a statement. This statement must be substantiated and related to the offer. Pursuant to section 27 WpÜG, the statement must refer to the compensation, the consequences that would result from an acceptance of the offer, the objectives of the bidder as well as the expected action regarding the acceptance or rejection of the offer by the shareholders on the board of directors and the supervisory board. In this statement, the board has the opportunity to present arguments against the offer (Krause, Pötzsch, & Stephan, 2020). Communication between the executive board and supervisory board and the shareholders is not limited to statements. Rather, public advertising measures may be undertaken by the executive board and supervisory board. This is permitted within the limits of factual information and acceptable valuations. This also includes information about the potential for an increase in value if the offer is rejected. Since the board of directors is allowed to advocate and advertise its position and may also use company funds, and as long as this is within a reasonable scope, such measures do not fall within the prohibition of section 33 para. 1 cl. 1 WpÜG (Krause, Pötzsch, & Stephan, 2020).

6 Assessment of the measures according to their economic and legal effectiveness

The fact that the defensive measures came to Germany from United States of America becomes evident repeatedly, as many measures can either not be applied at all or only to a very limited extent in Germany. There is a strong balancing of interests and the guidelines established by the WpÜG set clear limits to the board's possibilities for action, which can only be circumvented by authorisation through the approval of the supervisory board or by the general meeting.

Commercial partnership limited by shares

Already by choosing or converting to the legal form of a Commercial partnership limited by shares, a measure that can protect a company can be taken long before an attack. High conditions are set for conversions, according to section 240 para. 1 cl. 1 UmwG 75 % of the represented share capital must agree. Furthermore, the shareholders who hold the position of personally liable partner must agree. At the same time, the shareholders partially lose their power, since all resolutions can be annulled by the shareholders through their right of veto. In addition, the limited influence leads to a decrease in attractiveness on the market. The possibilities for raising capital are consequently limited (Schuster, 2003). The influence of the shareholders effectively limits the possibilities of a hostile takeover. At the same time, the restriction of powers and decision-making authority is more likely to induce shareholders not to commit to a commercial partnership limited by shares and therefore to refuse their approval. In addition, the difficulty of raising capital in the day-to-day business of the commercial partnership limited by shares may be subsequent. Consequently, it has the potential to exclude a possible offer. An intention to convert may meet with resistance and thus tend to result in shares being sold, consequently the potential of a conversion is only low.

Staggered board

Staggered board are a way of hindering companies from replacing the executive board and the supervisory board. The reshuffle is likewise highly impeded by German legislation. The biggest hurdle is that it is a rather long-term process and that a quorum of a qualified majority is required to remove the board. This is likely to have a deterrent effect, but it is unlikely to be sufficient as a defensive measure if another company wants to take over exactly this target company. From a legal point of view, a stagged board is quite innocuous and also economically it has no impact on the company, since only an internal change in the terms of office takes place. Since this measure can also be circumvented, even if it involves additional effort, it will have a deterrent effect on some companies, but per se it is not guaranteed to prevent a takeover.

Golden parachutes

Golden parachutes would in principle be a very easy protective measure to implement. Since the measures can be built up well in advance without having to incur significant costs or change the structure of the company before the takeover bid. Settlement payments are bound by the adequacy requirement defined by company law and will therefore rarely or never reach sums that have such a high deterrent factor that a company would not make an offer for this reason. Excessively high payments are disproportionate to the tasks, making them inadmissible under section 87 para. 1 AktG. Rather, it can be assumed that the board's resistance will be lower with the prospect of a severance payment. Consequently, this strategy can work against the objective (Krause, Pötzsch, & Stephan, 2020). As a result, the German legislator is regulating the options to a greater extent. In addition, it is unlikely to be in the interest of the shareholders to extract a large financial sum from the company and thereby weaken the company economically. Since excessive payments are already precluded in advance and the target companies will be aware of this, the measure loses its deterrent factor and is therefore not suitable as a defensive measure.

Authorised capital

The use of authorised capital is another way to create opportunities in advance to defend against hostile bids. The aim behind is to achieve a kind of dilution, whereby more shares are available and therefore a higher number of shares is necessary to take control. In order to achieve real success, subscription rights must first be excluded. At the same time, it might not be very promising to trade the shares on the stock exchange, as they could otherwise be bought by the bidder. Simultaneously, a high number of shares is likely to lead to a falling price, which in turn leads to the opposite effect, since more shares have to be acquired, which are available at a lower price. This will reduce the disincentive effect and not drive the price up as effectively. Furthermore, the increase in the number of shares would have to be substantial in order to achieve a significant defensive effect.

Repurchasing own shares

In principle, the repurchase of own shares is a defensive measure that is quite promising. It is necessary to obtain the consent of the general meeting first and even with the approval the 10% limit is a hurdle. The repurchase of shares in the amount of 10% can weaken the financial strength of the company for further measures. Depending on the number of shares the company already holds in advance, the repurchase of 10% will not prevent the bidding company from taking over the company. Consequently, the implementation is legally unproblematic if the general meeting approves the measure. Economically, on the other hand, depending on the share price, the company could lose financial strength. The bidding company is only hindered by the measure to a limited extent from taking over the company. If the lower number of shares available as a result increases the price, this might have a more significant impact on the bidder.

Non-voting preference shares

There are many benefits to non-voting preference shares. Capital can still be increased but voting rights do not shift. As a result, shareholders can also be targeted more easily, as there is a smaller number of them. Problematically, the smaller number of voting rights quickly leads to the formation of a block (Schuster, 2003). In this case, ordinary shareholders can sell shares, which makes the non-voting preference shares less effective (Schanz, Verteidigungsmechanismen gegen feindliche Übernahmen nach Umsetzung der Übernahmerichtlinie im deutschen Recht, 2007). As a result, the effect can even tend to be reversed. Simultaneously, as soon as the company cannot provide the preferential services, the voting rights can be regained, allowing those owners to exert influence. It therefore becomes even more important that companies are able to provide the preferential services. Consequently, non-voting preference shares are legally unproblematic, as they can also be executed subsequently. Furthermore, the protection factor is very high, as the company is less vulnerable to attack without suffering negative economic consequences in the form of a lack of capital. The success of the defensive measure depends on the shareholders.

Registered shares with restricted transferability

Registered shares with restricted transferability aim to create obstacles in the transferability of the shares. This can be achieved if criteria are laid down in the articles of association that justify refusing to transfer the shares in the event of a takeover bid. As this is regularly against the interests of the shareholders, it is unlikely to be feasible, especially if the requirements attached to a change in the articles of association are set very high. Consequently, registered shares with restricted transferability offer very effective protection if the criteria are implemented before the initial public offering (IPO). At the same time, the special restrictions are likely to lead to a low attractiveness and thus a lower share price. This in turn is economically disadvantageous. As a result, a trade-off between the adverse economic effects and the likelihood of a potential takeover would have to be made before the IPO.

Employee shares

Employee shares also serve to minimise the proportion of free shareholdings. The same regulations apply here as for the repurchase of shares and for this reason they are subject to the same valuation.

The success of the white squire depends on two factors. First, the third party must retain the shares sold in the sale. Just like any other holder, the white squire can sell the shares to a bidding company. Another possibility is the takeover of the target company by the white squire. To prevent this, a standstill agreement can be reached (Schlitt, 2017). If a takeover attempt has already taken place in the form of a bid, which failed because the required majority could not be achieved, but the number of shares that creates a blocking minority was purchased, the bidder and the target company can find themselves in a mutual blockade. In this case, a standstill agreement makes sense in order to minimize harmful effects. The standstill agreement obligates, in this case the friendly third party, not to acquire further shares and thereby not to increase the shareholding further (Krause, Pötzsch, & Stephan, 2020). From a legal point of view, the action of preventing the success of an offer by its potential requires justification by the possibilities of Section 33 WpÜG. Economically, the measure, if successfully executed, has no negative effect. The defensive measure is based on trust in another company, which is supported by a standstill agreement. Even if the measure is suitable to prevent a takeover, the company bears a significant risk. Furthermore, a white squire only makes sense in a specific case, otherwise the risk borne is too great. Furthermore, the target company should not hold a share in the white squire, otherwise a reciprocal interest is created (Schlitt, 2017).

Poison pill

Convertible bonds with a change-of-control clause have become increasingly popular. A convertible bond without change-of-control clauses has no chance of defence, as otherwise there is no immediate repayment obligation. Since they are generally issued long before the takeover attempt, the temporal element of section 33 WpüG is not fulfilled. If, on the other hand, an attempt is made to issue convertible bonds during a takeover situation, this falls within the scope of section 33 WpÜG. Furthermore, the issue of bonds also gives rise to a subscription right. If the subscription right is not excluded, the effect is nullified (Schuster, 2003). Consequently, the bonds must already be issued before a possible offer. If the convertible bonds have already been issued, they may well act as a defence. The potential immediate repayment obligation places a further financial burden on the bidder. However, since funds must be guaranteed for each share when the offer is made, it is questionable to what extent this really works as a deterrent.

Voting trust agreements

The weaknesses of voting agreements become clear very quickly. Basically, they are only valid in the internal association, i.e. votes cast against the agreement still remain valid. Furthermore, the use of voting agreements in listed companies raises a problem with "acting in concert". According to section 34 para. 2 WpHG, as well as section 30 para. 2 WpÜG, even with a restrictive interpretation, which the BGH recommends, the agreement on decisions in the general meeting is encompassed and not only designed for a one-time decision (Schürnbrand & Habersack, 2019). If a long-term agreement is made, the voting rights of the other party will also be attributed to the declaring party (Drinhausen, 2017; Petersen, 2021). Since the voting agreements are only horizontal contracts under the law of obligations, they do not pose a legal problem, only vertical voting agreements are invalid. Consequently, the board cannot control this behaviour or conclude these contracts itself. It is unclear how reliable and promising these contracts are, since an action contrary to the contract does not lose its validity. If contractual penalties were agreed to discipline such behaviour, shareholders would not enter into such contracts, since freedom of contract does not allow to enforce them. As a result, contracts of this kind are not problematic from a legal point of view and will not have any far-reaching economic consequences. As a supportive measure, voting agreements may well be purposeful, but as a defensive measure they appear unsuitable.

Reciprocal shareholding

There are also risks associated with reciprocal involvement. Thus, as with the white squire method, there is a risk that the company with which a measure is being pursued will attempt to take over the target company (Brandi, 2017). In principle, the economic and legal valuation can be transferred. A differentiation can be made here in that the intended mutual participation can already be acted upon well in advance. At the same time, the risk that shares will be sold is likely to decrease, since the target company has shares of its own. Furthermore, the limit of 25 % does not have to be exceeded.

Equity carve-out

The IPO of the subsidiary is in principle a very effective way to achieve a prophylactic defensive effect. It can regularly be assumed that a subsidiary is not only listed on the stock exchange as a defensive measure (Schlitt, 2017). In principle, a company that is doing well is despite this not ready to be listed on the stock exchange. Rather, legal and economic requirements are imposed, and organizational requirements must also be met. The requirements are quite high, the process is time and cost intensive (Handelsblatt Research Institute). Furthermore, according to section 9 cl. 2 no. 3 WpÜG-AVO, the bidder can be exempted from the obligation to make a compensation offer. This may be the case if the shareholding in the company is less than 20 %. In this case, the shareholding is based on the book value of the assets (Schlitt, 2017). If the target company already has a subsidiary that is to be listed on the stock exchange, it is an excellent option. As a result, there is a very high probability that the offer will be withdrawn, as the costs can increase significantly and is therefore not sustainable for the bidding entity. But this cannot be assumed, especially in the case of smaller companies. The formation and/or going public is such an extensive, time-consuming and also costly project that it is not suitable for use as a purely defensive method. Legally and economically, it is a particularly effective measure if the conditions are already met.

Asset lock-up

The asset lock-up has the advantage that no direct takeover risk arises from a company in which a shareholding is surrendered. In principle, the asset lock-up also does not fall within the scope of application of section 33 WpÜG, as the option is only used in the event of a call option and the time frame of section 33 WpÜG is therefore exceeded. As a result, the scope of application of section 93 para. 1 cl. 2 AktG, here it must be examined in each individual case whether there is a breach of duty and whether this precludes permissibility (Krause, Pötzsch, & Stephan, 2020). Consequently, the measure is not legally unproblematic and requires closer examination. Furthermore, the measure is very costly, but at the same time offers a high potential to ward off an offer. In economic terms, the measure is likely to have a negative effect on the target company in the long term, especially if significant parts of the company are spun off.

White knight

The white knight is an effective measure to be taken over by a bidder with better conditions. The hostile takeover would be converted into a friendly takeover (Rosengarten, Burmeister, & Klein, 2020). The time frame for finding a second bidder is limited, which means that the Management Board has a maximum period of ten weeks pursuant to section 16 para. 1 cl. 2

WpÜG, after the 4 weeks resulting from section 14 para. 1 cl. 1 WpHG (Wertpapierhandelsgesetz (WpHG), 1998). Considering that takeover processes are usually long-term projects, it is very difficult in practice to find a suitable bidder within a short period of time. Therefore, it is recommended to start the search in advance at the first signs of a takeover (Fuchs, 2006). In fact, this means that in order to have potential success, regular exploratory talks should have taken place at the time of bidding. The insider information provided to the white knight must also be provided to the bidder (Schlitt, 2017; Kumpan & Grütze, 2020; Karrer, 2018).

In the past, it has been shown that the white knight is not always accompanied by improved conditions; for example, the Swiss La Suisse insurance company took the offer of the white knight Swiss Life on worse conditions and achieved a lower price than the original bidder offered (Watter & Hoch, 2016).

Consequently, the white knight does not provide a defence against hostile takeovers in general, but rather against a specific bid. Legally, this is one of the simplest reactive measures, as it is already authorized by section 33 para. 1 cl. 2 2nd variant WpÜG. But the measure must be initiated prior to the offer, otherwise the time frame is likely to be insufficient. There is also the risk that the white knight sells the company himself or tries to remove the management board. Consequently, only the goal of achieving better conditions can be pursued.

Crown jewels defence

The crown jewels defence appears to be promising, as the sale of important assets has a significant impact on the interest in a takeover and is therefore potentially suitable for a bid to be withdrawn. A distinction must be made between those items or divisions in which the bidder has only a minor interest and those which are essential to the success of the takeover and without which the success of the takeover is at risk. If, on the other hand, the interest is deemed not to be substantial, and thus has no negative effect on the takeover bid, a sale is legally unproblematic. (Schuster, 2003).

Not every asset can be sold. If the asset is essential for the target company itself, a sale is only rarely possible on the basis of the exercise of discretion. Furthermore, the Federal Court of Justice has already ruled that the Annual General Meeting must approve the sale of material assets or business units (Hens, 2002). In addition, a sale/spin-off which has an influence on the offer of the bidder or which the bidder would have refrained from making an offer without the subject matter is contrary to section 33 para. I cl. 1 WpÜG and is therefore not permissible. An exception to this is to be assumed if the sale was already planned prior to the publication of the takeover offer or is approved by the Supervisory Board or the General Meeting. (Kraft, Jäger, & Dreiling, 2003; WpÜG, 2001).

Often, the sale of insignificant assets is even advantageous for the bidder, so only an asset exchange is made. If the aim is to strip a company of its assets, this process is already carried out by the target company and is therefore facilitated. Since the target company is obligated by the prohibition of damages to sell the assets at a justified value, no reduction of the company value takes place. In contrast, if a repurchase is agreed, this can lead to an increase in the repurchase price and is therefore detrimental to the company (Steinmeyer, 2019).

Consequently, a defence by the Crown Jewel Defence must be well balanced. This also includes the objectives and the interests in order to avoid further strengthening the bidder's interest. At the same time, the potential success is already diminished by the fact that a significant asset cannot be sold. This would not be advisable even without a prohibition, since even a buyback option does not guarantee that the asset will be resold. This also applies to each additional asset. At the same time, the transaction is an asset swap and the repurchase is also feasible for the target acquired. It is therefore recommended that the repurchase option is limited to only one person or group of persons, at best to the named member of the Management Board. This measure is only promising to a limited extent, since the value of the company is not actually reduced, and the limitation already protects the part that is regularly of interest to the bidder and excludes it from the sale. Furthermore, the Annual General Meeting will not approve the sale if this results in damage to the company.

Pac-Man defence

Contrary to the partial assumption, the Pac-Man defence, in which the target company makes a counteroffer, is permissible but difficult to implement in practice (Krause, Pötzsch, & Stephan, 2020; Steinmeyer, 2019). The principles on which the measure is based are already very restrictive. The bidder must be a company capable of being taken over, which presupposes that shares are held. Furthermore, the target company must be in a position to finance the takeover. This funding must also be arranged during the offer period (Steinmeyer, 2019). The measure is also subject to approval if the activities of the bidder exceed the business purpose of the target company. Under stock corporation law, the takeover must be in the interest of the company. It is also likely that the defence alone does not reflect the company's interest and thus contradicts the principles of stock corporation law (Krause, Pötzsch, & Stephan, 2020).

This measure is likely to be unsuitable on a regular basis to prevent success. First of all, this presupposes that the acquirer is initially established, which cannot be assumed, for example, in the case of natural persons. Furthermore, considerable financial assets have to be raised within a very short period of time. Here the risk of a substantial indebtedness of the enterprise exists. Consequently, a distinctive examination and in the most frequent cases a consultation with credit institutes would have to take place. The time available for this is likely to be too short. As a result, the Pac-Man defence entails considerable risks that are economically hazardous. Furthermore, it must be critically assessed whether a purchase of a company is in reasonable relation to a takeover and whether the management board is not in breach of its duties when implementing measures to that effect.

Antitrust violation

The purchase of companies that trigger an antitrust problem is very efficient in theory. Initially, the change in the indebtedness of the company will influence the interest of the bidder, especially since the reason for the indebtedness is also disadvantageous. The antitrust issue is not an insurmountable subject, the merger can be approved by the antitrust authority if the divestiture of the purchased company is set as a condition (Schlitt, 2017; Kraft, Jäger, & Dreiling, 2003). In addition to this, the merger to cause prohibition under merger control law opens the scope of application of section 33 para. 1 WpÜG. Since bidders can state in the offer documents that the offer is subject to clearance by the competent merger control authority. Instead, the Executive Board requires authorization from section 33 para. 2 WpÜG (Krause, Pötzsch, & Stephan, 2020; Kraft, Jäger, & Dreiling, 2003).

Under stock corporation law, a purchase of this kind is only permissible if the acquisition or the stake in another company is part of the corporate strategy or part of the company's interests. Defence is not a basis under interest law in this case (Krause, Pötzsch, & Stephan, 2020; Schlitt, 2017).

But even without opening the scope, a merger or acquisition that triggers such a problem can hardly be timed (Schlitt, 2017).

In practice the weak points become apparent. Initially, as long as no exclusionary condition has been included in the offer, the purchase can be reversed by an agreement with the anti-trust authorities, thereby dissolving the effect. Furthermore, it would have to be possible to implement a takeover within the period of the offer. This in turn requires complex and time-intensive preparation. It is true that the measure is potentially very suitable and can certainly have a deterrent effect. This can be circumvented.

Statement pursuant section 27 WpÜG

The statement of the Executive Board is legally unproblematic, as it is required by law. Furthermore, communication between the Board of Management, the Supervisory Board and the shareholders cannot be limited. In principle, the main interest of their shareholders is to achieve the highest possible profit. If the company sees a higher chance of success by not selling the shares, the shareholders will hold on to them and thus prevent the takeover from working. Even if the measure is not to be equated with the classical measures, the statement is legally suitable and is also economically recommended.

7 Recommendation for action for companies

A uniform and generally valid recommendation for action cannot be given; rather, the recommendation for action varies depending on internal as well as external factors. Initially, a differentiation must be made between small and medium-sized enterprises and corporate groups, as well as between those with high and low financial strengths.

Furthermore, an evaluation of the current market, the overall economic situation and the competitive situation should take place regularly. This analysis is crucial, especially in phases of economic downturn and falling share prices, such as at the beginning of the Corona pandemic. In addition, it should be carefully evaluated which internal reasons make a takeover bid more likely. Is the company trading at too low a price, what is the company's free float and how are shareholdings distributed?

Not all of these factors can be influenced by the company. In some cases, the company will not have any interest in intervening, but awareness of these basic conditions is essential in order to develop a long-term and reasonable strategy that will bring sustainable success. This strategy should be laid down in a manual. In principle, no offer is the best strategy of defence, so the aim should be to make the firm as unattractive as possible to bidders. The company should only be rendered less attractive as the existing resources are fully utilised, the enterprise value is correspondingly high, and the share price is also appropriately endowed. If a company is not considered as a potential takeover target from the outset, the company is not burdened, resources remain untapped and normal business activities are not affected.

A company should always attempt to retain the highest possible enterprise value. This can be achieved through takeovers, inter alia. By enlarging the target company, and in the case of a successful takeover with successful integration, the value increases considerably. This makes a takeover less likely. Consequently, acquisitions are in themselves a promising defensive measure.

If the free float is very high and mainly in the hands of small investors, the aim should be to reduce the stake. Although large shareholders holding large blocks of shares also pose a risk in that fewer shareholders need to be persuaded to hold a significant proportion of shares and control can be achieved more easily, this strategy has proven to be more advantageous.

Furthermore, the process should begin well in advance of the takeovers. The board should strive to keep the shareholder base sympathetic throughout the process. Both preventive and reactive measures are often dependent on the approval of the general meeting. Consequently, the board should persuade the AGM on these matters and thereby generate some fidelity. This can be supported through consideration of interests and an optimised dividend policy.

Preventive measures should be the foundation. Ideally, they should be planned for the long term, with an intensive evaluation of the measures, potential damage weighed up and gaps adjusted. With successful and accurate planning, preventive measures can be much less aggressive and therefore protect resources.

- One promising option for small and medium-sized enterprises as well as for large companies is the issuance of registered shares with restricted transferability. Ideally, this should be subject to conditions prior to issuance. Thereby, proportionality should be maintained. If the conditions are too restrictive, the company will have difficulties finding shareholders who want to possess these shares. Yet, this can already prevent shares from being issued without consent. The process as a whole is delayed, which gives the company an advantage and allows it to take further actions.

- Non-voting preference shares can also be advantageous and advisable for companies that are financially strong and where the possibility of not being able to comply with the preference can be excluded. But the possibility of block formation should not be underestimated. Rather, a case-by-case consideration should take place in which the risks are weighed. The loyalty of shareholders should be given special consideration. Economically weak companies should not issue preference shares because the risk is too high.
- The creation of authorised capital is also a promising measure. Authorised capital gives the board of directors' room to manoeuvre, which can be used both in and out of a takeover situation. Although the law sets a holding period, this can be renewed by a resolution of the general meeting. This can be used to finance the repurchase of own shares or the issue of new shares. Although this measure alone may not be sufficient to defend against a hostile takeover, it can make the process more difficult if other measures are taken.
- Furthermore, the anticipatory resolution can be promising through section 33 para. 2 WpÜG. The authorisation to take defensive action by the general meeting can entitle the board of directors to take defensive action against takeovers for a period of one and a half years. This recommended action should only be taken if there is a concrete suspicion of a potential takeover. If this becomes public, it may lead to the company being seen as an attractive takeover target in particular. Furthermore, the authorisation only extends to actions that can be delegated.
- In preparation, it is also advisable to occasionally list potential candidates who could act as white knights. An exploratory discussion is not recommended without the expectation of an acquisition. A potential hostile takeover is the point at which target companies should react as quickly as possible in order to find a white knight.

As a rule, buying activities of shares should be observed, so that a significantly higher transaction rate can be recognised at an early stage and takeovers therefore can be identified in advance.
If the preventive measures have already been fully utilised and the decision to make an offer has nevertheless been announced, reactive measures can be taken. Despite the time pressure, these should be weighed up sufficiently and the risks weighed up to one another.
After the bidder has become known, an evaluation of the reasons for the takeover should take place. It should be considered whether the aim is to merge and create synergies or merely to extract value from the company. If synergies are the goal, the bidder will try to find a more friendly approach. If only the value of the company is to be extracted or a mere tax advantage is to be realised, the bidder's approach may become more aggressive. Furthermore, the reasons for the takeover provide a first insight into which strategies are recommended.

- The statement of the board of directors and the accompanying advertising measures can certainly have a strong positive effect and for this reason should be emphasised in addition to the obligation that exists. The will-forming process in which the shareholders find themselves can be significantly influenced at this point. If the supervisory board has confidence in the board of directors and the general meeting, its assessment is taken seriously, and the shareholders can be convinced by well-founded counter-arguments. Opinion can be influenced by the advertising measures in addition to the statement
- If the target company is a group that intends to implement an IPO of the subsidiary in the near future, this offers enormous protection and can serve as a successful measure. Since this is regularly not the case and only addresses a small number of companies, this strategy can be excluded. The situation is similar with the Pac-Man defence. This action is regularly only recommendable for financially strong companies. At the same time, the process is likely to be feasible only in very few cases.
- If a pre-selection of potential white knights has already been made at the time of the announcement of the decision to submit an offer and, at best, initial talks have taken place, the search for a competing bidder and thus the achievement of a friendly takeover is feasible. This measure is particularly advisable in the case of a presumption of asset stripping or mere buy-out for economic reasons. White Knight does not offer a

defensive measure in the conventional sense, but the resulting negative consequences can be mitigated. It remains unchanged that the measure is taken from a defensive position and that the company will definitely be taken over. Consequently, it should be the last possible measure to be initiate.

8 Conclusion

In summary, a hostile takeover describes a process in which a bidder publishes a takeover bid to the shareholders and management against the will of the board. In particular, financial reasons, the development of market dominance or the interest of a special company value are driving reasons for company takeovers.

Hostile takeovers are very unusual in Germany and hardly documented. They are a sub-area of the capital market, which must be viewed abstractly as a totality of possible takeovers. The German capital market has been increasingly liberalised in recent years. In contrast, the WpÜG, which was created as a set of rules that defines the framework conditions, is still restrictive and more regulated than in the United States, the domestic market for takeovers. The set of rules that results from the WpÜG and the corresponding stock corporation laws limits the possibilities for defensive measures and therefore protects the interests of the shareholders/directors. As a result, the defensive measures that work there cannot be implemented in Germany without adaptation. Rather, a strategy adjusted to the regulations and the many legal restrictions must be implemented.

Section 33 WpÜG is one of the most important paragraphs in relation to hostile takeovers. It specifies the possible actions of the board of directors in a specific takeover situation and thus compliments the additionally applicable principles of stock corporation law. It stipulates that, after the announcement of the decision to make an offer, measures that are likely to prevent the success of the offer are prohibited and at the same time offers corresponding exceptions. The management board, which is regularly replaced by a management board selected by the bidder, especially in the case of a successful hostile takeover, does have the possibility to repel a bid under restrictive conditions.

Consequently, the management board, which is regularly replaced by a management board selected by the bidder, especially in the case of a successful hostile takeover, does have the possibility to repel a bid under restrictive conditions.

A distinction is made between preventive and repressive measures, i.e. those measures that are taken before or after the decision to make an offer becomes known. But not all measures are equally suitable; in particular, unsuitable American measures pose considerable risks for the target company. The aim should be to create a basis through preventive measures which, at best, already lead to the target company being excluded for a takeover in the target search process. Preventive measures are usually less aggressive and do not have such drastic economic effects on the target company and should therefore be preferred. They can be undertaken well in advance and in a planned manner. This reduces the general risks associated with defensive measures.

For this purpose, measures are recommended which make the transfer of shares more difficult in advance or exclude the voting rights of the shares. The measure which offers the board the greatest room for manoeuvre is pre-approved capital. This can be used to create new shares or to buy back shares. Furthermore, the board can be authorised in advance to take action in the event of a takeover. Since these must be defined in advance, the authorisation to act remains in the hands of the general meeting.
The goodwill and trust of the general meeting is not only important for the authorisation to act. Rather, the trust of the general meeting is of particular importance for the entire process.

Repressive measures are usually implemented under enormous pressure and in a very short period of time. This is where section 33 para. 1 WpÜG intervenes and restricts the measures that the board can take. Basically, the measures are much more aggressive and have a stronger impact on the company.
The most important instrument and at the same time the measure that does not have a direct economic or legal impact on the company is the statement of the executive board and the supervisory board. In this context, the executive bodies have the opportunity to communicate their view on the takeover and to present arguments against accepting the offer.

More aggressive measures, which regularly fail due to time or financial burden, but are otherwise quite promising, are the Pac-Man defence and the IPO of a subsidiary.
As a last measure, the White Knight measure is a possibility. However, since a takeover is not prevented, only the conditions and the company by which the target company is taken over are adjusted, this is one of the economically most far-reaching methods due to the abandonment of independence.

In summary, it can be stated that the board of directors certainly has various methods of defence at its disposal. Ultimately, this is a matter of weighing up the risks that the board is prepared to take and the resulting expectation of success. The consideration should be carried out under very close scrutiny, since promising measures, taking into account the loopholes and the limitation by German law, lose their effectiveness considerably and, in certain cases, favour the takeover. Since no successful hostile takeover has been recorded so far it has been shown that the possibilities are extensive and sufficient. At the same time, legal certainty is created.

A strategy that guarantees that capital continues to be drawn from the stock market, the attractiveness of the shares remains unaffected, and no financial burden is placed on the company is not possible. In fact, it is questionable whether this would be sensible at all. Rather, a possible takeover is a known risk on the stock market and a takeover also holds the potential for further development of the company.

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