ISSN 2411-958X (Print)
ISSN 2411-4138 (Online)

European Journal of
Interdisciplinary Studies

January - June 2022
Volume 8, Issue 1

Hostile Takeovers: Desirable or Dangerous? A Survey Study into the Circumstances Under Which Hostile Takeovers in the Netherlands Are (Un)Permissible

J. Nijland

T. L. M. Verdoes

M. P. Lycklama a Nijeholt

N. T. Pham

Department of Corporate Law and department of
Business Studies, Faculty of Law, Leiden University

Abstract

A number of recent hostile takeover attempts in The Netherlands have triggered the discussion in the Netherlands on the circumstances under which protection of the target company against a hostile takeover should be justified or not be justified. To answer this question, 21 experts involved in mergers and acquisitions from various angels on the highest (management) level, were selected to participate in a survey investigation combining open questions and giving scores for submitted factors. The outcomes show that the participants advocate non-protection in case of relatively high performance of the bidding company, new value creating opportunities a non-responsive board of the Target with personal interest of the board, and cash payment for the target. They are in favor of protection in case of takeover attempts that incur personal board benefits of bidder or target, intended debt push down financing, and in case of considerable societal risks and consequences.

Keywords: shareholder value, long term value creation, stakeholders, corporate governance, hostile takeover, protection

1. Introduction

Hostile takeover bids attract considerable attention such as two takeover attempts in the Netherlands in 2017: the takeover bid for AKZO Nobel by PPG and the takeover bid for Unilever by Heinz Kraft. Both hostile bids were opposed by the management of the target company because the bids would not be in the interest of the company or the long-term value of the company. This is in line with a prior case in which an attempt of telecom giant America Movil to acquire the shares of telecom company

KPN was halted. Two obstacles that hampered the acquisition process at the time were the national security and public interests of the vital telecom infrastructure that KPN manages. Other companies might incite a similar protective stance arguing that takeover attempts by foreign companies controlled by national governments are aimed at taking over unique knowledge or research and development that are in danger of disappearing from the Netherlands. Opposite noises are also heard. For example, the financing theory states that hostile takeover bids have a disciplining effect on malfunctioning management of the target company. Poorly managed companies will perform less well, resulting in a falling share price, making these companies attractive acquisition candidates. According to this theory, it is in the interest of the shareholders of the target company and ultimately of all stakeholders that a (hostile) takeover emerges in such cases. The three recent acquisition attempts in The Netherlands have triggered the discussion in the Netherlands on the circumstances under which a hostile takeover is desirable or not. On the one hand, the well-functioning of capital markets and the disciplining effect of the market of corporate control are of importance. At the same time, issues such as corporate interests, national security, and preservation of intellectual capital may play a role. It is questioned to what extent short term shareholder value outweighs long term value at the company level and societal level. Based on these evolvements, in this paper the following research question is examined.

What circumstances make a hostile takeover permissible?

To answer this question, 21 participants/respondents were selected to participate in a survey. All participants were involved in mergers and acquisitions from various angles and play important roles in hostile takeover decisions. First, using open questions, they were asked to provide the characteristics of a hostile takeover as well as to indicate when protection against a hostile takeover attempt is justified and when not. Subsequently, a number of factors were presented to the participants. For each of these factors, they indicated whether it justifies protection against a hostile takeover attempt or not. The selected factors were derived from previous research of Dutch case law evolution on mergers and acquisitions, literature review, and previous in-depth interviews with stakeholders from practice. Besides, these factors were submitted in advance to a panel of experts.

This research contributes to our understanding of how a hostile takeover is perceived in the professional field. It provides insight into the factors that influence the permissibility of a hostile takeover and the protection against it. The research is unique in its kind in that it is not limited to the outcomes of a theoretical discussion, but it also tests these theoretical outcomes in practice. As far as we know, such an investigation has never been conducted; it may contribute to new directions and insights regarding corporate governance and hostile takeovers.

This paper proceeds as follows. First, to provide insight into the Dutch company law perspective, elements of Dutch case law regarding corporate interests and the

purpose of the company in a takeover context are discussed (2). Then, the state of the art of literature on the circumstances under which a hostile takeover is permissible will be discussed. From this, the hypotheses are formulated (3). Thereafter, the methodology and the model of the research will be discussed (4). Then, the results will be presented (5). The paper ends with a conclusion (6).

2. Evolution of elements in Dutch case law

The notion that a company is a legal person with a definable purpose is accompanied with the acknowledgment that the company could be seen as an actor with its own interest, to be distinguished from those involved in or who have a stake in the company and its activities. The view that company interest could exist, distinct from the interests of the stakeholders of the company, applies best in the situation when a company maintains a firm. In a series of judgments in the takeover context,1 the Dutch Supreme Court explicitly acknowledged the distinction between the 'company's interest' and the interests of 'others involved in the company'. The Supreme Court has consistently rendered its decisions based on the directors' obligation to act in the interest of the company and its affiliated firm (article 2:129/239(5) DCC, as codified in 2013), in conjunction with the standards of reasonableness and fairness to take due care of the interests of those involved in the company (article 2:8 DCC).

The growing body of case law in the Netherlands indicates that – although recognizing the open ended nature of the purposes companies may have – in the typical situation where a firm is connected to a company, the purpose of the company is to promote the interests of the firm. Yet, it was not until the *Cancun* judgment in 2014, that the Dutch Supreme Court explicitly assigned legal significance to the interest of the firm by interpreting the scope of the company's interest: 'if a firm is connected to a company, the company's interest is, as a general rule, mainly determined by promoting the sustainable success of this firm'.[1]

After *Cancun*, the amended Dutch Corporate Governance Code 2016 (DCGC 2016) acknowledged that the purpose of the company was *'to create long-term value'*.[2] It is important to note that before the amendments to the Code, from 2003 onwards, the view of the Corporate Governance Monitoring Committee was that '*a company endeavours to create* ***long-term shareholder value*** [emphasize added]'.[3] Moreover, in the recent high profile takeover contest between Akzo Nobel and PPG, the Dutch Enterprise Court applied the *Cancun* formula and decided that company boards are

[1] Dutch Supreme Court, 2014 NJ 2014/286 (Cancun), paragraph 4.2.1.
[2] See the preamble of de DCGC 2016 and article 1.1.1 (strategy for long-term value creation) of the Code.
[3] See the preamble of the DCGC 2003, under paragraph 3.

obliged to direct their actions towards *'the **long-term value creation** of the company and its affiliated firm'* [emphasize added].[1]

The legal translation could be argued as follows: that the company's interest to create value is regarded as a legal norm which is addressed to the company, to the constituents of the company such as the board of directors, the supervisory board and the general meeting of shareholders, and any other stakeholder involved in the company and its affiliated firm. Accordingly, acknowledging the company's interest as a legally enforceable norm is not without consequence, nor does it leave the corporate governance debate unaffected. [2]

The following three principles regarding the dichotomy between shareholders and stakeholders are of importance in the Dutch corporate governance code:

1. The interest of the company in the sustainable success of its affiliated firm transcends any stakeholder and shareholder interests;
2. Executive directors, under the supervision of supervisory directors, have an obligation towards the company to make business decisions (including strategic decisions) to further pursue the sustainable success of the interest of the company and its affiliated firm[3] and when making these business decisions have an obligation towards the company's stakeholders, including shareholders, to take due care and not cause unnecessary or disproportionate harm;[4]
3. The company's shareholders, when acting collectively in the general shareholders meeting in the pursuit of their (collective) interests, are bound via the standards of reasonableness and fairness, to not disproportionately harm the company's interest, under the penalty of deterioration of the shareholders' resolution. A situation where individual shareholders are confronted with a bid and are incentivized to put their private interests first, may legitimately face frustration of the bid by the target board.

3. Substantiation of the factors from theory

According to Pitelis and Teece (2009) the essence of the firm is that the future value creation consequences of corporate actions and decisions cannot be foreseen. Value creation cannot be proven in advance. In the same way: it cannot be proven (in advance) that mergers create (shareholder) value. This means that the arguments exchanged during the hostile takeover process are partly rhetorical – it is a discourse (Négre et al., 2018). Therefore, multi perspectives and research methods are taken

[1] Dutch Enterprise Court 29 May 2017 ECLI:NL:GHAMS:2017:1965, paragraph 3.34 (Akzo/Nobel), JOR 2017/261 with annotation from C.D.J. Bulten.
[2] For an analysis of Dutch case law from 1971 to 2017, see Pham et al., 2018).
[3] Accordingly, exercising their legal task (article 2:129/239 DCC).
[4] Accordingly, to abide by the standards of reasonableness and fairness (art. 2:8 DCC).

into account to distill the relevant factors that the stakeholders could take into account in determining their position in the hostile takeover discourse.

Empirical research shows that mergers on average do not create value. Some studies show that on average 7 out of 10 mergers do not live up their promises (Epstein, 2005); mergers are a mixed blessing; average returns to bidding companies' shareholders are at best slightly positive, and significantly negative in some studies (Morck et al., 1990). King et al. (2004) conclude that M&A activity has a modest negative effect on long-term financial performance of acquiring firms. It is thus extremely important that hostile takeovers are scrutinized thoroughly.

Discussion of research with different perspectives brings different factors into sight which are the basis for the factors surveyed. Research about discriminating factors – explaining success or failures of mergers and acquisitions – show mixed results. Morck et al. (1990) conducted a research into three characteristics of mergers explaining failure: relatedness, buying growth, and past performance of acquirer management. They conclude that these types of acquisitions have systematically lower and predominantly negative announcement period returns to bidding firms. Furthermore, they find out that managerial objectives drive bad acquisitions. King et al. (2004) conducted a meta-analysis of post-acquisition performance. They conclude that the most commonly studied conditions studied in prior M&A research – conglomerate acquisition, related acquisition, method of payment, and prior acquisition performance – do not impact post acquisition performance. "What impacts the financial performance of firms engaging in M&A remains largely unexplained. This problem could be resolved by taking notice of other kinds of research, such as case studies and surveys.

Epstein (2005) asserts that success and failure of M&A has been studied in terms of narrow and uninformative measures – such as profit and or short-term stock price fluctuations. "Research on M&A desperately needs a new perspective and a new framework for analysis". He conducts a field research on the success of a merger and deduces the following six determinants: 1. Strategic vision and fit, 2. Deal structure, 3. Due diligence, 4. Premerger planning, 5. Postmerger integration and 6. External factors. Brouthers et al. (1998) also note that there is a gap between the theoretical communis opinion that mergers are at best break-even situations – and practice where managers use mergers as a major strategic option – and perceive them as successful. This gap may be caused by managers pursuing other goals, or being overly optimistic. Another reason may be that empirical research uses inaccurate data. A better measure of merger success or failure could be the degree to which the mergers achieve these predetermined objectives. Brouthers et al. (1998) conducted a survey among CFO's of Dutch firms who made an acquisition to find out the managerial

motives of mergers. They used the following 17 motives used in previous merger studies[1]:

Economic motives
Marketing economies of scale
Increase profitability
Risk-spreading
Cost reduction
Technical economies of scale
Different valuation of target
Defense mechanism
Respond to market failures
Create shareholder value

Personal motives
Increase sales
Managerial challenge
Acquisition of inefficient management
Enhance managerial prestige

Strategic motives
Pursuit or market power
Acquisition of competitor
Acquisition of raw materials
Creation of barriers to entry

Each motive could be rated between not important (1) and extremely important (7). Economic motives had the highest score (2.889), followed by strategic motives (2.754) and personal motives (2.154). This suggests that multiple motives exist. From these factors 5 were rated above average: 1. pursuing market power (5.242), 2. Increase profitability (5.065), 3. Achieving economies of scale (4.395), 4. Create shareholder value (4.371) and 5. Increase sales (4.303). They also measured the key success factors of the acquisition; it seems that the key success factors correspond to the key motives. It is thus no coincidence that CFO's labeled these acquisitions as successful.

Another perspective in finding relevant 'merger-judgment-factors is a more process related perspective. "Hostile takeover bids are unique events in the life of a company – they naturally attract much attention – both form the media and the general public. Hostile takeover bids can be perceived as interorganizational events that threaten organizational identity and integrity." (Négre, 2018, 803, 808). As previously mentioned, statements about future value creation cannot be proven. Usually the arguments exchanged by the Target and The Bidder contain a rhetoric element. "Mergers and acquisitions can be seen to incorporate multiple realities, the potential for multiple, complex and contradictory interpretations." (Vaara and Tienari, 2002)

The disclosures made by both parties constitute a dynamic and mutual influence process. (Nègre, 2018). In fact a discourse arises: in which mergers are justified, legitimated and naturalized (Vaara and Tienari, 2002). The campaign thus has the character of constructing a reality in order to reach a practical and concrete objective: "in communicating reality, you construct reality." (Nègre et al. 2018, 808)[2]. The hostile takeover process - and the arguments exchanged - is thus important and can shed a

[1] These factors can overlap, substitute or complement each other. Besides, they could sometimes be classified in a different way. "Increase of sale" could be classified within all three rubrics.
[2] A social constructivist view, referring to "if men define situations as real, they are real in their consequences".

new perspective on the relevant factors to assess it. Vaara and Tienari (2002) distinguish four discourse types: rationalistic, cultural, societal and individualistic. Societal consequences are the potential consequences and risks for society and the different stakeholders. According to Vaara and Tanieri (2002) the rationalistic discourse usually becomes the dominant discourse; if broader societal concerns are given specific attention they are usually labelled "unfortunate but unavoidable".

As previously mentioned, the factors questioned are based on theory, expert meeting, and interviews (Pham et al., 2018). From the above mentioned studies we distilled the following clusters of relevant factors in assessing if a target firm should (not) be protected in a hostile takeover situation: (1) performance of bidder and (2) target, (3) strategic fit, (4) takeover process, (5) method of payment – deal structure, (6) characteristics of CEO's of bidder and (7) target, and the (8) (societal) risks and (9) consequences of a hostile takeover. These can be traced to the following research findings.

Usually (under)performance of the target is considered to be an important argument of a hostile takeover to replace inefficient management. (Brouther et al., 1998). This is the essence of the disciplining force of the market for corporate control (Jensen and Ruback, 1983, 47)[1]. To this a symmetrical aspect can be added: the performance of the bidder. Underperformance could be a sign of weak management that makes detrimental acquisition decisions. Besides it could be considered that the bidder is merely buying profit instead of creating it by itself (Morck et al., 1990). The level and shape of the strategic fit of acquirer and target– expressed by variables such as relatedness, conglomerate formation, competitors, complementarity, and synergies - is a frequent used discriminant in M&A research (Brouther et al., 1998, Morck et al., 1990, Epstein, 2005, King et al., 2004). The takeover process contains elements such as negotiations, agreements, disclosures, and due diligence that could influence the merger outcome because of more detailed research into the possible benefits and risks of a merger and a reduction of the conflicts with other stakeholders (Epstein, 2005, Pham et al., 2018). Furthermore, the method of payment could be a discriminating factor: an acquiring firm could use cash instead of shares if CEO's think that the shares are undervalued and do not reflect post-acquisition performance (King et al, 2004). Personal motives of both the bidder and target CEO's – instead of strategic and/or economic reasons – could influence merger performance. The hubris hypothesis states that CEO's of bidding corporations may be overconfident about their own abilities (Roll, 1984). However, this could also be viewed from a different angle: The Target's CEO's could entrench themselves by not considering new opportunities because of fears of losing control and power. Frustrating and blocking a hostile takeover attempt could thus be driven by personal reasons too. We therefore added characteristics of Target's CEO's. Societal risks and consequences are not

[1] They also concluded that "knowledge of the source of takeover gains still eludes us" (Jensen and Ruback, 1983, 47). It seems that this remark still applies.

frequently taken into account in research into mergers and acquisitions and hostile takeovers. The only exception is in public media research: the justification and legitimization of a hostile takeover in trying to influence public opinion. This could thus be a relevant factor in assessing a hostile takeover especially considering the Dutch stakeholder view of corporate governance – and the therein stated purpose of long term value creation - as is previously shown.

From this the following hypothesis are derived: these will be questioned by the mentioned clusters containing a number of collected explanatory variables (factors):

H.1 The judgement of participants of (not) protecting the Target company is influenced by the performance of the Target as well as the performance of the Bidder. (see cluster of factors 1 and 2)

H.2 The judgement of participants of (not) protecting the Target company is influenced by the extent and shape of the strategic fit between the Target and Bidder (see cluster of factors 3)

H.3 The judgement of participants of (not) protecting the Target company is influenced by the hostile takeover process and the agreed contractual conditions. (see cluster of factors 4)

H.4 The judgement of participants of (not) protecting the Target company is influenced by the personal motivation/interest of CEO's of the Target and the Bidder. (see cluster of factors 5 and 6)

H.5 The judgement of participants of (not) protecting the Target company is influenced by the deal structure. (see cluster of factors 7)

H.6 The judgement of participants of (not) protecting the Target company is influenced by the (societal) risk and consequences. (see cluster of factors 8 and 9)

4. Research Method

In the above section, a number of factors and related hypotheses are introduced that may affect the attitude regarding (non) protecting a Target from a hostile takeover attempt by the Bidder. The selected factors are derived from previous research of Dutch case law evolution on mergers and acquisitions, and literature review. Moreover, this paper builds on previous research by the authors in which in-depth interviews were conducted concerning some major takeover conflicts, international developments in corporate governance, recent court decisions, and the adoption of long-term value creation of the company and its connecting firm in the Dutch corporate governance system (Pham et al., 2018).

To carry out empirical testing of the selected factors and their determinants, a survey study is being conducted. Before this survey is conducted among the participants, the questionnaire as well as the factors have first been submitted to a panel, consisting of experts from practice, business law and science. In a round table discussion, the panel

has tested the factors and the survey questions regarding clarity and substantive consistency.

21 experts were selected to participate in the survey from the following angles:

Partcicpants

Participants	%	Number
Judicial officer	23.81	5
Director, executive, exco member	19.05	4
Statutory auditor, non-executive	28.57	6
External supervisor	14.29	3
Institutional investor	14.29	3
Total	100	21

First, using open questions, the participants are asked to provide the characteristics of a hostile takeover as well as to indicate when protection against a hostile takeover attempt is justified and when not. Subsequently, the previously mentioned factors that may affect the preference for (not) protecting the bidder against a hostile takeover from the Target, are presented to the participants. For each of these factors, the participants indicated whether it justifies (non) protection against a hostile takeover attempt.

5. Results of the study

5.1. Open questions

5.1.1. What is meant by a hostile takeover?

Respondents were asked to give a description of hostile takeover. In literature two aspect are frequently mentioned: 1. If the target managers reject the initial bid by the bidding company, and 2. The nature and intensity of target resistance (Nègre, et al., 2018, 803)[1]. The answers were coded to discover a pattern in the perceptions of a hostile takeover situation. We depicted 6 different elements in the descriptions of the participants:

Elements:	*Number*[2]
A bid or intention that is considered undesirable by the board and/or supervisory board.	*9*
There is no agreement about the intention to bid	*6*

[1] The motives behind target resistance have been subject to some controversy and are diverse in nature: financial, personal, strategic and social (Nègre et al., 2018, 804).
[2] Numbers add to more than 21 because some participants mentioned more than one element.

If a target has not requested a takeover proposal *4*

There was no prior consultation about the bid or intention to bid *3*

An attempt to acquire controlling interest in the company *3*

If the target board considers the acquisition to be in conflict with the interest of the target company *1*

Remarkable, resistance is not explicitly mentioned and considered a crucial element. Besides being undesirable, important elements are disturbed negotiations, transparency and an open dialog. A hostile takeover could be considered as a new option or opportunity, that should be considered rational, but usually emotional, nationalistic, and psychological elements are very important. Judging and assessing this new option with many dimensions is rather complex. As previous is indicated statements and arguments about value creation are partly rhetoric, because they cannot be proven. The term has the connotation that the bidder is to blame, but frequently, the bidder in an earlier stage has tried to open negotiations. In many cases a hostile takeover does not fall from the sky. It looks like it is sudden and unexpected but it is also possible that the Bidder has tried to start the negotiations earlier[1]. The question is therefore who is to blame for the hostility. The Target has obligations too in creating an equal level playing field and generate the relevant information to make a proper assessment.

5.1.2. When is protection against a hostile takeover not justified?

Participants were asked to give a description of the case that protection against a hostile takeover is not justified. The answers are coded to discover a pattern in the responses about the unfairness of protecting a Target against a hostile takeover bid. We distinguished 11 elements in the descriptions:

Elements *Number*

When one of the stakeholders, including the board, primarily serves his own interests. *6*

When it appears that only one person involved has been served in the protection and thus there has been no pluralistic consideration of interests by the board from the stakeholders' viewpoint. *5*

[1] The Target company can easily frustrate the negotiations by simply refusing to talk and/or to not allow the potential bidder to execute a due diligence.

In the event of underperformance of the business of the target
4

In case of protection for an indefinite period
2

When protection is not in the interest of shareholders.
2

In case of asserted nationalistic, economic interests
1

When there is a reasonable offer with opportunities to create value.
1

The higher the price offered for the shares in relation to the last market price prior to the bid, the more difficult it is to defend protection.
1

Board refuses reasonable consultation. *1*

If the board cannot explain why a stand-alone scenario is better for those involved with the company. *1*

If the protection measure is not in accordance with the interests of the target company
1

The general impression is that respondents prefer an open balanced judgment/decision that takes into account the interests of all the stakeholders of the company. There is no primary stakeholder (the shareholder and/or the Board) – this reflects the stakeholder approach of the Netherlands. However, a more classic shareholder view can also be distracted from a number of descriptions: shareholders are the only stakeholders explicitly mentioned, and underperformance and a higher price offered in relation to the share price means that respondents are less averse against a hostile takeover. A hostile takeover opens an unexpected and unforeseen opportunity in which the continuity of the (partly) immobile and the embedded business are questioned. Participants prefer an open dialogue in which the diverse options are examined and compared with an open mind were protection is only temporary – only needed to not disturb this balanced process because of a hectic, uncontrollable process under severe time pressure, fears, and rumors. This temporary protection preference also shows up in the next question. Frustrating this takeover process - both from the Bidder and the Target - is not appreciated.

5.1.3. When is protection against a hostile takeover justified?

Participants were also asked in which case they would support protection against a hostile takeover. We distinguished the following 13 elements:

Elements	Number
When protection is in the interest of the target company, it is greater than shareholder value (such as maintaining employment).	9
If the bid is too low in relation to the interests of stakeholders and/or the present value of the company.	4
When a strategy change is envisaged.	3
If the protection is only temporary.	3
If it concerns national security interests and/or companies that are essential for the Netherlands, such as Banks, Insurers and/or companies that are critical for the infrastructure and data structure.	3
When the authority of the board to determine the strategy is crossed.	1
When constructive consultation becomes possible with the protection measure.	1
When there is no long-term underperformance.	1
If there is a negative track record of the bidder in previous acquisitions.	1
When the independency of the group is potentially lost.	1
When innovation is compromised.	1
In case all stakeholders are unanimous against the takeover.	1
None, the protection structures existing in the Netherlands are neither necessary or useful	1

The list is more diffuse and diverse compared with the “against protection” question. The most frequently mentioned answers represent the importance of the stakeholder view: shareholder value is not the sole yardstick for assessing the bid, the interests of the stakeholders have to be taken into account. There is also some resistance to change and undermining the autonomy of the board. But it is also stressed that protection is acceptable if it is temporary and used for constructive consultation, and there is no long-term underperformance. Also, society is recognized as a stakeholder in case of critical (data) infrastructure.

5.2. The Hypothesis questioned with the factors surveyed

We asked the respondents to rank the level of their preference of protecting a Target company from a hostile takeover on the following scale:

Strongly disagree (1) disagree (2) neutral (3), agree (4), strongly agree (4) to protect. A lower than average score of 3 indicates that the prominent participants (n=21)

prefer less protection (thus are in favor of a hostile takeover) , a score above 3 – the point of indifference – indicates a preference to protect the Bidder (thus are against a hostile takeover).

5.2.1. Performance of the Bidder:	av.	(1)	(2)	(3)	(4)	(5)
Bidder's profitability is better than the benchmark	2.10	5	9	7	0	0
Bidder's profitability lags behind the benchmark	3.00	2	3	10	5	1
Development of Bidder's share price on the stock market is better than the benchmark	2.24	3	10	8	0	0
Development of Bidder's share price on the stock market is lagging behind the benchmark	3.10	1	4	9	6	1
Development of Bidder's sustainability indicators is better than the benchmark	2.10	6	8	6	1	0
Development of Bidder's sustainability indicators lags behind the benchmark	3.10	2	3	8	7	1

In case of better performance – in terms of profitability, share price and sustainability – of the Bidder, participants are less averse to a hostile takeover and have a slight preference for non-protection.

5.2.2 Performance of the Target:	av.	(1)	(2)	(3)	(4)	(5)
Target's profitability is better than the benchmark	2.86	3	4	7	7	0
Target's profitability lags behind the benchmark	2.48	2	9	8	2	0
Development of Target's share price on the stock market is better than the benchmark	2.67	3	4	11	3	0
Development of Target's share price on the stock market is lagging behind the benchmark	2.71	2	6	10	2	1

The results show that the opinion of the participants on the influence of the performance of the target company on the justification of protection against the hostile takeover is not decisive: there is no clear link between the performance of the target and the preference of the participants of protection against the takeover.

The positions of the participants are a bit asymmetrical: better performance of the Bidder is more rewarded than bad performance of the Target is punished. Poor performance ot the Target in terms of share price (a measure of underperformance)

does not influence the preference for protetction. This is not in line with the market for corporate control hypothesis. The (combined) results indicate that hypothesis 1, stating that the judgement of participants of (not) protecting the Target company is influenced by the performance of the Target as well as the performance of the Bidder, seem only partly to be endorsed: in case of relatively high performance of the Bidder, participants are less averse to a hostile takeover and have a slight preference for non-protection. The opinion of the participants on the influence of the performance of the target company on the justification of protection against the hostile takeover is not decisive.

5.2.3. Strategic Fit:	av.	(1)	(2)	(3)	(4)	(5)
Target can offer new opportunities for Bidder	1.90	5	13	3	0	0
Business activities of Bidder and Target are complementary	1.86	6	12	3	0	0
Business activities of Bidder and Target are a substitute	2.52	5	6	5	4	1
Business activities of Bidder and Target are not related	3.00	4	3	4	9	1
Bidder can offer new opportunities for Target	1.90	5	13	3	0	0
The synergies envisaged by Bidder are credible and well substantiated	1.86	6	12	3	0	0
The synergies envisaged by Bidder are mainly in efficiency benefits (scale)	2.57	3	8	6	3	1
The synergies envisaged by Bidder are mainly in the complementarity of the Bidder and Target activities (scope)	2.29	3	10	7	1	0
The synergy envisaged by Bidder with the acquisition is realized by restructuring of Target	2.81	3	6	5	6	1
Bidder and Target are direct competitors	2.81	3	6	5	6	1

Participants are less against a hostile takeover in case of new value creating opportunities for the Bidder as well as for the Target, complementary activities, and credible and well substantiated synergies envisaged by the Bidder. In all other cases, e.g. of non-relatedness, focus on efficiency, and reduction of competition, participants have no explicit opinion.

It follows that hypothesis 2, stating that the judgement of participants of (not) protecting the Target company is influenced by the extent and shape of the strategic fit between the Target and Bidder, is recognized by the participants.

5.2.4. Hostile takeover process:	av.	(1)	(2)	(3)	(4)	(5)
Target maintains the status quo	2.52	2	8	9	2	0

Bidder guarantees the independence of Target for a set term	2.24	2	12	7	0	0
Bidder wants to make changes to the Target board	2.57	2	9	7	2	1
There is no consultation between Target and Bidder	3.62	1	3	5	6	6
Target does not allow a due diligence by the Bidder	2.38	2	10	8	1	0
Bidder offers a favorable social plan	2.43	3	8	8	2	0

The results indicate that participants prefer an open dialog for investigating the new opportunity: if there is no consultation between Target and Bidder during the hostile takeover process, most participants consider protection against the acquisition admissible. Furthermore, a majority of the participants agrees that a guarantee by the Bidder of the Target's independence does not justify protection against the acquisition. In case of emphasizing the continuity – in terms of CEO's, target's independence, status quo and a social plan – participants are less inclined to protect the Bidder.

It turns out that hypothesis 3, stating that the judgement of participants of (not) protecting the Target company is influenced by the hostile takeover process and the agreed contractual conditions is only endorsed by the participants in case of the absence of an open dialogue.

5.2.5. Board of Target:	av.	(1)	(2)	(3)	(4)	(5)
Target's board is strongly connected to the workplace	2.67	3	7	6	4	1
Target's board is strongly connected locally	2.57	3	8	5	5	0
Target's board would rather take over than be taken over	2.43	8	10	3	0	0
Target's board has an interest to resist the takeover	1.76	8	10	3	0	0
Target's management does not respond to the pressure from the capital market	2.19	5	9	5	2	0
Target's board does not respond to public opinion	2.10	6	8	6	1	0

Participants are less inclined to protect a Target in case the Board is non responsive to the capital market and the public. If perceived personal interest of the board – e.g. prestige, power, reputation – prevails, participants are strongly in favor of non-protection.

5.2.6. Board of Bidder:	av.	(1)	(2)	(3)	(4)	(5)
Bidder's board is strongly connected to the workplace	2.30	3	8	10	0	0

Bidder's board is strongly connected locally	2.50	3	6	11	1	0
Bidder's board would rather take over than be taken over	2.70	3	6	8	3	1
Bidder's board has an interest in the takeover	3.40	3	2	4	7	5
Bidder's management does not respond to the pressure from the capital market	3.00	2	4	7	8	0
Bidder's board does not respond to public opinion	3.10	2	4	7	6	2

Participants are somewhat opposed to hostile takeovers incurring Target's personal board benefits. A remarkable outcome is that they do not seem to punish the non-responsiveness of the Bidder's Board to public and/or capital market pressure. This neutral position is different from their opinion to non-responsiveness of the Target's Board.

The results show that Hypothesis 4, stating that the judgement of participants of (not) protecting the Target company is influenced by the personal motivation/interest of CEO's of the Target and the Bidder is partly endorsed by the participants. They are opposed to protection against a hostile takeover in case of a non-responsive Target Board. Furthermore, they are opposed to facilitate personal interests of the both the Bidder's and Target's Board. Non responsive Target's CEO's are punished more severely than Bidder's non-responsiveness.

5.2.7. Deal structure:	av.	(1)	(2)	(3)	(4)	(5)
Bidder mainly wants to finance the takeover bid through a "share-for-share offer"	2.76	2	6	8	5	0
Bidder mainly wants to finance the takeover bid with debts that Target itself will bear (debt push down)	3.76	2	1	4	7	7
Bidder mainly wants to finance the takeover bid through a cash payment	2.29	3	10	7	1	0
Bidder mainly wants to finance the takeover bid by issuing bonds itself	2.52	2	8	9	2	0

Participants oppose to a hostile takeover – thus have a preference for protection – in case of a debt push down – increasing the financial risk of the Target. A cash payment seems to be slightly favored to a share payment. This is in line with the earlier hypothesis that a cash offer signals Bidder's management belief that the shares are undervalued because this value does not reflect post-acquisition performance (King et al., 2004).

The outcomes subscribe hypothesis 5, stating that the judgement of participants of (not) protecting the Target company is influenced by the deal structure. They are opposed to debt push downs and are slightly in favor of acquisitions that are financed in cash.

5.2.8. Societal Risks:	av.	(1)	(2)	(3)	(4)	(5)
Substantial uncertainty about decisions by the Authority of consumers and markets	3.71	1	1	4	12	3
Considerable uncertainty about approval by (central) works council	3.05	1	5	9	4	2
Substantial risk of a loss of investments by Target in its sustainability policy	3.57	1	2	5	10	3
Significant risk of compromising investments by Target in R&D	3.57	1	3	4	9	4
Considerable risk of breaching agreements with suppliers and/or strategic partners of Target	3.57	1	2	3	14	1
Considerable integration costs	2.95	1	6	8	5	1
Significant difference in culture between Target and Bidder	3.67	1	3	3	9	5
Considerable risk of reputation damage and loss of customers of Target	3.71	1	2	3	11	4
Substantial breakup fee in the event of a failure of the hostile takeover	2.71	2	8	6	4	1

This table contains different kind of risks and the corresponding attitude of participants towards (non) protection. Participants are open to new opportunities (see H. 2 above) and take the associated costs and resistance for granted - both aspects show that participants take a neutral position in protecting the corporation. However participants fear the risks involved in questioning the position the corporation performs in the value chain and or society. The corporation is embedded in a business ecology (Moore, 1993, Iansiti and Levien, 2004) – it has created a (sustainable competitive advantage) position by making (partly) irreversible

investments. This evolved position is questioned – creating (new) uncertainties. It could also be argued that they resist change themselves.

5.2.9. Societal Consequences:	av.	(1)	(2)	(3)	(4)	(5)
Considerable loss of high-quality knowledge	3.62	1	2	5	9	4
Substantial reduction in employment	3.48	1	2	5	12	1
Substantial loss of training facilities	3.33	1	3	7	8	2
Discontinuity of the independent Target company	2.67	2	9	5	4	1
Loss of iconic company	2.67	3	6	7	5	0
Loss of critical resources, information, products or services that are of national importance	3.90	1	1	3	10	6

This is an extension of the previous factors. Again, participants don't hesitate to give up protection if the hostile takeover is a valuable opportunity, even if this means the loss and discontinuity of an (iconic) company. However, they fear the societal consequences of transferring knowledge and employment abroad – a kind of brain drain. This reflects the feeling that corporations have a kind of hub function in a national economy. Participants strongly resist a hostile takeover in case of loss of control over critical national resources.

Hypothesis 6, stating that the judgement of participants regarding (not) protecting the Target company is influenced by the (societal) risk and consequences, is recognized by the participants. The outcome of the survey implies that in case of general unfavorable societal risks and consequences participants are more inclined to protect the Bidder.

6. Concluding remarks: Overall view and Limitations

There are three limitations of this study/survey. First: the factors are presented separately. In practice however the factors are weighed against each other. Second: some factors are presented as fact, others as opinion. Participants have to consider the reliability of the statements. Three: during the hostile takeover process the critical factors can shift; the importance could depend on the stage in the hostile takeover process.

This research examines the circumstances that justify protection of the target company against a merger or acquisition. From Dutch case law evolution on mergers and acquisitions, literature review, and previous research by the authors, several factors were derived that may be determining for justification or non-justification of

protection against a hostile takeover attempt. These factors were clustered in the following nine main themes: (1) performance of bidder and (2) target, (3) strategic fit, (4) takeover process, (5) method of payment – deal structure, (6) characteristics of CEO's of bidder and (7) target, and the (8) societal risks and (9) societal consequences of the hostile takeover, culminating in 6 hypothesis. The factors are included in a survey investigation that is submitted to 21 experts. The outcomes show that the participants advocate non-protection in case of relatively high performance of the bidding company, new value creating opportunities for the Bidder as well as for the Target, a non-responsive board of the Target with personal interest of the board, and cash payment for the target. They are in favor of protection in case of takeover attempts that incur personal board benefits of Bidder or Target, intended debt push down financing, and in case of takeover attempts that incur considerable social risks and consequences. Participants apply a balanced stakeholder view and they implicitly use a kind of SWOT analysis, sometimes use a checklist (Pham et al., 2018). The results from the survey confirm the assumption that long-term value, and societal considerations are important arguments for the decisions to protect or not protect a target against a hostile takeover. More research into the position, function, and purpose of listed corporations is urgently required.

References

[1] Brouthers, K.D., van Hastenburg, P., & van den Ven, J. (1998). If most mergers fail why are they so popular? *Long Range Planning*, Vol. 31 (3), 347-353.

[2] Epstein, M.J. (2005). The determinants and evaluation of mergers success, *Business Horizons*, 37-46.

[3] Iansiti, M., & Levien, R. (2004). Strategy as Ecology. *Harvard Business Review*, 68-78.

[4] Jensen, M. C., and Ruback, R. S. (1983). The market for corporate control. *Journal of Financial Economics*, 11, 5-50.

[5] King, D.R., Dalton, D.R., Daily, C.M., & Covin, J.G. (2004). Meta-analyses of post-acquisition performance: indications of unidentified moderators, *Strategic Management Journal,* (25), 187–200.

[6] Moore, J.F. (1993). Predators and Prey, a new ecology of competition. *Harvard Business Review*, 75-86.

[7] Morck, R., Shleifer, A., & Vishny, R.W. (1990). Do Managerial Objectives Drive Bad Acquisitions?, *The Journal of Finance*, Vol. 45 (1), 31-48.

[8] Nègre, E., Verdier, M-A, & Cho, C.H. (2018). Discursive struggles between bidding and target companies: an analysis of press releases issued during hostile takeover bids, *M@n@gement*, Vol. 21., 803-833.

[9] Pham, N.T., Verdoes, T.L.M., Lycklama à Nijeholt, M.P. & Nijland, J. (2018). Shifting Paradigm? Long-Term Value Creation as a Normative Principle in a Hostile Takeover: Evidence from the Netherlands, *European Journal of Interdisciplinary Studies* 4(2): 91-102.

[10] Pitelis, C.N., & Teece, D.J. (2009). The (new) nature and essence of the firm, *European Management Review*, 5-10.
[11] Roll, R. (1986). The Hubris Hypothesis of Corporate Takeovers, *The Journal of Business*, Vol. 59 (2),197-216.
[12] Vaara, E., & Tienari, J. (2002). Justification, legitimization and naturalization of mergers and acquisitions: a critical discourse analysis of media texts, *Organization*, 9(2), 275-303.