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Research Report

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Rethinking the Control Threshold in German Takeover Law*

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Summary

The mandatory bid regime under the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpÜG) rests on an empirical premise that no longer corresponds to contemporary shareholder participation patterns in German listed companies.

§ 29(2) WpÜG defines control through a typified threshold of 30% of voting rights based on the assumption that a participation of 30% would, in most cases, confer a majority at shareholders' meetings. This would enable shareholders to replace the supervisory board and influence the company's strategy without having to convince the remaining shareholders. An empirical analysis of shareholder participation rates in Germany demonstrates that this assumption no longer holds. Even when only considering companies without a controlling shareholder, a shareholder with 30% of voting rights would have possessed a voting majority in fewer than one third of the observed meetings.

The current control threshold of § 29(2) WpÜG is set too low relative to the empirical assumptions underlying its introduction. If the legislator intends the takeover law concept of control to approximate typical voting majorities at shareholders' meetings, a threshold of one third of the voting rights—as is set, e.g., in Switzerland—would correspond more closely to present participation patterns.

*SAFE policy papers represent the author's personal opinions and do not necessarily reflect the views of the Leibniz Institute for Financial Research SAFE or its staff.

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1 Introduction

The concept of control occupies a central position in German takeover law. Pursuant to § 35 WpÜG, the acquisition of control triggers a mandatory bid designed to protect minority shareholders during changes of corporate control. In essence, corporate control implies the ability to successfully implement changes to the supervisory board and to make major decisions for the company without having to convince outside investors. This implies the risk of a majority shareholder using his voting power to gain private benefits (*Konzerngefahr*). A mandatory bid forces the shareholder to offer a buyout of all outstanding shares at a minimum price determined by the weighted average share price of the last three months. This is associated with very high costs for the investor, as shown in the last year by the substantial efforts of UniCredit to circumvent the obligation of issuing a mandatory bid to Commerzbank's shareholders. The statutory definition of control in § 29(2) WpÜG relies on a formalized threshold: control is presumed once a shareholder holds 30% of the voting rights in the target company.

The legislative rationale for this threshold combined two considerations. First, the legislator referred to comparative international practice, noting that several European jurisdictions relied on thresholds of 30% of voting rights. Second, and more importantly, the legislative materials expressly referred to participation rates at shareholders' meetings of German listed companies. The government draft stated that a participation of 30% would, in most cases, confer a majority at shareholders' meetings.[1] The statutory threshold therefore primarily rested on an *empirical* assumption concerning shareholder participation.

At the time of enactment, this assumption broadly corresponded to the available data.[2] Yet, despite substantial changes in shareholder participation patterns over the last decades, the empirical foundations of the takeover law control threshold have rarely been reassessed in detail. At the same time, legal scholarship has continued to repeat the proposition that a 30% participation generally suffices to secure voting majorities at shareholders' meetings.[3] This creates a tension between the formalized control concept of takeover law and the actual distribution of voting power in listed companies.

The present White Paper examines whether the empirical premise underlying § 29(2) WpÜG continues to hold. It is based on the paper "Zur Hauptversammlungspräsenz bei börsennotierten Gesellschaften" published in *Neue Zeitschrift für Gesellschaftsrecht*.[4] Using shareholder participation data from DAX and MDAX companies between 2023 and 2025, the analysis evaluates whether a shareholder holding 30% of voting rights would typically command voting majorities at shareholder general meetings. The findings suggest that the current threshold no longer reflects the participation structures upon which the mandatory bid regime was originally justified.

[1] Government draft of the German Securities Acquisition and Takeover Act (RegE WpÜG), BT-Drs. 14/7034, p. 53 ("in den meisten Fällen").

[2] Tobias Tröger, Unternehmensübernahmen im deutschen Recht (II) – Übernahmeangebote, Pflichtangebote, Squeeze Out, DZWiR 2002, p. 397.

[3] Daniela Favoccia, in: Assmann/Pötzsch/Schneider, WpÜG, 4th edition 2024, § 29 supra 9; Rainer Süßmann, in: Angerer/Brandi/Süßmann, WpÜG, 4th edition 2023, § 29 supra 17.

[4] Bero Gebhard, Zur Hauptversammlungspräsenz in börsennotierten Gesellschaften, NZG 2026, pp. 877–882.

2 Analysis

2.1 Data and Methodology

The analysis is based on shareholder participation rates in DAX and MDAX companies (as constituted in April 2026) between 2023 and 2025. Companies in which only non-voting preferred shares were listed were excluded from the dataset because they are unsuitable for an analysis centered on voting participation. Companies structured under foreign corporate law regimes were likewise excluded because they cannot meaningfully serve as a basis for conclusions regarding German takeover and corporate law.

Across the observation period, the average participation rate amounted to 70.63% of voting rights. The median participation rate was even higher at 72.81%. These figures already indicate a substantial deviation from the assumptions underlying the introduction of the 30% threshold.

2.2 The Empirical Weakness of the 30% Threshold

As the average participation rate at shareholders' meetings exceeds 70% of voting rights, a shareholder holding 30% of the voting rights would possess only approximately 43% of the votes represented at the average meeting. More importantly, the decisive issue is not the mathematical average but whether the threshold produces voting majorities in the *majority of cases*.

The empirical findings demonstrate that this is no longer the case. Across all 225 observed shareholders' meetings, a shareholder holding 30% of voting rights would have possessed a voting majority in only 46 meetings, corresponding to merely 20.44% of all observations. The statutory threshold therefore falls considerably short of the legislative assumption that such a participation would confer a majority "in most cases."

The discrepancy remains substantial even when the analysis is limited to companies without an already controlling shareholder. From a policy perspective, these companies are the more relevant benchmark because the mandatory bid regime is principally designed for companies characterized by dispersed ownership structures rather than already controlled firms.

Once companies with a controlling shareholder are excluded, 50 companies remain in the dataset. In these companies, the median participation rate amounted to 66.10% of voting rights. A shareholder would therefore require approximately 33% of voting rights to obtain a voting majority in the median case. By contrast, a participation of exactly 30% would have secured a voting majority in only 46 out of 150 observed shareholders' meetings, corresponding to only 30.67% of cases—undermining the empirical grounds of the concept of corporate control in the WpÜG.

The empirical findings therefore strongly suggest that the current control threshold no longer captures the factual conditions that originally justified the mandatory bid regime. The statutory presumption of control is triggered in a substantial number of cases in which shareholders are in fact far removed from stable voting majorities.

2.3 Divergence Between Concepts of Control in § 29 WpÜG and § 17 AktG

The findings also illustrate a widening divergence between the control concept of takeover law and the substantive control concept employed in German corporate group law (Konzernrecht) under § 17 AktG.

The concept of control under § 17 AktG is generally associated with the ability to exercise sustained influence over corporate decision-making, often reflected in stable voting majorities across several consecutive shareholders' meetings. Although the exact doctrinal thresholds remain contested, legal scholarship frequently associates control with the existence of voting majorities over multiple years.[5]

Measured against this benchmark, the empirical weakness of the takeover law threshold becomes even more apparent. A shareholder holding 30% of voting rights would have satisfied such an understanding of control in only 11 of the 75 observed companies, corresponding to 14.67% of cases. Even among companies without an already controlling shareholder, a 30% participation would have produced stable voting majorities across all three years in only 22% of companies.

This demonstrates that the concepts of control in takeover law and corporate group law have drifted apart empirically to a degree that has not yet been sufficiently reflected in legal policy debates. Although the legislator may legitimately employ a typified and formalized concept of control for takeover law purposes, the present gap raises severe doubts as to whether the current threshold still meaningfully approximates factual corporate control.

2.4 Comparative Perspectives

While several jurisdictions indeed employ thresholds around 30% of voting rights, the international picture is more differentiated than often assumed. The United Kingdom, France, Italy, and Austria all rely on thresholds of 30%. Switzerland, however, employs a threshold of one third of voting rights under Art. 135 FinfraG. Swiss law additionally permits companies to opt out of the mandatory bid regime or to raise the threshold up to 49% through their articles of association.

European takeover law itself does not prescribe a specific numerical threshold. Article 5(3) of the Takeover Directive merely refers to a participation "which confers control", explicitly leaving the specification of the threshold to the Member States. This legislative openness reflects the fact that participation structures, ownership concentration, and regulatory objectives differ substantially across jurisdictions.

Accordingly, a reform of the German threshold toward one third of voting rights would remain fully compatible with European law and would continue to fit within established comparative practice.

3 Policy Recommendations

3.1 Reconsidering the Empirical Basis of § 29(2) WpÜG

The primary policy implication of the empirical findings is straightforward: the factual premise underlying the current control threshold no longer holds. The legislative materials to the WpÜG expressly justified the 30% threshold by asserting that such a participation would confer voting majorities in most shareholders' meetings. Contemporary participation rates clearly refute this assumption.

[5] Alexander Schall, in: BeckOGK AktG (October 1, 2025), § 17 AktG supra 32.

If the legislator intends the takeover law concept of control to function as a typified approximation of actual voting power at shareholders' meetings, the threshold should be recalibrated to reflect current participation structures. The empirical data indicate that a threshold around one third of voting rights would correspond substantially more closely to the median participation rate observed in non-controlled companies.

3.2 Raising the Threshold to One Third of Voting Rights

It should be noted that the spread of shareholder participation rates throughout the DAX and MDAX indices is huge, making it de-facto impossible to set a meaningful one-size-fits-all control threshold tailored to the needs of all companies. Under these circumstances, a control threshold of one third of voting rights would, naturally, not perfectly replicate actual voting majorities in all cases. However, it would approximate the legislative objective considerably more closely than the existing 30% threshold.

Using the observed dataset, a shareholder holding one third of the voting rights would have possessed a voting majority in 76 out of the 150 observed shareholders' meetings among non-controlled companies. This result tracks the median participation rate almost exactly and therefore reflects the idea of a typified control threshold more accurately than the current statutory rule, as the Type I error (formal control is assumed, but not substantially given) and Type II error (control is not formally assumed, but substantially given) would be present at equal rates.

From a legislative perspective, such a reform would also be comparatively easy to implement. The legislator could raise the threshold with an appropriate transition period while leaving the current regime temporarily in force. Unlike a reduction of the threshold, such a reform would not create meaningful opportunities for abuse because shareholders exceeding 30% of voting rights would until the implementation of the reform remain subject to the mandatory bid obligation under the existing framework.

3.3 Clarifying the Function of the Control Threshold

The broader issue underlying the present debate concerns the precise function of the takeover law control threshold. Different regulatory objectives point in different directions: A lower threshold may be justified as an instrument of minority shareholder protection by providing shareholders with an earlier exit opportunity once a large block-holder emerges. At the same time, a lower threshold makes stake-building in German companies less attractive to investors and may be an obstacle to efficiency gains achieved via public takeover activity as well as the functioning of the market for corporate control as a component of reducing agency costs in German public companies. Conversely, a threshold designed to approximate factual corporate control should correspond more closely to actual voting majorities at shareholders' meetings.

The current legal framework does not clearly articulate how these competing objectives should be balanced. Yet the legislative materials relied on a specifically empirical justification rather than an openly normative decision to adopt an intentionally low threshold. The present findings therefore suggest that the statutory concept should either be recalibrated empirically or reconceptualized more explicitly in functional terms.

4 Conclusion

The German takeover law control threshold rests on empirical assumptions that no longer correspond to contemporary shareholder participation patterns. A participation of 30% of voting rights no longer confers voting majorities in most shareholders' meetings and, even in companies without a controlling shareholder, fails to produce such majorities in more than two thirds of observed cases.

The resulting divergence between the formalized control concept of § 29(2) WpÜG and the substantive understanding of control reflected in § 17 AktG has become too substantial to ignore. While takeover law may legitimately employ a typified concept of control, the current threshold no longer plausibly approximates actual voting power.

A reform toward a threshold of one third of voting rights would align the statutory framework more closely with contemporary participation structures while remaining compatible with comparative European practice and the Takeover Directive. More fundamentally, the findings underline the importance of periodically reassessing empirically motivated legal concepts once the factual conditions underlying their introduction have changed. In this respect, the debate concerning the takeover law control threshold illustrates a broader methodological point for corporate and financial market regulation: legal concepts that rely on empirical assumptions require continuous re-evaluation if they are to retain their functional legitimacy.